ANDHRA PRADESH HIGH COURT

Garimalla Suryakantam alias Suramma

Vs.

Garimella Suryanarayanamurthy

Appeal No. 630 of 1950, in O.S. No. 88 of 1948

(Subba Rao, C.J. and Bhimasankaram, J.)

21.01.1955

JUDGMENT

Bhimasankaram, J.

1. This appeal arises out of a suit filed by the appellant to recover possession of the properties described in the plaint schedule from defendants 2 to 23.

2. Her case may be briefly stated thus. Her husband is the first defendant in the suit and defendants 8 and 9 are his brothers. She was married in the year 1929 when the brothers were joint with their paternal uncles, Krishnamurthi and Narasimhamurthi. Defendants 4 to 6 are the sons of Krishnamurthi and the 12th defendant is Narasimhamurthi. The family possessed extensive immovable properties. Even by the time of his marriage, the first defendant, who was then about 18 years old, had got into evil ways and it was therefore arranged by his well-wishers that he should execute in favour of his wife and his mother jointly what is called a settlement deed which is Ex. A-1 in the case. Under that deed, the first defendant's share in the joint family properties was settled on the plaintiff and her mother-in-law for life subject to the condition that he should receive a sum of Rs. 200 per annum for his maintenance. It was also provided therein that the properties should, after their death, pass to the male issue that might be born to the first defendant. This deed was executed on 17th November 1932. About four years later, there was a partition in the family evidenced by Ex. A-4, a registered partition deed, dated 20th October 1936. The first defendant's mother, Seethamma, had died in the meanwhile and the plaintiff was treated by the other sharers as the person entitled to the whole of the share of the first defendant in the family properties. She was thus assigned the specific properties described in Ex. A-4 as "the third 'C' share". The first defendant was not a party to the partition and he made no complaint at any time thereafter that his rights were not recognised thereunder. Nearly five years later, i.e., on 11th September 1941, as per Ex. A-5, styled a relinquishment deed, the first defendant commuted his right to receive a sum of Rs. 200 every year into an immediate payment of Rs. 1,000 the receipt of which he acknowledged by Ex. A-5 (a). In Ex. A-5 he made a reference to Ex. A-1 without questioning it. But however he purported to alienate items 1 to 16 of the plaint schedule claimed by the plaintiff to be part of the aforesaid third 'C' share as if they belonged to him. Despite Ex. A-1, he continued to lead a wayward life and was borrowing

moneys freely for his evil purposes. On several occasions, both before and after the execution of Ex. A-1, his paternal uncle, Krishnumurthi, inserted advertisements in the 'Andhra Patrika' notifying that the first defendant's borrowings would not be binding on the family. The contesting defendants or their predecessors-in-title, however, purchased several properties from the first defendant in spite of Ex. A-1, Ex. A-4 and the publications referred to above. The plaintiff maintains that she is entitled to the properties so alienated as, according to her, the first defendant had no right to alienate them.

3. Defendants 13, 14 and 19 to 22 are the contesting defendants. They claim that both Ex. A-1 and Ex. A-4 were sham and nominal transactions not intended to be acted upon and in fact not acted upon, that the first defendant continued to be the real owner of the suit properties throughout and that therefore the plaintiff has no right to recover them. Some of the defendants also raised a question of estoppel on the ground that the plaintiff was precluded by her conduct at the time when the first defendant sold the properties to them from questioning the transactions in their favor. All of them claim to be *bona fide* purchasers for value without notice of the plaintiff's rights.

4. Thirteen issues were framed in the suit, but it is clear that the basic question for determination in the suit was whether by virtue of the settlement deed and the partition that followed, the plaintiff became the real owner of the properties or whether both the deeds of settlement as well as partition were merely a cloak to keep the properties in the name of the wife. In what we are constrained to observe is a very unsatisfactory judgment, the learned Subordinate Judge now here addressed himself directly to this principle question. Without going into the evidence as regards the reality or otherwise of the transactions evidenced by Ex. A-1 and Ex. A-4, he proceeded to consider what he calls the validity of Ex. A-1 (a) as a contract supported by consideration and (b) as a gift. He held that, as Ex. A-1 evidences a contract imposing a liability on a minor who is incompetent to contract it is void ab initio. He also held that, in any event, Ex. A-1 conveyed only a half interest in the suit properties to the plaintiff while the other half vested in the deceased mother of the first defendant. He therefore thought that, as the plaintiff was not the heir of her mother-in-law she would, at the most, be entitled to recover only a half share in the suit properties. Looking at Ex. A-1 as a deed of gift, in the alternative, he was of the opinion that as no individual member of a Hindu family could alienate his undivided share by way of gift, Ex. A-1 was void from that standpoint also. He proceeded therefore to record a finding in these terms :

> "If under Ex. A-1, the plaintiff gets no rights Ex. A-1 being a void transaction, Ex. A-4 also automatically falls."

5. The reasoning of the learned Judge leading up to this conclusion is contained in paras. 11 to 15 of his judgment, paras. 16 to 22 contain his findings as regards the consideration for each of the alienations in dispute. The learned Judge goes into the evidence and finds that every one of the alienations impugned is true and supported by consideration. Then in para. 23 he refers to the evidence adduced on behalf of the plaintiff and says :

> "Whatever the plaintiff deposes to in the light of the above evidence, it is quite useless as under Ex. A-1 she got no property, Ex. A-1 being a void transaction and the document executed subsequent to Ex. A-1 in pursuance thereof, the partition deed, Ex. A-4 also

serves no useful purpose."

6. Then, in paras. 24 to 37, the learned Judge purports to record his findings on the several issues seriatim on the basis of the foregoing reasoning. On issue (1) he finds that the settlement deed and the partition deed were nominal and sham transactions not intended to be acted upon and in fact not acted upon. It is indeed very curious that the learned Judge should have recorded a finding in these terms when there is no discussion at all in any of the previous paragraphs in the judgment as to the nominal and sham nature of the transactions or as to whether they were acted upon or not. He seems merely to have recorded a finding in terms of the issue without being conscious of the need for discussing the evidence bearing on the point. On the actual reasoning adopted by him one would have thought that his conclusion should have been not that these transactions were nominal and sham but that they were ineffective to convey title to the plaintiff as Ex. A-1 was void ab initio-and as Ex. A-4 based thereon could be of no effect. It is true that if the plaintiff obtained no title under Ex. A-1 and or Ex. A-4 her suit should fail. As we cannot accept the finding thus recorded, we must consider whether the learned Judge was right in his view that Ex. A-1 in the first instance and Ex. A-4 as being dependent upon it, are void and ineffective. It seems to us perfectly clear that there is nothing in the nature of either Ex. A-1 or Ex. A-4 rendering them void ab initio. Though the learned advocate for the plaintiff in the Court below did not claim that Ex. A-1 constituted a gift and indeed seemed to have conceded that it was not one we consider that the proper way of looking at it is as a gift deed. Strictly speaking, in a case like this, it is not only permissible but very reasonable to construe the transaction as a gift to the minor for life of the whole of the income of the property minus the money payable by way of maintenance to the donor. We cannot see how a minor is incapacitated by law from receiving a gift of that nature. Alternatively, it would be treated as a gift deed with a condition attached. Section 127 of the Transfer of Property Act deals with an onerous gift in favor of a minor. The third paragraph of that section runs thus :

> "A done not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But, if after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound."

7. Applying the terms of that section to the present case, it has to be considered whether the plaintiff had repudiated the gift after she had attained majority, a question which has not been considered by the Court below and which, in our opinion, needs no consideration in the circumstances of this case because it was not only not contended for the defendants that the plaintiff had repudiated the gift after attaining majority, but their only case was that the settlement and the partition following thereafter were purely nominal transactions. In this view, the lower Court's finding that Ex. A-1 is a transaction which is void ab initio is obviously wrong. It therefore follows that issue No. 1 should be considered with reference to the evidence in the case in the light of the above observations. In doing so, it has to be borne in mind that, in the circumstances that preceded Ex. A-1 the probability is that persons interested in bringing Ex. A-1 into existence would have thought that a real rather than a nominal transaction would serve their purposes better.

8. As regards the other point that it is not open to an undivided member of a Hindu family to make a gift, it is to be seen that the law is not that the gift of an undivided share is void in the

sense that it is a nullity but only in the sense that it is not binding on the other coparceners. The rule is that no such gift can be made without the concurrence of the persons affected. But whereas in this case the members of the family subsequently recognized and acted upon the gift and allotted a share to the donee, the transaction cannot be attacked by a stranger or the donor himself. In *Lakshmi Chand v. Mt. Anandi*[1], their Lordships of the Privy Council stated that it is well-established law that a co-sharer in a Mitakshara joint family without having obtained partition can, with the consent of all his co-sharers, charge his undivided share for his own separate purposes. In that case, their Lordships held that a document purporting to be a will but which failed so to operate was good evidence of a family arrangement contemporaneously made and acted upon by all the parties. If therefore Ex. A-1 was treated by the rest of the members of the family as good and they allotted a share to the plaintiff at the time of the partition, there could be no impediment in law to the passing of a good title in favour of the plaintiff under that arrangement.

9. It remains to consider the further contention that Ex. A-1 being a joint gift in favor of the plaintiff and her mother-in-law, cannot operate to pass full title in the properties to the plaintiff after the death of her mother-in-law. It is true that joint tenancy as such is unknown to Hindu Law. It cannot therefore be contended that the plaintiff obtained by survivorship the other half share on the death of the co-grantee. It is to be noted however that the other members of the family proceeded on the footing that the plaintiff became entitled to the whole of the estate on the death of Seethamma and that the share which the first defendant should have otherwise got, was allotted by them to the plaintiff. We think they were right in doing so. As we read Ex. A-1, the remainder in the properties is to pass to the male issue of the donor only after both the lives of the grantees. It seems to us that neither the donor nor his sons could reduce the properties to possession and enjoyment until after Seethamma as well as the plaintiff had died. We therefore hold that the plaintiff is entitled to the whole of the properties for her life.

10. The findings recorded by the learned Subordinate Judge as regards the payment of consideration by the several alienees have in our judgment no real bearing upon the plaintiff's right to recover the properties. If the first defendant had no title to convey, surely the fact that consideration was paid to him by his alienees cannot validate his transfers. If, on the other hand, the plaintiff obtained no rights, she has no concern with the question as to whether any consideration was paid to the first defendant. Hence, in our opinion, the only other questions that have to be decided are the special pleas raised by some of the defendants as regards estoppel as also the plea raised by the 14th defendant that the property purchased by him is not part of the joint family property that fell to the share of the plaintiff under Ex. A-4, but the maternal grandfather's property of the first defendant. There is no clear finding recorded by the

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learned Subordinate Judge as to whether item 7 of the plaint schedule with which the 14th defendant is concerned is or is not part of the plaint schedule property. It is true that under issue 2 as well as under issue 4, he has recorded a finding that the property purchased by the 14th defendant is the maternal grandfather's property of the first defendant and that the sale-deed in respect of that item is binding upon the plaintiff. It is also true that he found that the suit in respect of item 7 is premature since 'the first defendant has only a reversionary right therein and the plaintiff admits that Subbamma is alive', Subbamma being apparently the maternal grandmother of the first defendant. Unfortunately, the learned Judge has made no reference to the evidence adduced in the cases in arriving at these findings, but has only recorded them

perfunctorily with reference to the language of the issues.

11. We therefore set aside the findings of the lower Court on all the issues except the findings as regards the consideration paid by the various alienees and the truth of the alienations in their favour which, as stated above, are in our opinion, irrelevant to the controversy between them and the plaintiff.

12. The memorandum of cross-objections filed on behalf of some of the respondents against the direction of the lower Court as to costs has not been seriously pressed and, in any case, having regard to what we propose to do, is without substance. It is therefore dismissed with costs. In the result, this appeal is allowed and the suit remanded to the lower Court for determination of issues 1, 3, 9 and 10 in the light of the foregoing observations. Costs will abide and follow the result. The appellant is entitled to refund of the court-fee paid on the memorandum of appeal.

13. This appeal and the memorandum of objections having been set down for being mentioned this day the Court further delivered the following judgment :-

Subba Rao, C.J.

14. This appeal is posted today for being mentioned. Mr. Seshachalapathy contends that his client, i.e., the 19th defendant has a special plea, namely, that the items purchased by him were not covered by the settlement deed. It is true that he raised that plea in the written statement; but the judgment does not disclose that he has pressed that at the time of the disposal of the suit. He says that it might have been due to the fact that the learned Judge disposed of the suit on other grounds in his favour, and he further contends that that question is also covered by issue 4. We do not propose to express any view. He may take this plea before the learned Judge and, if he is satisfied that issue 4 covers the question raised he may also give a finding on that question.

Appeal allowed.