

Mamidi Venkata Satyanarayana Manikyala Rao and Another

Vs

Mandela Narasimhaswami and Others

Civil Appeal No. 420 of 1963

(A. K. Sarkar, V. Ramaswami – I, Raghuvar Dayal JJ)

27.08.1965

JUDGMENT

SARKAR. J. –

In a certain money suit, being Small Cause Suit No. 9 of 1953, a decree had been passed against. Narasimhaswamy and his four sons who were members of a Mitakshara Hindu Joint family. In execution of that decree the share of the four sons in the joint family properties, described altogether as 4/5th share, were put up to auction on December 21, 1936 and purchased by one Sivayya whose successors-in-interest are the appellants. The father Narasimhaswamy's share had not been put up for sale because an application for his adjudication as insolvent was then pending. The sale to Sivayya was duly confirmed. Thereafter Sivayya sold the properties purchased by him at the auction to one Prakasalingam. On November 6, 1939, an order was made under O. 21 rr. 35 [2] and 96 of the Code of Civil Procedure for delivery of joint possession of the properties purchased to Prakasalingam along with the member of the joint family in actual possession. This order was duly carried out and possession was delivered to Prak

On October 16, 1951, Sivayya filed the suit out of which this appeal arises, against the then members of the joint family whose number had by that time increased, and various other persons holding as alienees from them, asking for a partition of the joint family properties into five equal shares and thereafter for possession of four of such shares by removing the defendants from possession. The trial court decreed the suit but held that Sivayya was not entitled to a 4/5th share but only to a 2/3 share because before the decree a 5th son had been born to Narasimhaswamy who had not been made a party to the suit or the execution proceedings and whose share had not consequently passed under the auction sale. Some of the defendants appealed to the High Court allowed the appeal on the Ground that the suit was barred by limitation under Art. 144 of Schedule I to the Limitation Act. Sivayya had filed a cross objection in the High Court on the ground that he should have been held entitled to a 4/5th share of the prope

Various questions had been raised in the Trial Court out only two survive after its decision. They are, whether the suit was barred by limitation and whether Sivayya was entitled to a 4/5th share.

On the question of limitation, two articles of the Act were pressed for our consideration as applicable to the case. They are Arts. 144 and 120, We consider it unnecessary to decide in this case which of the two articles applies for in our view, the suit was not barred under either.

As earlier stated the High Court held that Art. 144 applied. The application of this article seems to us to present great difficulties to some of which we like to refer. That article deals with a suit for

possession of immovable property or any interest therein not otherwise specially provided for and prescribes a period of twelve years commencing from the date when the possession of the defendant becomes adverse to the plaintiff. This article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to see for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession would date from the period when a specific allotment w

In the case in hand the learned Judges of the High Court thought that the applicability of Art. 144 to a suit like the present one was supported by the decision of the Judicial Committee in *Mahant Sudarsan Das v. Mahan Ram Kirpal Das*. We feel considerable doubt that the case furnishes any assistance. It held that Art. 144 extends the conception of adverse possession to include an interest in immovable property as well as the property itself. In that case a purchaser of an undivided share in a property which was not coparcenary property, had obtained possession of that share and he was held to have acquired title to it by adverse possession. That was not a case of a person who was not entitled to possession. We are not now concerned with adverse possession of an interest in property.

Having expressed our difficulties on the matter let us proceed on the assumption without deciding it, that Art. 144 is applicable. Even so, it seems to us that the suit is not barred. It is not in dispute that in order that the suit may be barred under the article the defendant must have been uninterrupted possession for twelve years before the date of the Suit. Now, in the present case that was not so. By the delivery of symbolical possession under the order of November 6, 1939, the adverse possession of the defendants was interrupted. Time has, therefore, to commence to run from that date and so considered, the suit having been brought within twelve years of that date, it was not barred under that article. That would follow from the case of *Sri Radha Krishna Chanderji v. Ram Bahadur* where it was held that delivery of formal possession also interrupted the continuity of adverse possession.

It was however said that the order for deliverer of possession made in the present case was a nullity because Sivayya and his transferee who had purchased an undivided share in coparcenary property were not entitled to any possession at all. We agree that the order cannot be supported in law but we do not see that it was for this reason a nullity. It is not a case where the order was without jurisdiction. It was a case where the learned Judge making the order had, while acting within his jurisdiction, gone wrong in law. Such an order has full effect if it is not set aside, as it was not in this case. *Yelumalai Chetti v. Srinivasa Chetti* to which we were referred does not support the contention that the order was a nullity. There a purchaser of an undivided share in coparcenary property at an execution sale had applied for possession under s. 318 of the Code of Civil procedure of 1882 which corresponds to O. 21. r. 95 of the present Code. That application was dismissed as barred by limitation. Later, the purc

It seems to us that the question of adverse possession is one of fact. If the person against whom adverse possession is set up, shows that he had in fact obtained possession, whether lawfully or not, that would interrupt any possession held adversely against him. The question is whether there was in fact an interruption was justifiable in law. Under the order for delivery of symbolical possession, whether it was legal or otherwise. *Prakasalingam* did obtain possession and this was an interruption of the adverse possession by the respondents. In respect of the present suit time under Art. 144 must, therefore, commence from that interruption.

We wish to observe here that aspect of the matter exposes the anomaly that seems to arise from the application of Art. 144 to this case. If Prakasalingam's possession under the order of November 6, 1939 was no possession in law because, as is contended, he was not entitled to possession at all, then it would be difficult to hold that at that time somebody else was holding the property adversely to him. Since Prakasalingam or his successor Sivayya was not entitled to possession till after the decree in a suit for partition brought by him. Art. 144 would seem to be inapplicable to that suit.

Learned counsel for the respondents referred us to Mahadev Sakharam Parkar v. Janu Namji Hatle and Janu Bahadur Singh v. Hanwant Singh to show that the delivery of symbolical possession does not avail the appellants. On behalf of the appellants it was said that these decisions are no longer good law in view of the judgment of the Judicial committee in Sri Radha Krishan Chanderjis case. Apart however from the merits of this contention which no doubt, deserve consideration, the principle of these cases does not seem to us to be applicable to the present case. That principle was expressed in the case of Janu Bahadur Singh which also is clearly to be implied from the decision in the case of Mahadev Sakharam Parkar in these words, If possession was delivered in accordance with law, what undoubtedly would, as between the parties to the proceeding relating to delivery of possession, give a new start for the computation of limitation and the possession of the defendants would be deemed to be a fresh invasion of the

Learned counsel for the respondents however contended that O. 21 r. 35 [2] only applied where there was a decree for joint possession and it did not apply to the present case because here there was only an order for delivery of joint possession and not a decree. This contention cannot be accepted because under s. 36 of the Code the provisions relating to the execution of decrees are applicable to execution of orders. In any case, the order is clearly within the terms of o. 21 r. 96. The delivery of symbolical possession made in this case was quite in terms of the code and so amounted to an interruption of the respondent's adverse possession and the period of limitation for the purpose of the application of Art. 144 would start from the date of such delivery. As the suit was brought within twelve years from the date of that delivery of possession Art. 144 even if it applies, does not bar it.

We then turn to art 120. In Bai Shevantibai v. Janardan R. Waricks it has been held that to a suit like the present this is the article that applies. Learned counsel for the respondents himself contended that this was the appropriate article to be applied. This article applies to suits for which no period of limitation is provided elsewhere and prescribes a period of six years commencing from the date when the right to sue accrues. Learned counsel for the respondents relied on the observation in Shevantibai is case that in a suit like the present one, the period of limitation under Art. 120 commences to run from the date of the sale. This the case no doubt held, but we think in that respect it did not lay down the law correctly. it has been held by this court in Mst. Rukhamabai v. Lala Laxminarayan and C. Mohammad Yunus v. Syed Unnissal that the right to sue accrues for the purpose of 120 when there is an accrual of the right asserted in the suit and an unequivocal threat by the respondent to infringe it

The result is that the suit was not barred whether Art. 144 or art. 120 applied to it.

It remains now to deal with the cross objection. We do not think that it has any merit. Both the courts below have held that what Sivayya purchased at the auction sale was the share of the four sons of Narasimhaswamy in the joint family properties. At the date of the auction sale that share which was originally $\frac{4}{5}$ had been reduced to $\frac{2}{3}$ rd by the birth of another son, Venugopal, to Narasimhaswamy who had not been made a party either to the suit or the execution proceedings. It

is irrelevant to enquiry whether after his birth the fifth son's share could be proceeded against in the execution of the decree in suit No. 9 of 1933. It is enough to say that that was not in fact done. What was purchased at the execution sale was only the shares of Venugopal's four brothers at the date of the sale and this was 2/3rd. That being so, we think Sivayya was not entitled to get Venugopal's 1/6th share also allotted to him in the partition suit. The cross objection must fail. We may add that no claim has been made against

In the result we would allow the appeal, set aside the judgment and decree of the High Court except as to the dismissal of the cross-objection and restore that of the learned trial Judge. The appellants will be entitled to proportionate costs here and in the High Court.

RAMASWAMI. J. –

The question of law involved in this appeal is what is the period of limitation applicable to a suit filed by an alienee of a coparcener of an undivided share in the joint family property for general partition. The appellants are the legal representatives of the deceased plaintiffs Mamidi China Venkata Sivayya. The suit was filed by him on October 16, 1951 for partition and separate possession of the 4/5th share in the joint family properties. It is alleged that he purchased the undivided share of defendants. 2 to 5 at a Court auction sale held on December 21, 1936 in execution of a decree of the court of small causes. The sale was confirmed on February 23, 1937. Later on i.e. on March 5, 1939 the purchaser Sivayya sold the right he had purchased to one Prakasalingam who, it is alleged, obtained symbolic delivery of possession of the undivided share of the joint family properties on November 6, 1939. It appears that Sivayya obtained a reconveyance of the right from Prakasalingam on April 11,

Before dealing with the question as to which Article of the Limitation Act applies to the present case it is necessary to examine the legal position of persons like Sivayya who purchase shares of some of the coparceners of the Hindu Joint Family. It is well settled that the purchaser does not acquire any interest. In the property sold and he cannot claim to be put in possession of any definite piece of family property. The purchaser acquires only an equity to stand in the alienor's shoes and work out his rights by means of a partition. The equity depends upon the alienation being one for value and not upon any contractual nexus. The purchaser does not become a tenant in common with the other members of the joint family. He is not entitled to joint possession with them. The alienee is suit for partition must be one for partition of the entire property and not for the partition of any specific item of, or interest in the family property. Such a suit, however, will not be technically on a par with a suit for pa

On behalf of the appellants learned counsel put forward the argument that the right of the alienee to sue for partition is a continuing right and there is no period of limitation for enforcing such right. In my opinion, there is no warrant for this argument. A suit for partition filed by the alienee from a coparcener is not, in a technical sense, a suit will not have the necessary effect of breaking up the joint ownership of the members of the family in the joint property nor the corporate character of the family. As observed by Bhashyam Ayyangar, J. In *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*.

"The vendee's suit to enforce the sale by partition is not a suit for 'partition', in the technical sense in which 'partition' or 'vibhaga' is used in the Hindu Law. A suit for partition, in technical sense, can be brought only by an undivided member sense, can be brought only by an undivided member of the family. The right to such partition is

personal to him and not transferable. Such a suit can be brought only in the lifetime of the coparcener and even if so brought, it will abate if he should die before final decree, without leaving male issue. A partition in the technical sense, whether effected amicably or by decree of court, breaks up not only the joint ownership of property, but also the family union i.e. the corporate character of the family. Each member thereafter becomes a divided member with a separate line of heirs to himself. An undivided member of a family, though he may alienate either the whole [Gurulingappa v. Nandappa - I. L. R. 21 Bom. 797], or any part of his undivided share will continu

In my opinion, a suit like the present one will fall within Article 144 of the Limitation Act.

It is true that an alienee of an undivided interest of a Hindu coparcener is not entitled to joint possession with the other coparcener and he is also not entitled to separate possession of any part of the family property. But the alienee is entitled to obtain possession of that part of the family property which might fall to the share of his alienor at a partition. What the alienee acquires by a purchase is not any interest in specific family property but only an enquiry to enforce his right in a suit of partition and have the property alienated set apart for the alienor's share, if possible. In the present case the alienee has instituted a suit for general partition with the prayer that he may be put in possession of that part of the family property which may be allotted to his alienor. It is not right to consider such a suit as a suit for more partition. The main relief sought by the plaintiff is the relief for possession of that part of the property which may be allotted to the alienor's share and a reli

If Article 144 is the proper applicable, when does time commence to run? According to the third column of Article 144, time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. As I have already pointed out, the possession of the non alienating members of the family cannot be deemed to be possession on behalf of the alienee also, because the purchase alienee does not acquire any interest in the property sold and does not become tenant in common with the members of the family nor is he entitled to join possession with them. It is clear that in the absence of a clear acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of the non alienating coparceners would be adverse to the alienee, from the date on which he became entitled to sue for general partition and possession of his alienor's share. The fact that the alienee has purchased an undivided interest of joint family property is not inc

"Now it is the respondents case - it in fact their main contention on this issue-that the appellant has never at any time had adverse possession against them because, the disputed property being a four- anna undivided share, his possession has been throughout no more than a joint possession with them. And the joint possession which coparceners enjoy in respect of the undivided property involves that, prima facie, the exclusive possession of any one of them is not adverse to the others. Their Lordships have no doubt of the validity of this general rule. But they are unable to think that it will be in any way departed from if they hold that in respect of the disputed property itself the appellant's possession has been adverse to the owners of the other shares. In truth there is some confusion involved in the argument. What is in question here is not adverse possession of the block of property in which the various undivided interests subsist but adverse possession of one undivided interest. Article 144 certainly

In the present case, therefore, adverse possession began to run from the date of purchase of the undivided share i.e. from December 21, 1936 but it was submitted on behalf of the appellants that Prakasalingam obtained symbolic delivery and possession of the undivided share on November 6, 1939 after notice to defendants 2 to 5 and there was a fresh cause of action to sustain the present suit for possession. It was contended on behalf of the respondents that the symbolic delivery was illegal and the executing court was not competent to make an order of delivery of possession, either symbolic or actual with regard to the sale of an undivided interest of joint family property. In support of this argument reliance was placed on the decision in Yelumalai Chetti v. Srinivasa Chetti in which it was held that the purchaser at a court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member

On behalf of the appellants it was also argued that a decree for 5/6th share of the joint family properties and not merely for 2/3rd share should have been granted. The claim of the appellants was rejected by the trial court. It is not disputed by the plaintiff that the 6th defendant was born before the court sale and it is also not dispute that the execution case was taken out only against defendants 2 to 5. It is manifest that the plaintiff is not entitled to recover the possession of the share of the 6th defendant in execution proceedings and there is no merit in the cross objection filed on behalf of the plaintiff in the High Court. I am unable to accept the argument advanced by the appellants on this point.

For these reasons I hold that the judgment and decree of the High Court should be set aside and the judgment and decree of the trial court should be restored and a preliminary decree of partition of the properties should be granted as mentioned in the trial court's decree. The appeal is accordingly allowed costs.

Appeal allowed.

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