Abdul Parida and anr. Vs. Dinabandhu Pahi and anr.

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Court : Orissa

Decided On : Dec-14-1959

Reported in : AIR1960Ori151

Judge : R.L. Narasimham, C.J. and ;J.K. Misra, J.

Acts : Limitation Act, 1908 - Sections 6 and 8 - Schedule - Articles 44 and 144

Appeal No. : Second Appeal No. 181 of 1956

Appellant : Abdul Parida and anr.

Respondent : Dinabandhu Pahi and anr.

Advocate for Def. : L.K. Das Gupta and ;H.C. Roy, Advs.

Advocate for Pet/Ap. : A.K. Das and ;K.P. Acharya, Advs.

Disposition : Appeal dismissed

Judgement :

Narasimham, C.J.

1. This is a plaintiff's appeal against the concurrent decisions of the lower Courts, dismissing his suit for partition.

2. The disputed property originally belonged to a Hindu joint family consisting of the branched of two brothers namely Nanda and Rahasa. The pedigree is given below:

NANDA PAHI

|

| | |

Rushi Balaram Adhikari

Jadu Purushottam Sagar-wife

Rammamani

(D.8) (D.5) (D.7)

|

Narayan

RAHAS PAHI

|

| |

Kinu Brundaban

| |

Banchannidhi |

(D.4) |

| | | |

Dinabandhu krupasindhu Mayadhar Daughter

| | | (Married)

(D.1) (D.2) (D.3) to

Gananath

(D.9)

3. On the 10th March 1937, by two registered gift deeds (Exts. A and A. 3) defendants 1, 2 and 3; Kinit (father of defendant No. 4) and Adhikari (father of defendants 6 and 7 and Kartha of the joint family consisting of himself and two sons of his two brothers Rushi and Balaram transferred by way of gift about 15 acres of their property in favour of defendant No. 9 Gananath, who is the son-in-law of Brandaban. The gift was said to have been made by way of implementing a promise made when defendant No. 9 married the daughter of Brunduban.

The finding of the two lower Courts which was rightly not challenged before us was that Gananath came into possession of the properties by virtue of the two deeds of gift and was exercising exclusive possession all along. Defendant No. 8 was then a minor, He attained majority sometime in 1948 and on the 22nd September, 1949 sold his share of the properties (mentioned in Schedule G) to the plaintiff by a registered sale deed. The plaintiff, therefore, claimed title to the same and asked for partition of

the said 'Ga' Schedule properties.

4. In the plaint the plaintiff's vendor Jadu was impleaded as a pro forma defendant No. 8 and he remained ex parte. At a later stage the plaintiff applied to the trial Court for transposing defendant No. 8 as a co-plaintiff. But that application was rejected and the lower appellate Court also upheld that order of the trial Court. We also see no reason to question the correctness of the same in this second appeal.

5. Several questions as to whether the two gift deeds were benami documents or not, whether Nanda's branch had separated from Rahasa's branch prior to the deeds of gift and whether Adhikary could validly gift away the interests of his branch for implementing the promise made during the marriage of the daughter of the other branch, were canvassed before the lower Courts. Both the courts held that Nanda's branch was divided from Rahasa's branch and consequently Adhikary, as the Kartha of Nanda's branch could not gift away the joint family property of his branch with a view to implement the promise made during the marriage of a daughter of the other divided branch. There was some argument as to whether such a gift would be void ab initio or only voidable until set aside by the aggrieved party.

For the purpose of this appeal however, it is unnecessary to decide this question. Even if wet accept the extreme contention put forward by Mr. A. K. Das on behalf of the appellant, that the deeds of gift were wholly void ab initio, the main difficulty is with regard to the question of limitation as admittedly, more than twelve years have elapsed between the date on which the defendant No. 9 took possession of the property by virtue of the deeds of gift namely the 10th of March, 1937; and the date on which the present suit was brought, namely the 30th August, 1950.

6. Before the two lower Courts it was argued that limitation would be saved by Article 44 of the Limitation Act. Though that Article, gives a special period of limitation only to a minor, it was urged that the benefit of that Article may also be availed of by a transferee from a minor. The lower appellate Court held that the plaintiff cannot, is a transferee, from Jadu, avail of the special period of limitation provided by Article 44 and hence this appeal.

7. It appears to me that both the lower courts overlooked the fact that Article 44 has no application to the facts of this case. The deeds of gift by Adhikary in favour of the defendant No. 9 were not executed by him in his capacity as guardian of Jadu. Whatever might be the description which he might have given in those deeds his position was really that of a Kartha of the Hindu joint family consisting of himself, his sons & his brother's sons. A suit by a coparcener to set aside an alienation made by the Kartha of a Hindu joint family during his minority, will not be governed by Article 44. It the alienation was made by his father, Article 120 would apply, and if the alienation was made by some other manager, the relevant Article would be Article 144 (See Sheoraj v. Ajudhiya, AIR 1929 Oudh 284, and Kishori Chandra v. Suraj Narain Singh, (S) AIR 1955 Pat 386).

8. Mr. A. K. Das raised two contentions. First, that adverse possession cannot be computed against a minor during his minority and hence possession of defendant No. 9 would be adverse to Jadu only from the date on which the latter attained majority sometime in 1948. Secondly, even if it be held that time runs against Jadu from the date of the deeds of gift (10th March, 1937) he is entitled to the special rule of limitation prescribed in Sections 6 and 8 of the Limitation Act and that special rule

may be availed of not only by himself but also by his transferee, namely the plaintiff.

9. In my opinion, neither of these contentions can be accepted. The idea that time would not run against a minor seems to have been based on an observation of Lord Hardwicks, in Morgan v. Morgan, (1737) 1 Atk. 489, to the following effect:

'Where any person, whether a father or a stranger, enters upon the estate of an infant and continues the possession, the Court will consider such person entering as a guardian to the infant.'

This broad proposition of law has not been accepted as correct in subsequent decisions and its limits were pointed out in Seetharama Raju v. Subbaraju, JLR 45 Mad 361 at p. 368 : (AIR 1922 Mad 12 at p. 15), as follows :

'We do not think it can be stated as a general proposition that there could be no adverse possession of property, which belongs to a lunatic or minor, during the continuance of the lunacy or minority of the owner. The question has, in each case, to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic, and whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would, in law, make him only an agent or bailiff of the minor or lunatic.'

The question ultimately turns on whether the person in possession can be said to be in some sort of fiduciary relationship towards the minor. If he is a stranger, time wall run against the minor even during his minority. This principle has been reiterated in Narain Bhai v. Narbada Prasad, AIR 1941 Nag 357; Rachappa v. Madivalawa, AIR 1945 Bom 63; Bibhuti Bhusan v. Girish Chandra, AIR 1950 Pat 191; and Janardan v. Nilkantha, AIR 1952 Orissa 31.

10. Mr. Das then relied on some observations in Khem Chand v. Dayaram Jessomal, AIR 1941 Sind 50 and Lalit Kumar v. Nogendra Lal, AIR 1940 Cat 589. With great respect to the learned Judges we would prefer the other view taken by the majority of the High Courts.

11. No doubt, the minor will get the protection of Section 6 read with Section 8 of the Limitation Act, and as a result of the combined effect of both these sections, he would be entitled to challenge the alienation within three years of his attaining majority. Though there is no clear finding about the exact date on which the minor attained majority, it may be assumed that the suit was brought within three years of that date. But the question still remains as to whether the special privilege of Sections 6 and 8 can be availed of by the transferee of a minor. On this point, however, decisions are all uniform to the effect that a transferee or assignee cannot take advantage of those sections. They give a personal privilege to the minor which can be availed of either by him or by his legal representatives, but not by his assignees. See Rudra Kanto Surma v. Naba Kishore, ILR 9 Cal 663, Mahadev Ram v. Babi Chimnaji, ILR 26 Bom 730. Rangaswami v. Thangavelu, ILR 42 Mad 637 : (AIR 1919 Mad 317) and Mariyayya Sidramayya v. Chanvirangouda Virangouda, AIR 1935 Bom 420.

The only qualification made to this rule is where the assignor and the assignee are joined as co-plaintiffs, then the benefit of these sections may be available to the assignee also. See Bandu Annaji v. Yeshwant Rama Rao, AIR 1938 Bom 358. But in

the original suit the plaintiff did not implead his assignor namely Jadu as a co-plaintiff. On the contrary, he made him only a pro forma defendant (No. 8). The subsequent prayer for transposing him as co-plaintiff was rejected. The fact that Jadu has been made a joint appellant with the plaintiff both before the lower appellate Court and before this Court cannot make any difference.

12. I must therefore hold that the plaintiff's suit is barred by limitation by Article 144 of the Limitation Act and that Sections 6 and 8 of the Act are not available to the plaintiff for the purpose of avoiding limitation. The appeal is dismissed, but there will be no order for costs of this Court. The lower appellate Court's order for costs will however remain.

Misra, J.

13. I agree.