

Gooty Thotappa and ors. Vs. Gooty Gurusiddappa and anr.

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Court : Karnataka

Decided On : Feb-01-1977

Reported in : AIR1977Kant175; ILR1977KAR330; 1977(1)KarLJ231

Judge : G.K. Govinda Bhat, C.J. and ;M.N. Venkatachaliah, J.

Appellant : Gooty Thotappa and ors.

Respondent : Gooty Gurusiddappa and anr.

Advocate for Def. : Javavittal Kolar and ;Padubidri Raghavendra Rao, Advs.

Advocate for Pet/Ap. : V. Krishna Murthy and ;Basavalingappa, Advs.

Judgement :

Venkatachaliah, J.

1. This appeal brought on behalf of defendants 1 and 2 in O. S. No. 123 of 1974 on the file of the Court of the Civil Judge, Bellary, is directed against the judgment and decree dated 4-11-1970 made therein decreeing partition -and possession of plaintiff's 1/7th share in the plaint 'A' schedule properties (excluding, however, House Item No. 1; and Item 5 and Items 17 to 35 thereof).

2. First respondent herein is the plaintiff. Appellants 1 and 2 and the second respondent are defendants 1, 2 and 3 respectively. The parties are hereinafter referred with reference to their array and ranking in the Court below.

3. it is averred in the plaint that parties were members of a Hindu undivided family and that the immovable properties in the plaint 'B' schedule and the moveables in the plaint 'B' schedule constitute coparcenary estate liable to partition, plaintiff claiming a 1/15th share therein. The relationship amongst the parties is set out in the following genealogical table : (see the Table below)

Plaintiff alleged that the said joint family was originally comprised of two branches, Channappa and: his brother Jambappa representing one branch and Thotappa, Kotrappa and Chandrappa defendants 1 to 3 respectively and Veerappa, plaintiff's father, representing the other branch of Gaddeppa-11, each branch having had a moiety of interest, In the latter branch each of the four sub-branches had an undivided 1/4th share. In other words, Channappa and Jambappa together had an undivided half-share and the branches of Veerappa, Thotappa, Kotrappa and Chandrappa which together constituted the branches of Gaddeppa-11 was entitled to the other half.

4. It is further averred. in the plaint that the conduct of Veereppa, plaintiff's father, not having been considered satisfactory, he separated himself from the other members, including the plaintiff, as this was considered to be in the best interest of the family-- and that accord- under a registered deed of partition dated 17-1-1935 (Ext. P-1) Veerappa separated himself from the Joint family, having taken away his individual 1/16th share in the family properties. The said partition, it is averred, was confined to the interest of Veerappa alone, as in view of his conduct, it was considered undesirable to effect severance of the plaintiff's joint status in the joint family, and that accordingly, plaintiff continued to be a member of the joint family till a notice demanding partition (Ext. P-8 (a)) was issued prior to the institution of the suit.

5. The third defendant did not contest the plaintiff's claim, except in the matter of certain particulars touching the existence and the extent of certain items of property. He himself sought a partition and separate possession of his own 2/7th share, which has also been granted by the decree under appeal.

GENEALOGY| |Veerappa (dead) Thotappa (dead)| | |Chinnappa Jambappa
Gaddeppa-II Kotrappa Andanavva| | |Veerappa Thotappa Kotappa Chandrappa alias

Chandra | | |(Def.1) (Def.2) verappa (Def.3)| Gurusidappa| (Plaintiff)

6. Defendants 1 and 2 were the contesting defendants, though, however, this appeal which was initially brought by both of them was, in so far as the first defendant was concerned not pressed.

7. The second defendant urged several defences, the principal amongst them being that under the partition under Exhibit P-1 Veerappa's branch of the family, including the plaintiff, stood severed in status; that after Cihannappa's death, there was an oral partition on 21-2-1945 between the two branches, one represented by Jambappa and the other by Thotappa, first defendant, at which the half share of the former's branch was separated and put in possession of Jambappa; that on the same day, viz., 21-2-1945, under Ext. D-9 the said Jambappa made a gift of the properties which came to be allotted to him in favour of Veerappa, and his three brothers, defendants 1 to 3; and that a further partition amongst the defendants, inter se, also took place within three months of the said Gift and, that thereafter defendants are in possession of distinct items of the erstwhile joint family properties in their own right and that at all events, plaintiff's claim stood statute barred. It was further contended that a proper construction of Ext. P-1 would yield and indeed render inescapable the inference that the 1/16th share of plaintiff which was valued at Rs. 10,000/- separated from the joint family and was entrusted to Channappa; and that ChannaPpa discharged this trust by effect-delivery of gold of a value of Rupees 10,000/- to Plaintiff's mother in satisfaction of plaintiff's right in the Properties, and that remedy, if any at all, of the plaintiff could only be in the nature of a claim of a cestui Que trust against his trustee or his estate for accounts or other reliefs.

8. on these pleadings, the Court below struck the necessary issues, of which Issues 1, 3, 4, 7 and 7-A are material. They are the following:

(1) Whether the plaintiff got divided from the other members of the family along with his father by the partition deed of 17-1-1935 ?

(3) Whether the plaintiff's share of property was entrusted to Channappa and is the same valid and binding on the plaintiff ?

(4) Whether the said Channappa delivered the plaintiff's share in the form of gold as pleaded in paragraphs 5, 6 and 7 of the written statement of defendants 1 and 2 and if so, is the same valid and binding on the plaintiff ?

(7) Whether defendants 1 and 2 have perfected title to the -plaintiff's share of the property by adverse possession ?

(7a) Is the suit barred by time ?

9. The evidence of Plaintiff was re- on commission as he was then serving in the Defence Services at Poona. Defendants 1 and 2 tendered evidence as D. W. 1 and D. W. 6 respectively. They also examined on their side Udd annayya, D. W. 2; Babu Sab D. W. 3; Veerabasappa, D. W. 4 and Talvar Kenchappa, D. W. 5. The third defendant tendered evidence as D. W. 7.

10. On an appreciation of the evidence on record, both oral and documentary, the trial Court recorded findings on all the material issues in favour of the plaintiff and entered a decree in his favour. However, In view of the circumstance as evidence by Ext. D-9 - that the half share Of the branch of Jambappa had come to be separated, the Court below held that plaintiff's share had had to be ascertained and demarcated out of the s are remaining after the separation of the share of Jambappa's branch and accordingly granted a decree for partition and separate possession of -plaintiff's 1/7th share in such remaining properties after excluding Item 1 of the house property and Item 5 and Items 15 to 35 of the plaint 'A', schedule which had earlier been allotted to the share of Jambappa. The Court below held against the existence of the movables in plaint 'B' schedule and denied relief to the plaintiff in that behalf. This is not challenged by the plaintiff. The trial Court also negatived the defence that plaintiff's rights had been satisfied by delivery of gold worth of Rs. 10,000/- This finding is not challenged before us.

11. We have heard Sri V. Krishna- learned counsel for the appellant- defendant; Sri Java Vittal Kolar, learned counsel for the first respondent and Sri Padubidri Raghavendra Rao, learned counsel for the second respondent. We have been taken through the evidence on record and the judgment of the trial court,

12. Sri V. Krishnamurthi, learned counsel for the appellant second defendant, has urged the following contentions in support of the appeal:

(i) that the finding of the trial court that notwithstanding the separation of Veerappa, plaintiff in fact continued to be a member of the larger joint family is erroneous and opposed to the clear intendment a. gatherable from a proper construction of Ext. P-1;

(ii) that as a proposition of law it requires to be held that when a Hindu father separates himself from the other branches of the joint family such separation has the effect of severing the status of his minor sons also from the branches from which the father separates;

(iii) that the Court-below was in error in granting! 1/7th share while plaintiff himself had asked for 1/15th share in the suit, and

(iv) that the finding of the Court-below that the plaintiff's suit is not statute barred is erroneous.

Point No. (i) deals with the question of construction of Ext. P-1. Point No. (U) posits the question whether a minor can at all continue his joint status with other branches of a joint family when his father separates. Point No. (iii) pertains to the quantum of plaintiff's share and Point No. (iv) with the question whether the suit was barred by limitation. We shall consider these points in that order.

13. Point No (i) The contention of Sri V. Krishnamurthi is that a proper construction of the deed of partition, Ext. P-1 would compel the inference that it was the entire branch of Veerappa and not Veerappa alone that was separated from the other branches. The relevant recitals in Ext. P-1 on which Sri Krishnamurthi seeks to rely in this behalf are the following:-

(In Kannada omitted-Ed.)

On the basis of these recitals, Sri Krishnamurthi contends that factually the two annas share which Veerappa's branch possessed was separated; that out of the said two annas share, property equivalent to the value of one anna share was

taken away by Veerappa and the other one anna share belonging to the plaintiff was entrusted to the management of Channappa. Accordingly, any relief that the plaintiff can seek in respect of that share could not again be for partition; but could only be in the nature of proceedings by a cestui Que trust against the trustee or his estate for accounts or other appropriate reliefs. There is considerable difficulty in the way of acceptance of the construction of Ext P-1 that Sri V. Krishnamurthi suggests. The reference in Ext. P-1 to the share of Veerappa's branch and its quantification -at 2 annas in the rupee and the further reference to plaintiff's share being 1 anna in the rupee, is in our opinion, merely incidental to the process of ascertainment of the share of the outgoing member who - there is ample material in Ext. P-1 itself to hold - was Veerappa alone. This reference which was obviously made in an anxiety, to emphasise that partition did not touch or affect plaintiff's share, must be understood to be merely for purposes of the identification of what was left behind. When some coparceners desire to separate, it may become necessary to refer in quantitative terms to the shares of the others who desire to continue joint, such reference being obviously for the purpose of determining the shares to be allotted to the out-going coparceners and as a means of calculation. The mere fact that shares of the coparceners are so ascertained does not by itself necessarily lead to an inference that the ascertained shares stand separated. There maybe reasons for such ascertainment, other than a contemplated immediate separation. To constitute such separation mere ascertainment is not sufficient; but the share should be defined with the intendment of an immediate partition, for, to effect severance intention is essential. In the -absence of such intention, mere ascertainment of shares would neither justify nor necessarily lead to an inference of severance. 'It is from the intention to sever, followed by conduct which seeks to effectuate that intention that partition results; mere specification of shares without evidence of intention to sever does not result in partition' (See: *Girijanandini Devi v. Bijendra Narain Choudhary*, : [1967]1SCR93).

Sri Krishnamurthi sought to probabalise his construction by some recitals in Exhibit D-9 which support to imply that under Ext. P-1 Veerappa took away the 1/8th share of his branch. The relevant recitals in Ext. D-9, to which Sri Krishnamurthi asks our attention, read:

(Original in Kannada omitted-Ed.)

According to this recital Veerappa actually took separate possession of a 1/8th share. It is nobody's case that under Ext. P-1 Veerappa took away a 1/8th share of the joint family properties. It is undisputed that what Veerappa actually took separate possession of under Ext. P-1 was one anna (or 1/16th) share. The above recital is, therefore, factually erroneous. That apart, this statement cannot be considered to bind plaintiff who is admittedly not a party to Ext. D-9. The possession of under Ext. P-1 was one terms of Ext. P-1 cannot be construed decisively with reference to the self-serving statement of the There is considerable difficulty in anna (or 1/16th) defendants contained in another document to which neither plaintiff nor his father was a party

Indeed, it is seen from Ext. P-1 that plaintiff is amongst the array of parties, whom Veerappa sought to separate himself from. There are again the following recitals in Ext. P-1:

(Original in Kannada omitted-Ed.)

The above recitals, in our opinion, place the matter beyond doubt that the partition under Ext. P-1 was not intended to affect the interest and status of the plaintiff.

14. For these reasons, we have no hesitation to hold, agreeing with the Court 'below, that under Ext. P-1 it was only, Veerappa's individual share and interest that came to be separated. We, accordingly, answer Point No. (i) against the appellant.

15. Point No. (ii): This contention turns upon - what Sri Krishnamurthi contends is - a legal incident flowing from the separation of Veerappa, the head of his branch, which would ipso-facto bring about the separation of his minor son also. The contention of Sri Krishnamurthi seeks to proceed on the basis of the rule that as between the different branches division should be spiritual, it being per capita only amongst the members of each branch and that should there be an exception to this rule of division per stirpes and some member of one branch remains joint with other branches, it could be only on the basis of the exercise of the volition of the

member. This would, according to Sri Krishnamurthi, presuppose a capacity for such volition and would, by parity of reason, be confined only to coparceners capable of expressing such volition. In the present case, - the argument proceeds, plaintiff having been a minor at the date of Ext. P-1, and incapable of expressing any volition, there was no possibility of this rule of exception operating in his favour at all as to enable him to continue joint with the other branches notwithstanding the head of his own branch separating there from. When one member separates from the family the legal basis for the continuance of the rest, according to Sri KrishnaMurthi, posits a re-union *eo instanti*, involving inevitably the element of volition. Therefore, according to Sri Krishnamurthi, the consequence of the separation of Veerappa, the head of the plaintiff's branch is that all coparceners of that branch who by themselves are incapable of exercising a volition to continue joint with the other branches must necessarily be held to have separated. This argument was attractively presented by Sri Krishnamurthi. We shall presently examine if it is as sound as it is attractive.

16. The view taken in the earlier Calcutta cases was that the separation of one member was a separation of all; but as regards the non-separating member, the presumption was that they are reunited immediately after the separation. The general principle is that a Hindu family is presumed to be joint unless the contrary is proved: but where it is shown that one coparcener did separate and had his share partitioned off for him there is no presumption that the rest of the members continued to be joint. There is no presumption too that because one member separated himself there has been a partition in regard to all. It would be a question of fact in each case to be determined upon evidence relating to the intention of parties whether there was a separation amongst them or whether they remained united. The remaining co- may, without any special agreement amongst themselves, continue to be coparceners and to enjoy as members of joint family what remained of the properties. The whole thing depends upon intention. Partition may stop at the *pristage*, that is to say, the members of each branch may - and oftener than not do - remain joint while the branches became separate from each other. Similarly, one member or one branch only may separate from the other members or branches, while the latter continue to live jointly as before. Hence, partition or separation of one or some members is not incompatible with the

jointness of the re- branches. Thus, there seems to us to be nothing either in principle or authority which renders such continuance of a minor in the main family impermissible in law. Therefore, when Ext. P-1 does not manifest an intention to sever the joint status so far as plaintiff was concerned, his joint status could continue without there being a special agreement. Under the Hindu law there is no distinction between a major coparcener and a minor coparcener, so far as their rights in the joint family properties are concerned. By virtue of the minority that right can not be exercised by a minor in, the same manner as would a major coparcener. A minor cannot have a volition of his own. It is therefore that a guardian or next friend acting on behalf of the minor can exercise such volition on his behalf. It seems to us that even if expression of volition in favour of continuance is necessary, when a guardian or next friend act- on behalf of the minor can exercise such volition to separate, by the same token and consistent with first principles, there is no reason why such volition cannot also be exercised in favour of continuance. However in case the volition is ,exercised in favour of separation, such exercise should be approved of by the court. In Ext. P-1, Veerappa, -plaintiff's ,father has clearly expressed himself in I favour of plaintiff remaining in the joint family fold. We, therefore, hold and ,answer point No. (ii) against the appellant.

17. Point No. (iii) Sri Krishnamurthi contended that while in the plaint plaintiff himself asked for a 1/15th share, the Court-below had done the impermissible thing of awarding to him a higher share i.e., 1/7th share. This grievance of the appellant is without substance and wholly unjustified. In the suit, the plaintiff sought a partition of the estate of the larger family consisting of the branches of Channappa and Jambappa on the one hand and that of Gaddeppa-II on the other. Both branches had an equal 8 annas share. After Veerappa separated himself under Ext. P-1, the branch of Gaddeppa-II had a 7 anna share and that of Channappa the original 8 annas share. In 1945, as acknowledged in Ext. D-9, the 8 anna share of the latter was partitioned and separate The Court below has excluded from the decree the properties allotted to that branch under that partition. What remained in the branch of Gaddeppa-II was a 7 anna share, in which the plaintiff had 1 anna share and defendants 1 to 3 respectively had 2 anna share each. The rule that the allotments be equal at a spiritual partition amongst different

branches applies to cases in which all the branches desire and effect a partition at the same time. In cases where only some members of the joint family separate from it at one time and, others on a subsequent occasion, regard should be had to the shares allotted at the first partition in computing the shares to be allotted at the second partition. The decisions in *Manjanatha v. Narayana*, ((1882) ILR 5 Mad 362) and *Narayana Sah v. Sankara Sah*, (AIR 1929 Mad 865) (FB) are on -point and the view taken therein is to be -preferred to the view taken by the Bombay High Court in *Pranjivandas v. Ichharam*, ((1915) ILR 39 Bom 734): (AIR 1915 Bom 255). Accordingly, having regard to the 1/16th share allotted to Veerappa at the earlier partition under Ext. P-1, what is allowable to the plaintiff at the present partition is the remaining 1 anna of that branch. Plaintiff had asked for 1/15th share in the properties belonging to the branches of both Jambappa and Gaddeppa-II and consistent with the exclusion of the properties equivalent to a 8 anna share of Jambappa's branch as evidenced by Ext. D-9, a 1/7th share remained to be allotted to him out of the share of the branch of Veerappa. It is stated that the properties which were allotted to Jambappa at the partition of 21-2-1945 and which were, in turn, gifted by Jambappa in favour of Veerappa and defendants 1 to 3 are the subject-matter of separate proceedings. Therefore, the allotment of 1/7th share in favour of the plaintiff cannot be said, to amount to grant a relief in excess of what was asked for by the plaintiff. We, accordingly, hold and answer point No. (iii) also against the appellant.

18. Point No. (iv): This relates to the question of bar of limitation to the suit. It is the contention of the defendants that after the partition in 1935, Channappa was the manager of the family; that Channappa died in 1943 and that in 1946 Jambappa on the one hand and defendants 1 to 3 on the other effected a partition and that Jambappa gifted the properties obtained by him at that partition in favour of Veerappa and defendants 1 to 3. They also contend that about 3 months after the date of Ext. D-9 defendants effected -partition amongst themselves, inter se. This version of the defendants is not accepted by the Court below. The circumstance that some defendants are in separate possession of some items of the suit properties, were held by the Court below to be more consistent with an arrangement for a convenient enjoyment of the properties than with a partition inter se amongst defendants. The Court below took due note of the non-production

of the books of account admittedly maintained by the defendants, which if produced would have shown the mode of enjoyment. The Court below characterized the evidence of the first defendant (D. W. 1) in this behalf as evasive: the trial Court was also not impressed by the pretended ignorance

on the part of the first defendant as to how the plaintiff completed his medical education, and recorded its impression that first defendant could not conceal his anxiety to screen from the Court information which had a bearing on the manner in which the properties were dealt with after the death of Jambappa. That apart, on 31-5-1945 first defendant acted as guardian of plaintiff in the transaction of mortgage, evidenced by Exhibit P-10, executed by one Desai Krishna Rao in favour of plaintiff. First defendant received a sum of Rs. 2,668-75 on 25-2-1945 from the mortgagor in discharge of the mortgage and made the endorsement of discharge on the document. Sri Krishnamurthi referred to the circumstance that - plaintiff managed pursuant to a power of attorney from defendants the properties constituting the subject-matter of gift by Jambappa under Ext. D-9 and that therefore plaintiff could not plead ignorance of the existence of Ext. D-9 and recitals therein on the basis of which alone such management of the gifted properties was explicable. But even the recital in Ext. D-9 relied upon by Sri Krishnamurthi does not accord with admitted facts. The Court below on a consideration of the material on record, came to the conclusion that the plea of subsequent partition, inter se, amongst the defendants and consequent exclusion of plaintiff had not been made good by the defendants. We have examined the evidence on record and we are in agreement with the view of the matter taken by the Court below. Sri Krishnamurthi has not been able to point out how the finding of the Court below on this aspect stands vitiated or suffers from any legal infirmities. In our opinion, the approach of the trial Court to the matter and the appreciation of the evidence bearing on the point by it is sound and proper. Agreeing with the trial Court on this aspect of the case, we hold that defendants have not made good their plea of ouster in which the plea of bar of limitation rests. We, accordingly, answer point No. (iv) also against the appellant.

19. No other contentions were urged.

20. In the result, for the reasons stated above, this appeal fails and is dismissed with costs.

21. Appeal dismissed.

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