Thimmaiah And Ors vs Ningamma And Anr on 25 August, 2000

Equivalent citations: AIR 2000 SUPREME COURT 3529(2), 2000 AIR SCW 3214, (2000) 2 MARRILJ 571, (2000) 3 SCJ 341, 2000 (7) SCC 409, (2000) 4 RECCIVR 609, (2001) 2 ICC 400, (2000) 6 SCALE 115, (2000) 41 ALL LR 94, (2000) 3 CURCC 339, (2000) 5 SUPREME 739, (2000) WLC(SC)CVL 718, (2001) 2 CIVLJ 357, (2000) 9 JT 516 (SC)

Author: Ruma Pal

Bench: A.P.Misra, Ruma Pal

PETITIONER:
THIMMAIAH AND ORS.

Vs.

RESPONDENT:
NINGAMMA AND ANR.

DATE OF JUDGMENT: 25/08/2000

BENCH:
A.P.Misra, Ruma Pal

JUDGMENT:

RUMA PAL, J.

The issue to be decided in this appeal is the share of each of the parties in coparcenary properties. Hiri Thimmaiah (referred to briefly as Hiri) was the Karta of the coparcenary. He had two wives Sidamma and Ningamma. The appellants are the children of Hiris first wife, Sidamma. The respondent No. 1 is the second wife and the respondent No. 2 is her daughter. Hiri died in 1971. Soon after his death, in 1972, the appellant No. 1 filed a suit for partition by metes and bounds of 12 properties described in the Schedule to the plaint and for separate possession of 7/12th share in such properties. The case in the plaint was that items 1 and 2 of the schedule properties were ancestral and all the remaining properties belonged to the coparcenery. The further case in the plaint was that Hiri had illegally sought to gift away item No. 1 and 2 by deed dated 17.11.67 to the respondent No. 1 and items 3 to 6 by deed dated 9.6.71 to the respondent No. 2. The appellant No. 1 claimed a declaration that the gifts were void. The appellants 2, 3 and 4 were named as defendants 3, 4 and 5 in the suit. They filed a written statement substantially supporting the case of the appellant No. 1 and claiming 1/4th share in all the 12 properties. In their written statement, the

respondents (who were the defendants 1 and 2 in the suit) conceded that items 1 and 2 were ancestral properties but claimed that items 3 to 6 were the self- acquired properties of Hiri. They claimed that both the deeds were settlement deeds. The first settlement deed dated 17.11.67 made provision for the maintenance of respondent No. 1 out of items 1 and 2 and after her death, the properties were to revert back to Hiri. By the second deed dated 9.6.71, items 3 to 6 had been settled on the second respondent with the consent of appellant No. 1 who had not only put his left thumb impression on the deed but had also signed the document as a consenting party. Issues were framed on the basis of the pleadings. Witnesses were examined in support of the contesting parties. The Trial Court negatived the claim put forward by the respondents that the two deeds were deeds of settlement. It was held that items 3 to 6 were not the self-acquired properties of Hiri but belonged to the coparcenary and that the two deeds were deeds of gift and were void. In coming to this conclusion, the Trial Court noted the contention of the appellant No. 1 that fraud had been committed on him and that he had not fixed his left thumb impression by way of his consent to the document dated 9.6.71 and said: It has to be noted that there is material in the evidence of D.W- 2 the uncle of the plaintiff, to show that on the very same day of the execution of the document in question, the father of the plaintiff executed another document in favour of his brother D.W-2 as per Ex.P- 24 and in the course of obtaining consent of the plaintiff to that document, Ex.P-24, the signature of the plaintiff is by deceitful means obtained on Ex.D-2 also.

However, the Trial Judge did not hold that the deeds were void only because of the lack of the consent of appellant No. 1. Relying on the decision of this Court in Ammathayee alias Perumalakkal and Anr. V. Kumaresan alias Balakrishnan and Others AIR 1967 SC 569 the Trial Judge held that Hiri was incompetent to gift items 3 to 6 to the respondent No. 2 irrespective of the consent of the appellant No. 1. According to the Trial Judge immovable ancestral properties could only be gifted within reasonable limits for pious purposes such as the marriage of an unmarried daughter. The Trial Court found that a considerable portion of the coparcenary properties had been gifted by Hiri to the respondent No. 2 and that it could not be said that the gift had been made in favour of the second respondent in fulfillment of any pious purpose as she was well below the marriageable age when the gift was made. The appellant No. 1s suit was accordingly decreed on 8th August 1977 as prayed for by the respondent No. 1 and a preliminary decree for partition was passed. The respondents preferred an appeal before the District Judge. The first appellate Court dismissed the appeal and upheld the findings of the trial Court that the properties were coparcenery and could not have been affected by the two impugned deeds executed by Hiri in favour of the respondents. On the question of consent, the District Judge said: Plaintiff has taken the stand that his L.T.M. is taken to Ex.D-1 at Ex.D.1 (e) by practising fraud on him when he had gone to the Sub-Registrars Office at the time of execution of another document by his father regarding sale of a site. Even if it can be held on the basis of the evidence of D.Ws. 1 and 2 that plaintiff has attested Ex.D-1 by putting his L.T.M. at Ex.D-1 (e), I find it difficult to uphold the validity of Ex.D-1 as there is no recital in the body writing of Ex.D-1 that the properties were gifted by H. Thimmaiah in favour of the 2nd defendant with the specific consent of the plaintiff. Therefore, the mere attestation of Ex.D-1 by the plaintiff by putting his L.T.M. would not validate the gift of considerable portion of family properties made under Ex.D-1.

A second appeal was preferred by the respondents before the High Court. There it was urged by the respondents for the first time that by virtue of the Mysore Hindu Law Womens Rights Act, 1993 (hereafter referred to as the Mysore Act), the respondent No. 1 was entitled to a widows share and the respondent No. 2 to an unmarried daughters share in addition to their rights on intestacy as heirs of Hiri under the Hindu Succession Act, 1956 as well as under the two deeds dated 17.11.67 and 9.6.71. The High Court held that the respondent No.2 was entitled to 1/9th share in the coparcenary property under Section 8 of the Mysore Act but negatived the claim of the respondent No. 1 not only under the Mysore Act but also under the deed dated 17.11.67. As far as the deed dated 9.6.71 was concerned, it was held by the High Court that items 3 to 6 had been gifted to the respondent No. 2 with the consent of the appellant No. 1 and was, therefore, valid. The High Court held that the conclusion arrived at by the Trial Court and the first appellate Court that the appellant No. 1 had not consented to the gift, was not based on any acceptable evidence. According to the High Court, items 3 to 6 were, therefore, not available for partition and the parties entitlement in the remaining properties were: Appellant No. 1 4/9+4/54 = 28/54 (son) Appellant No. 2 = 4/54 (married daughter) Appellant No. 3 = 4/54 (married daughter) Appellant No. 4 = 4/54 (married daughter) Respondent No. 1 = 4/54 (widow) Respondent No. 2 (unmarried daughter) 1/9+4/54 = The judgment delivered on 1st August 1991 by the learned Single Judge of the High Court has been impugned before this Court on the ground that the High Court on second appeal should not have interfered with concurrent findings of fact on the appellants lack of consent and should not have applied the provisions of the Mysore Act which, according to the appellants, had been excluded by the provisions of Section 4 of the Hindu Succession Act, 1956. The respondents have relied upon the decision of this Court in Ladli Parshad Jaiswal V. The Karnal Distillery Co., Ltd. Karnal and Others AIR 1963 SC 1279 to contend that the High Court was competent to reverse the finding of the lower Courts that there was no consent of the appellant No. 1, because the finding was based on no evidence. It is also contended that the provisions of the Mysore Act are ancillary to the provisions of the Hindu Succession Act, 1956 and particularly Sections 6 and 8 of that Act. In Jaiswals case (supra), this Court has, no doubt, held that:

> A decision of the first appellate Court reached after placing the onus wrongfully or based on no evidence, or where there has been substantial error or defect in the procedure, producing error or defect in the decision of the case on the merits, is not conclusive and a second appeal lies to the High Court against that decision.
>
> But at the same time, this Court has noted that the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. In other words, if there is some evidence and the appreciation of the evidence is erroneous, a second appeal will not lie. Further the decision in Jaiswals case was rendered prior to the amendment of Section 100 by which the provisions of second appeal are more stringent and have been strictly limited to those cases where a substantial question of law arises and in no others. We have already noted the findings of the Trial Court as well as the first appellate Court on the question of consent. These observations clearly show that there was some evidence in support of the finding of the lower Courts. In the circumstances, the High Court was not entitled to reassess the evidence and arrive at

a different conclusion. Besides the onus was on the respondents to prove the fact of the appellant No. 1s consent. When items 3 to 6 were being claimed by the respondents to be the self-acquired property of Hiri, it could hardly be contended in the same breath that the appellant No. 1 had consented to the gift of items 3 to 6 on the basis that it was coparcenary property and the appellant No. 1 the only other coparcener. The High Court also erred in its view on the effect of consent on a gift which may otherwise be void. This Court in Ammathayee alias Perumalakkal and Another V. Kumaresan alias Balakrishnan and Others AIR 1967 SC 569 summarised the Hindu Law on the question of gifts of ancestral properties in the following words: Hindu law on the question of gifts of ancestral property is well settled. So far as moveable ancestral property is concerned, a gift out of affection may be made to a wife, to a daughter and even to a son, provided the gift is within reasonable limits. A gift for example of the whole or almost the whole of the ancestral moveable property cannot be upheld as a gift through affection. (See Mullas Hindu Law, 13th Edn., p.252, para 225). But so far as immovable ancestral property is concerned, the power of gift is much more circumscribed than in the case of moveable ancestral property. A Hindu father or any other managing member has power to make a gift of ancestral immovable property within reasonable limits for pious purposes; (see Mullas Hindu Law, 13th Edn., para 226, p. 252). Now what is generally understood by pious purposes is gift for charitable and/or religious purposes. But this Court has extended the meaning of pious purposes to cases where a Hindu father makes a gift within reasonable limits of immovable ancestral property to his daughter in fulfilment of an antenuptial promise made on the occasion of the settlement of the terms of her marriage, and the same can also be done by the mother in case the father is dead.(See Kamala Devi v. Bachu Lal Gupta, 1957 SCR (AIR 1957 SC

434).

The Karta is competent or has the power to dispose of coparcenary property only if (a) the disposition is of a reasonable portion of the coparcenary property and (b) the disposition is for a recognised pious purpose. The High Court has not come to any conclusion as to whether the gift of items 3 to 6 by Hiri to the respondent No. 2 was within reasonable limits or in fulfilment of an antenuptial promise made on the occasion of the settlement of the terms of the respondent No.2s marriage. It must be taken, therefore, that the findings of the lower Courts on both counts were accepted. That being so, Hiri could not have donated items 3 to 6 to respondent No. 2 and the deed of gift dated 9.6.71 was impermissible under Hindu Law. The question is - could such an alienation be made with the consent of the appellant No. 1? It is arguable that there is a distinction between a void disposition and a voidable one, and that the gift in favour of the respondent No. 2 being void cannot be made even with the consent of the appellant No.1. However, it is not necessary to decide the issue in the view that we have taken in this case. This Court in Guramma V. Mallappa AIR 1964 SC 510 has envisaged three situations of voidable transactions. It was held that a managing member may alienate joint family property in three situations namely: (i) legal necessity, or (ii) benefit of the estate or (iii) with the consent of all the coparceners of the family. Where the alienation is not with the consent of all the coparceners, it is voidable at the instance of the coparcener whose consent has

not been obtained. Needless to say where there is only a sole surviving coparcener and no other member of the family who has a joint interest in the property, there are no fetters on the alienation of the property. Assuming that the principle enunciated in Guramma V. Mallappa (supra) would apply to void alienations of joint family property, the question of consent of all interested parties would still remain. The rationale behind the impermissibility of certain dispositions of coparcenary properties is the protection of the interest of other coparceners. Where other persons have an interest in coparcenary property, whether inchoate or otherwise, and willingly acquiesce in the depletion of such interest for whatever purpose, such a disposition would be permissible. In this case, apart from the appellant No. 1, if the other heirs of Hiri had such an interest, merely getting the consent of the appellant No. 1 would not do. The impugned deed was executed in 1971, prior to Hiris death in the same year. By this time, the Hindu Succession Act, 1956 had come into force. The proviso to section 6 of the 1956 Act (considered at greater length later in the judgment) now provides that the deceaseds interest in Mitakshara coparcenary property does not devolve by survivorship if the deceased leaves surviving him female relatives specified in class I of the Schedule. Consequently, the interest of the surviving coparcener to the deceaseds coparcenary share, in such a case, no longer survives and his consent to depletion of his interest in joint family property would not, therefore, make a gift of coparcenary property otherwise invalid, valid. Consent in such a case would have to be obtained from all the persons who could claim a share in the deceased coparceners interest. The appellants 2, 3 and 4 as well as both the respondents are class I heirs of Hiri. It is not the case of the respondents that the appellants 2, 3 and 4 had consented to the gift. We are, therefore, of the opinion that the finding of the High Court on the validity of the deed of gift dated 9.6.71 is unsustainable and it is accordingly set aside. The next question is the applicability of Section 8 (1) (d) of the Mysore Act. It may be stated at the outset that while we affirm the conclusions reached as to the shares of the parties, it appears to us that the High Court has misconstrued the provisions of Section 8 (1) (d). Section 8 reads:

> 8. Certain females entitled to shares at partition.
>
> (1) (a) At a partition of joint family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have left no male issue shall be entitled to share with him.
>
> (b) At a partition of joint family property among brothers, their mother, their unmarried sisters and the widows and unmarried daughters of their predeceased undivided brothers who have left no male issue shall be entitled to share with them.
>
> (c)Sub-sections (a) and (b) shall also apply mutatis mutandis to a partition among other coparceners in a joint family.
>
> (d) Where joint family property passes to a single coparcener by survivorship, it shall so pass subject to the right to shares of the classes of females enumerated in the above sub-sections.

(2) Such share shall be fixed as follows: -

(a) in the case of the widow, one-half of what her husband, if he were alive, would receive as his share;

(b) in the case of the mother, one-half of the share of a son if she has a son alive, and, in any other case, one- half of what her husband if he were alive, would receive as his share;

(c) in the case of every unmarried daughter or sister, one-fourth of the share of a brother if she has a brother alive, and, in any other case, one-fourth of what her father, if he were alive, would receive as his share:

provided that the share to which a daughter or sister is entitled under this section shall be inclusive of, and not in addition to, the legitimate expenses of her marriage including a reasonable dowry or marriage portion.

(3) In this section, the term widow includes, where there are more widows than one of the same person all of them jointly, and the term mother includes a step- mother and, where there are both a mother and a step- mother, all of them jointly and the term son includes a step-son as also a grandson and a great grandson; and the provisions of this section relating to the mother shall be applicable mutatis mutandis to the paternal grandmother and great grandmother.

(4) Fractional shares of the females as fixed above shall relate to the share of the husband, son, father or brother as the case may be and their value shall be ascertained by treating one share as allotted to the male and assigning therefrom the proper fractional shares to the female relatives.

5. Each of the female relatives referred to in sub- section (1) shall be entitled to have her share separated off and placed in her possession.

Provisos: - Provided always as follows: - (i) No female relative shall be entitled to a share in property acquired by a person and referred to in Section 6, so long as he is alive;

(ii) No female whose husband or father is alive shall be entitled to demand a partition as against such husband or father, as the case may be;

(iii) A female entitled to a share in any property in one capacity of relationship shall not be entitled to claim a further or additional share in the same property in any other capacity.

Illustration: A and his son B effect a partition of their family property. A has a mother and two unmarried daughters. Their shares will be as follows: -

Father .. .. 1 Son .. .. 1 Mother .. .. ½ Two daughters .. .. ¼ each The property will be divided in the above proportion, the father getting 1/3, the son 1/3, the mother 1/6 and each daughter 1/12.

Clauses (a), (b), (c) and (d) of sub-section (1) of Section 8 deal with four separate situations. Clause (a) deals with a partition of joint family between a person and his sons. Clause (b) deals with the partition of joint family property among brothers, clause (c) applies to a partition among other coparceners in a joint family. Clause

(d) provides for a situation where joint family property passes to a single coparcener by survivorship. The female members who have been declared to be entitled to shares are the mother of the concerned coparcener, his unmarried daughters and widows and unmarried daughters of pre-deceased sons and undivided brothers. At this stage, it would be appropriate to refer in detail to relevant portions of Section 6 of the 1956 Act: 6. Devolution of interest in coparcenary property. - When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or interestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2 x x x x x x x x (Emphasis supplied) It is not in dispute that the Mysore Act deals with Hindu Mitakshara coparcenary rights. This is also clear from the definition of Hindu in section 3 (c) of the Mysore Act. Section 4 of the 1956 Act gives overriding effect to the 1956 Act in so far as any law governing Hindus is inconsistent with the provisions of the 1956 Act. Reading the proviso to section 6 of the 1956 Act with section 8 of the Mysore Act, it is clear that where the female members sought to be protected under Section 8 of the Mysore Act are in fact Class I heirs of a deceased coparcener, his interest in the joint family property cannot pass by survivorship at all. Thus the question of it passing subject to the rights of any class of females under Section 8 (1) (d) of the Mysore Act does not also arise. This would mean that Section 8 (1) (d) of the Mysore Act has been superseded by the proviso to Section 6 of the 1956 Act to the extent stated. The decision in Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum & Ors. 1978 (3) SCR 671 is an authority for the proposition that where a female is entitled to a share in coparcenary property on partition, then by virtue of Explanation I to Section 6 of 1956 Act, she continues to be so entitled despite the fact that no partition may actually have taken place prior to the coparceners death. This Court held that Explanation I to Section 6 covered a situation where a Hindu coparcener dies without actual partition having taken place. In such event, the Court will have to assume that a partition had in fact taken place immediately prior to the death of the coparcener concerned and grant shares on the

basis of such notional partition. This Court also held that the share of the female member on such partition was in addition to any share which she may get as an heir of the deceased coparcener. [See also State of Maharashtra V. Narayan Rao 1985 (3) SCR 358; AIR (1985) SC 716, 721]. Reliance by the respondents on the decision of this Court in Gurupad Khandappa Magdum V. Hirabai Khandappa Magdum and Ors. 1978 (3) SCR 671 to contend that the respondents were entitled to shares in the coparcenary property by virtue of Section 8 (1) (d) of the Mysore Act is misplaced because as already noted Section 8 (1) (d) in terms does not apply in the facts of this case because of the proviso to Section 6 of the 1956 Act. Under Explanation I to Section 6 of the 1956 Act , the Court will have to ascertain what the shares of the parties would be as if Hiri had sought for partition just before his death. The only other coparcener being the appellant No.1, the partition would have to be effected according to Section 8 (1) (a) which provides for partition between a coparcener and his son/sons. Under Section 8 (1) (a) the female members who could claim a share in the coparcenary properties would be Hiris mother, his unmarried daughter (the respondent no.2) and the widow or unmarried daughters of any predeceased sons or brother. Admittedly, Hiris mother was not alive in 1971. Nor had Hiri any predeceased son or brother. The sole female member entitled to a share under Section 8 (1) (a) therefore is the respondent No.2. The appellant being the other coparcenar would get ½ of the coparcenary properties on partition. In terms of Section 8 (2) (c) of the Mysore Act, his sister, the respondent no.2 would get ½ her brothers share, namely 1/4th of the coparcenary properties. The remaining interest would belong to Hiri. It has not been disputed before us that under Section 8 of the 1956 Act, each of the parties to this appeal is entitled to claim a share in Hiris interest as his Class I heir. On the basis of the ratio in Gurupad Khandappa Magdums case (supra) , the respondent No.2 would also be entitled to a share in Hiris interest as an heir on intestacy, under Section 8 of the 1956 Act. To sum up: if there were an actual partition of the coparcenary properties between Hiri and his son, under Section 8 (1) (a) of the Mysore Act, his son, the appellant No. 1 would get ½ share. His wife, namely the respondent No. 1, and the appellants 2, 3 and 4 would not get any share in the coparcenary property at all. But the respondent No. 2 as the unmarried daughter would get a share calculated in terms of Section 8 (2) (c) of the Mysore Act, namely, 1/4th of the share of her brother, namely, the appellant No. 1 in addition to her share as the heir of Hiri. All the appellants as well as both the respondents are each entitled to an equal share in Hiris interest as heirs on intestacy. The High Court has, therefore, correctly calculated the shares of the parties and we affirm its conclusion in this regard. The appeal is accordingly partly allowed. We hold that items 3 to 6 of the Schedule to the plaint are available for partition as coparcenary property according to the shares declared by the High Court. There will be no order as to costs.