MUTHUSWAMI KAVUNDAN v. PONNAYYA KAVUNDAN.

KUMARASWAMI SASTRI, J.

in time. I do not see anything which would have prevented the fourth plaintiff filing her suit when defendants claimed the estate from her. She cannot by holding on extend the period of limitation when the rightful owners claim the estate and in this case defendants have been held to be the rightful owners. The widow in possession who has a claim against them is entitled to demand the sum she claims and to sue them. Time will begin to run from the date she made the payments or at least from the time the rightful person claimed the estate and her act in keeping possession of the estate will not enlarge the period.

The appeal fails and is dismissed with costs.

REILLY, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Ramesam.

1928, February 20.

VENKATAPATHI NAYAKAR (PLAINTIFF), APPELLANT,

v.

PAPPIA NAYAKAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Joint Hindu family—Alienation by one member—Sale of property for a consideration which is less than the real value of his share therein—Sale, whether, in what circumstances, and to what extent, to be set aside or upheld as against other members—Equities, if any, on setting aside.

Where a father, in a Hindu joint family composed of himself, his father and his son, sold joint family property worth two-thousand rupees for a consideration of four hundred rupees binding on the family, and the son sued, after the death of the

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* Second Appeal No. 1752 of 1925.

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father and the grandfather, to recover the property from the vendee, *Held that*,

(1) Where the whole of the consideration, even after being allotted to the alienor's share of the property, is grossly inadequate, the whole transaction should be set aside, making the consideration proved a charge on the family property, as laid down in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*, (1904) I.L.R., 27 Mad., 162;

(2) Where the whole of the consideration is not grossly inadequate, and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only, and the other members who question the transaction are entitled to recover their shares of the property, without being subjected to any equity, as decided in *Marappa Goundan* v. *Rangasami Goundan*, (1900) I.L.R., 23 Mad., 89; in such a case, if the members become divided, the alienor or his heirs may have a right to contribution; *Vadivelu* v. *Natesan*, (1914) I.L.R., 37 Mad., 435, dissented from; and

(3) Where the consideration exceeds the value of the alienor's share, the transaction may be upheld as the sale of the alienor's share only, and for the excess of the consideration a charge may be given over the share of the other members.

Consequently, the present case fell under the second of the above three classes, and the plaintiff could recover from the vendee three-fourths share of the property sold, without being subject to any equity.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 103 of 1924, preferred against the decree of the Court of the District Munsif of Kovilpatti in Original Suit No. 1 of 1921.

The material facts appear from the judgment.

S. Varadachari (with *P. R. Srinivasan*, *P. N. Appusami Ayyar*, and *P. S. Nagaswami Ayyar*) for appellants.

T. L. Venkatarama Ayyar for respondent.

The JUDGMENT of the Court was delivered by

RAMESAM, J.

RAMESAM, J.—This Second Appeal arises out of a suit by a minor plaintiff represented by his mother and

next friend to set aside a deed of sale, Exhibit XX, dated 21st November 1920, executed by his father, the late Subba Naick, in favour of the 1st defendant. The plaintiff claimed to be the adopted son of Subba Naick and was so found by the Courts below. Subba Naick died on the date of the sale-deed, soon after the execution. His father Papayya Naick (i.e., the grandfather of the plaintiff) died on the 1st December 1920. The sale-deed was executed for Rs. 600. The vendee was the minor son of Subba Naick's wife's brother, Lakshmipathi Naick, who is the second defendant. The plaintiff alleged that Subba Naick was not in a sound disposing state of mind when he executed the sale deed. But this point was found against the plaintiff by the District Munsif and was not pressed before the Subordinate Judge or before us. The plaintiff alleged that the property sold was joint family property of the vendor's family, but the defendants contended that it was his self-acquisition. This issue was found in plaintiff's favour by the Courts below. The respondent attacks this finding before us on the ground that the plaintiff is now precluded from raising this question by reason of an order on the claim petition, dated 6th December 1911—Exhibit II (*b*). The facts relevant to this point are that the late Subba Naick sold his share of the family property to one Ganapathi Asari under Exhibit I, dated 13th March 1911. Afterwards when the property was attached by a creditor, Ganapathi Asari filed a claim petition and the claim was allowed. No regular suit was filed within one year from the date of the order by Subba Naick to set aside the order and the respondent contends that the order operates as *res judicata* against the plaintiff. The Courts below have now found that the sale-deed in favour of Ganapathi Asari was a sham transaction effected with a view to

defraud Subba Naick's creditors. This finding is a question of fact and must be accepted. But the question whether, in spite of this finding, the order Exhibit II (b) precludes the plaintiff from contending that the sale of Subba Naick's property was a sham still arises. It is clear on the facts that, if the transaction was a sham transaction brought about to defraud creditors, Subba Naick himself, having defeated his creditors, would be estopped from contending that the sale was a sham transaction. But neither estoppel nor *res judicata* can operate against the plaintiff, who is a member of the undivided family of Subba Naick, whose right arises by adoption and who cannot be said to claim through Subba Naick. The result is that the finding that the suit properties are joint family properties of the vendor's family must stand.

The next question is whether the sale is binding on the plaintiff. The District Munsif found that the sale was not supported by any consideration and that the properties were worth not less than Rs. 2,000 and held that the sale was not binding on the plaintiff and gave a decree as sued for. On appeal the Subordinate Judge found that a part of the consideration of Rs. 600, namely, Rs. 400, was proved by Exhibits XVII series; and he also found that the properties were worth Rs. 2,000 and therefore there was no justification for selling the properties as the consideration proved amounted only to Rs. 400. He further held that the sale was not valid and binding on the plaintiff's share of the properties, which he thought was a half and that it was binding on the other half which he thought belonged to Subba Naick. The plaintiff filed this Second Appeal.

In Second Appeal Mr. Varadachariar, who appeared for the appellant contended that, as the plaintiff's

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grandfather was alive at the time of the sale, Subba Naick's share was only one-fourth and that even on the Subordinate Judge's findings the sale should be set aside as far as the remaining three-fourths share was concerned. So far as this question as to the extent of the share of Subba Naick is concerned, the respondent concedes that it was one-fourth. Secondly, Mr. Varadachariar, relying on *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetty*(1), contended that the whole sale must be set aside on condition of his paying to the vendee Rs. 400, the consideration proved which he is willing to do. But even in *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetty*(1), what was held was that the transaction could be upheld against the family in respect of the alienor's interest in the joint family property only to the extent of the value received and that if the conveyance had been of a reasonable portion of the joint family property for the discharge of an antecedent debt, the conveyance as such would bind the sons also; but in the circumstances of the particular case it was held that the vendee could not claim the benefit of the sale even as regards the father's share. In that case, even if the sale was regarded as a sale of the father's share, the consideration would be grossly inadequate and to give effect to the sale of the father's share would be to evade the principle of Hindu Law that it is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share, or any portion thereof, and this principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable. On the other hand, there are other cases, such as *Marappa Goundan* v. *Rengaswami Goundan*(2), and

(1) (1904) I.L.R., 27 Mad., 162. (2) (1900) I.L.R., 23 Mad., 89.

Vadivelam v. *Natesam*(1), and others which will be presently referred to, where the transaction was upheld as a sale of the alienor's share only where the consideration is not grossly inadequate when it is so regarded. In the present case, if the sale is regarded as a sale of the father's share only, as the share was worth Rs. 500 the sale could not be regarded as for a grossly inadequate consideration and as practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only. In this respect the facts of the case before us do not resemble the facts in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*(2), but resemble the facts of the other cases mentioned above.

The only question that next arises is whether there is any equity in favour of refunding any portion of the purchase money to the vendee. In *Marappa Goundan* v. *Rengaswami Goundan*(3), it was found that the sale was supported only to the extent of Rs. 120 though the consideration was apparently a much larger sum and that the vendee was practically a volunteer and therefore it was held that the sale must be upheld in respect of the vendor's share and no charge could be given on the plaintiff's share for two-thirds of the debt found to be binding. This decision came up for consideration before another bench of this Court in *Vadivelam* v. *Natesam*(1). In that case the Court held that, where a portion of the consideration that was proved was found to be binding on the whole family, it must be distributed over the whole of the property sold in proportion to the value of each part. They upheld the sale of the alienor's share and also gave a charge on the rest of the property for the

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(1) (1914) I.L.R., 37 Mad., 435. (2) (1904) I.L.R., 27 Mad., 162.
(3) (1900) I.L.R., 23 Mad., 189.

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proportion of the debt found to be binding on the other shares when so distributed. At page 438 it was observed

"It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases."

This principle is no doubt correct where the vendor is a divided member, but where he is still a member of a joint family this proposition conflicts with the statement of law in *Rottala Runganatha Chetti* v. *Pulicat Ramaswami Chetti*(1), where it was observed that the principle that a member of a joint family cannot make a gift of his share cannot be evaded by making a sale for a grossly inadequate consideration and practically making a gift of the property. We agree with the observations in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*(1), and are inclined to dissent from the observations in *Vadivelam* v. *Natesam*(2). The result would be if the consideration is distributed over all the shares and if we then try to uphold the sale even as regards the alienor's share the sale of that share should be for a grossly inadequate consideration. In the present case the sale of the father's share, which is worth Rs. 500 at least, would be for Rs. 100, which is his $\frac{1}{4}$ share of the consideration proved. Looked at from this point of view the sale of the father's share too would be for an inadequate consideration with the result that it cannot be upheld on the principles laid down in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*(1). In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share. If it is less than the value of the alienor's share, no further equity in

(1) (1904) I.L.R., 27 Mad., 162. (2) (1914) I.L.R., 37 Mad., 435.

favour of the vendee arises. If it is more, for the excess a charge may be given over the shares of the coparceners. Even when the consideration is so allotted, if it is grossly inadequate compared with the value of the alienor's share, it may be that the sale cannot be upheld, even for his share. It may be that in such a case where the consideration is found to be binding on the whole family the effect of allotting the consideration wholly to the alienor's share would be to give rise to some equity in favour of the alienor, for the result of such allotment would be to make him bear the whole of the debt, whereas it is a debt really binding on the whole family. If the family is divided, as a result of this transaction, it may be that he may file a suit for contribution; but, if the family continues undivided, there is no need for such equity. Where the vendor is dead and his representatives are the other members as in the case before us, then also there is no need for such equity.

To sum up, three possible cases arise:—

1. Where the whole of the consideration, even after being alloted to the alienor's share only, is grossly inadequate, the whole transaction may have to be set aside making the consideration proved a charge on the family property. That would be a case resembling *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*(1).

2. Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity.

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(1) (1904) I.L.R., 27 Mad., 162.

The case would then resemble *Marappa Goundan* v. *Rangaswami Goundan*(1). In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction, he or his heirs may have a right to contribution.

3. Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as a sale of the alienor's share only and for the excess a charge may be given over the shares of the other members.

The present case falls under the second of the above cases. The value of the father's share is Rs. 500 and the consideration proved is Rs. 400. If the transaction is upheld as sale of the alienor's share only, the vendee loses no part of the consideration he paid and there is no need for any further equity, nor is there any need for any right of contribution in favour of the father, for he died immediately after the sale and the plaintiffs are his representatives. The result is that we uphold the transaction as a sale of the father's share only, that is one-fourth of the property. The decree is accordingly modified. The plaintiff will be entitled to mesne profits and to three-fourths share.

For the reasons given above we are not inclined to follow the decisions of single Judges in *Seetharam Naidu* v. *Balakrishna Naidu*(2), and *Adinarayana Reddi* v. *Subbarayal Reddi*(3), which practically follow the decision in *Vadivelam* v. *Natesam*(4). In the former of those two decisions the particular point now argued before us was not raised.

The respondent also relied on *Muthukrishna Naidu* v. *Muthukrishnappa Naidu*(5). In that case the plaintiff offered to pay his share of the consideration found

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(1) (1900) I.L.R., 23 Mad., 89.
(2) (1914) 26 M.L.J., 604. (3) (1927) 104 I.C., 621.
(4) (1914) I.L.R., 37 Mad., 435. (5) (1917) M.W.N., 273.

proved and the point now argued did not arise. It cannot therefore be regarded as an authority supporting the respondent.

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In the appeal, the parties will bear their own costs.

The memorandum of objections will be dismissed with costs.

In the Courts below, the parties will give and take proportionate costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

GHOUSE KHAN (APPELLANT), PETITIONER,

1927, April 12.

v.

BALA SUBBA ROWTHER (RESPONDENT), RESPONDENT.*

Provincial Insolvency Act (V of 1920), sec. 28 (2)—Previous leave to file suit against insolvent, necessary.

Under section 28 (2) of the Provincial Insolvency Act (V of 1920), leave to institute any suit or other legal proceeding against a person adjudged insolvent must be obtained before such institution and cannot be granted afterwards. *In re Dwarkadas Tejbandas,* (1916) I.L.R., 40 Bom., 235, followed.

APPEAL against the order of R. A. JENKINS, District Judge of Coimbatore, in I.A. No. 53 of 1925 in I.P. No. 15 of 1921.

The facts are given in the judgment.

K. N. Rajagopala Sastri for appellant.

S. T. Srinivasagopalachari for respondent.

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* Appeal against Order No. 133 of 1925.