Gurupadappa Basappa Nelvaji Vs. Karishiddappa Shivabasappa Nelvagi

LegalCrystal Citation : legalcrystal.com/345793

Court : Mumbai

Decided On : Aug-31-1953

Reported in : (1954)56BOMLR252

Judge : Bavdekar and ;Vyas, JJ.

Appeal No. : First Appeal No. 96 of 1950

Appellant : Gurupadappa Basappa Nelvaji

Respondent : Karishiddappa Shivabasappa Nelvagi

Judgement :

Buvdekar, J.

1. [His Lordship, after narrating facts and holding that the plaintiff's adoption was valid and that he was entitled to re-open the partition of 1918, proceeded.] The next question which arises is as to whether the learned trial Judge was right in allotting to the share of defendants Nos. 2 to 5 the properties which they had alienated before the date of the plaintiff's adoption. It was contended on behalf of the appellants that in such a case the right of the plaintiff is to take his share, whatever it is-one-fifth in the present case-in the properties which were in existence at the time of the partition-in this case 1918, but exclusive of the property which was alienated between the dates of the partition and the adoption. These alienations would ordinarily be of two kinds : either they were binding upon the family, for example, when they were made for legal necessity like payment of debts which may have been allotted to the various branches by the partition. In the alternative, they may be also alienations which could not be justified by legal necessity upon the footing that when the partition was sought to be reopened by the plaintiff the branch of Basappa was to be regarded as still a joint family. It is said that even so inasmuch as the properties which were allotted to the shares of defendants Nos. 2 to 5 were their separate properties inter se and they were entitled to sell them, the alienees were not required to refrain from purchasing the property on the ground that subsequently an adoption might take place in the family and the adopted boy would be entitled to reopen the partition. The result of this argument at the most would be that the plaintiff may not be in a position to contend that the properties which had been sold by defendants Nos. 2 to 5 should be brought into the hotchpot. To do so would undoubtedly affect the alienees. It is contended, however, that not only is the plaintiff not entitled to say that he should be allowed to ignore the alienations, but he is also not entitled to insist that the properties which were alienated by defendants Nos. 2 to 5 should be given to their share, because to do so would be really .speaking calling upon defendants Nos. 2 to 5 to account for their acts which took place prior to his adoption. It is said that defendants Nos. 2 to 5 are not accountable in this manner to the plaintiff. The

plaintiff must take one-fifth share in such properties as were to be found on the date when he was seeking to reopen the partition. Many properties were alienated in the meanwhile, but whatever may be the reasons for which they were alienated, the plaintiff could not challenge the alienations in any manner. He could not even challenge them as against the alionors. The question is not free from difficulty. But it must be observed that whenever statements are made in the judgments in many of the cases on allied topics that an adopted son takes subject to all lawful alienations made before the date of the adoption the words must not be taken as if they were the words of a statute. It was observed, for example, in Bhlmaji Kruhnarao v. flanmantmo Vinayak (1949) 52 Bom. L.R. 290, that where a sole surviving coparcener had alienated properties which were erstwhile joint family properties and the widow in the family subsequently made an adoption, the test which the Privy Council asked the Courts to adopt in the case of Krishnamurthi Ayyar v. Krishnamurthi Ayyar (1927) L.R. 34 : 29 Bom. L.R. 960 was whether the alienations were made by a person who had full power at the time when they wore made over the property which he was alienating. If the adoption was subsequent to the alienation and the alienor had full power over the property which he alienated, then the adoption could not affect the property which was already disposed of by a person who had acted as the full owner of the property. The remarks from the judgment of their Lordships relied upon were (p. 262) :.When a disposition is made intra vivos by one who has full power over property under which a, portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place.

2. The case of Anant Bhikappa Patil v. Shankar Ramchandra Patil (1948) 46 Bom. L.R. 1 : 70 I.A. 232 was also relied upon, and the observations of their Lordships that Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption were also quoted. It is impossible, however, to accept the contention that the effect of this case is, to make, in all cases of alienations made by any person who has obtained joint family property before an adoption takes place whether by inheritance or partition, the question whether the alienation is binding on the adopted son not only as against the alienee but also as against the alienor dependent on the question whether the alienation was lawful at the time when it was made. There is a lotto be said in favour of the proposition that the alienee is not affected when the alienation is prior to the adoption. The alienee has got to make inquiries and to satisfy himself in the case of property belonging to a joint Hindu family that the alienation was for legal necessity. If he does so, he is not affected even if it turns out subsequently that the alienation was not for legal necessity. Where after the death of a father there has been a partition between his sons and provision has been made for the maintenance of the widow in the family of another son who had died before the partition, the alienee is not required even to make inquiries; he is entitled to purchase the property which is the separate property of the alienor after the partition, irrespective of the existence of a widow who might thereafter make an adoption. What the plaintiff, however, in this case seeks is not to obtain possession of the property which has been sold by the alienor. But he says that if the alienors made alienations, the properties alienated should be allotted to the share of the respective alienors as if there was a joint family consisting of the adopted son and defendants Nos. 1 to 5 and the properties had been alienated by a single coparcener without any legal necessity. It is true that the case where a sole surviving coparcener having

alienated property a widow makes an adoption and the adopted son sues the sole surviving coparcener for partition is analogous to the case where the brothers having made a partition the widow of a pre-deceased brother takes a son in adoption. In one case there is a partition. In the other case no partition has taken place and the property which is found at the time when the adopted son seeks for a partition has to be taken into consideration in determining what the share of the adopted son would be. One principle of Hindu law will perhaps justify a distinction, and that is that when anyone seeks partition of joint family property, the property which is to be divided is the property as it is when the partition is to be made. It is true, of course, that if a manager or anyone else alienates unauthorisedly joint family property, the plaintiff in a partition suit can say that he is not bound by the alienations and the properties alienated may be allotted to the share of the alienor. But that has application only in cases where there are restrictions on the power of the alienor to make alienations of property. A sole surviving coparcener, as mentioned by the Privy Council in the case of Anant v. Shankar, is entitled to alienate the property as his own. This could be justified by the ground that all the coparceners in a joint Hindu family are entitled to alienate the family property, whether there is legal necessity for the alienation or not. In case there is only one sole surviving coparcener, he is entitled to alienate even the joint family property because he is the sole surviving coparcener, and there being no other coparcener in the family, the rule that all the coparceners in a joint Hindu family can alienate property boils down in his case to the rule that he can alone himself alienate joint family property without legal necessity. In any case we are concerned in this case with the question as to the rights of the adopted son, where his uncles have, prior to his adoption, but subsequent to the death of his father, divided the joint family properties among themselves, and we have so far not come across any authority for the proposition that the alienations which may be effected by any one of the uncles would be binding upon him in spite of the fact that the alienor cannot point out any legal necessity, for example, for payment of a debt binding upon the family which may have been allotted to his share. Then again it is instructive to find out what happens in the case of a son who is in the womb at the time when the partition takes place but is born afterwards. Yajnavalkya deals with this question in verse 122 of the chapter on Dayabhaga, and the words which are used there show that the posthumous son is entitled to the 'visible' property corrected for income and expenditure. Mitakashara when commenting upon this observes :

When brothers have made a partition subsequently to their father's death, how shall a share be allotted to a son bom afterwards? ' (In such a ease, of course, there would be no share allotted to the father).

3. The reply of the author to this question is :

His allotment must absolutely be made out of the visible estate corrected for income and expenditure.

When commenting upon the passage both Balambhatta and Subodhini say that the words 'corrected for income and expenditure' mean, in the case of income, acquisitions made, for example, by following the profession of agriculture, and in the case of expenditure, expenses like payment of a debt which was binding upon the family (the actual words used are fir`.k) and expenditure incurred by a person to whom a share is allotted for maintenance of his family, which has been doubted by some; but inasmuch as a joint family would be required to maintain all the members of the family, there does not seem to be any objection to make allowance for it. Both

again justify the dictum of the Mitakshara upon the ground that even though the paternal estate is divided, it must be regarded as undivided, and it was following the observations in Subodhini that the Madras High Court took the view that in the case of a posthumous son where there were acquisitions made subsequently with the aid of property which was formerly joint family property, the son born after the partition is entitled not only to the estate as it was at the time when the partition took place but to those acquisitions. It is quite clear, therefore, that in the case of a posthumous son the position is that the property is to be regarded as joint, even though it is not undivided. It is, therefore, subject to all the incidence of joint family property. If it is alienated, it must be alienated for a purpose which is binding upon the family like fir`.k. If, on the other hand, acquisitions are made with the aid of the joint family property, the acquisitions must be regarded as joint family property and the posthumous son would be entitled to a share in them. The position of the posthumous son is, therefore, undoubted, and the only question which arises is whether the adopted son has got to be placed in the same position as the posthumous son. Mr. Murdeshwar, who appears for the plaintiff, says that the adoption in such cases is held to be valid on the ground that it relates back to the death of the adoptive father. If full effect is given to this doctrine, then obviously the adopted son must be taken to have been in existence at the time when the adoptive father dies, the partition would be invalid, and there would be no power in any of the alienors to make alienations of any of the property given to their share. He concedes that the principle of the adoption relating back to the death of the father is not of universal application. The first exception to that is to be found in the case of Bhubaneswari DM v. Nilkomul Lahiri (1885) L.R. 12, in which case their Lordships of the Privy Council held that an adoption by a widow after the death of a collateral does not enable the adopted son to succeed to the collateral in preference to the nearest heir of the collateral at the time of his death. The other exception to it is to be found in certain dicta in the case of their Lordships of the Privy Council in Krishnammtlii Ayyar v. Krishnamurthi Ayyar , which was the case of a will. It is obvious that in case an adoption was held to relate back to the death of the adoptive father, the adopted son would be entitled to challenge the will made by his father on the ground that the father would have no power to leave by will the property which was joint family property. The will must necessarily take effect at the moment after the death takes place. On the other hand, the adopted son will be regarded as living at the time when the father dies. The will could not affect, therefore, the joint family property. But their Lordships of the Privy Council specifically observed (p. 262) :.For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place.

4. In the second instance, the question whether an adoption can be made to relate back to the death of the adoptive father for the purpose of finding out whether the adoption was or was not a valid adoption is entirely different from the question what property the adopted son takes even when the adoption is a valid one. The alienations which are for a purpose binding on the family are admittedly binding upon him. It is only when we come to an alienation that cannot be justified for a similar consideration that the question of the binding character of the alienation arises. Now, as I have already mentioned, it cannot possibly be disputed that an adopted son could never entertain a claim to possession of such property as against an alienee. Where the alienation is a perfectly good alienation at the time when it was made, whatever may happen inter se between the members of a joint Hindu family, in which a widow has taken in adoption a boy, it is obvious that the alienee ought not to be affected by it, unless he was bound to make inquiries and satisfy himself as to the existence of the legal necessity, and there could be no question that where a partition has taken

place in a joint Hindu family, with the result that the share apportioned belongs subsequently to each one of the erstwhile coparceners, they are the separate property of the coparceners (leaving aside for the moment any question of any sons which they may have) and the alienee is not required to make inquiries in such a case. The separate property of an erstwhile coparcener can be disposed of by him even though the property was joint family property before the adoption took place. But the question is whether the adopted son can challenge these alienations even as against the alienors in so far that he asks that whore it is possible to do so the property which is alienated should be given to the share of the alienors. Now, it appears to us that this question can be answered even without having resort to the doctrine of relation back. It has got to be remembered that where an adopted son seeks to reopen a partition and it is found that any of the coparceners to whom a share was given had alienated the property given to his share, all that he is asking is that the property which was sold away by the alienors should be allotted to his share. It is true that when a partition of a joint family property is made, one is required to take into consideration the property as it is at the time of the partition. But this does not moan that if any of the family properties has been alienated formerly the alienation has got to be ignored, because even where a partition is made for the first time if properties are alienated legal necessity with regard to them has got to be determined, and where no such legal necessity is made out, it is permissible to allot such property to the share of the alienor so that the alienee should not be defrauded. Now, when an adopted son seeks that the same thing should be done when a partition is reopened, he is not asking the Court to go back upon the principle that at the time when the partition is effected one must look to the property as it is, but he is seeking for the application the same principle as has been applied at the time of the first partition, that is, where any property has been alienated it should be investigated whether that property was alienated for a purpose which was binding upon the family. It is true that at the time when the alienors in such a case alienate the property they were entitled to do what they liked with the property. But we are after all here concerned in this case with the question of reopening a partition which has already been effected, and when after the partition property has been alienated by any of the alienors, there is nothing wrong in the person who seeks to reopen the partition in saying that the property which has been alienated by a particular sharer after the first partition should be allotted to his share in the second partition. He has really got the property once; even if he has sold it, he has got the proceeds of the property. As a matter of fact, if the proceeds are in existence, it is open to an adopted son to say that the proceeds are really joint family property; but if the proceeds are not in existence, it is open to the adopted son to say that one of the sharers having had the property allotted to his share in the prior partition and having sold it he must be debited with that property when the partition is reopened and every one is to be allotted afresh shares equal in value. It is really a question of equity.

5. The question with regard to acquisitions, however, cannot be disposed of by similar considerations. The acquisitions made by a particular sharer after the earlier partition even if made by him with the aid of property which was his separate property at the date of the partition are ordinarily his own property. If at all it has got to be held that acquired property is also joint, it must be upon the footing that the acquisitions were made with the aid of property which were joint at the time when the acquisitions were made. It is impossible, therefore, to hold that the adopted son is entitled to a share in the acquisitions without holding that the property with the aid of which they were made was joint family property at the time they were made. But in our view there is no reason whatsoever why in such a case the doctrine of relation

back should not be given full effect. The argument which was advanced when contending that when property was alienated by a divided coparcener after the partition it must be taken as having been lost to the family at the time of the reopening of the partition , viz. that the divided coparcener was entitled to do what he liked with his property at the time when he alienated it was based upon the so called principle that an adopted son will take either the whole of the joint family property or a share in the joint family property subject to any lawful alienations which have been made. No such principle could be cited in this case. It is true that the acquisitions were made by the divided coparcener with the aid of property which was his own at the time when they were made; but it would not be his property qua the adopted son if full effect is given to the doctrine of relationship back. The doctrine of relating back has got exceptions, the two which occurred to us at first sight have already been mentioned above. It has got to be remembered, however, that as times have progressed there has been a change in the view of the Courts with regard to this doctrine. I am not referring at present to the view which this Court had taken formerly as to a joint family coming to an end either by the death of the last surviving coparcener or by a division of the family properties or by partition between the coparceners. Formerly greater caution was exercised in giving full effect to the principle of relationship back. Bubhaneshwari's case and the case to which their Lordships of the Privy Council referred in Krishnamurthi Ayyar v. Krishnamurthi Ayyar are illustrations of this tendency. There has been an undoubted change, however, in the matter after Amarendra's case and the case of Anant v. Shankar. Too much importance must not, therefore, in our view, be attached to those two exceptions.

6. We, therefore, hold that the plaintiff was entitled to one-fifth share not only in the family property as it existed at the time of the partition of 1918 but also any subsequent acquisitions made by defendants Nos. 2 to 5. None of the latter, however, is entitled to any share in the subsequent acquisitions of the others. [The rest of the judgment is not material to the report.]