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Court : Karnataka

Decided On : Feb-05-1988

Reported in : ILR1989KAR169; 1988(3)KarLJ1

Judge : K.A. Swami and ;D.R. Vithal Rao, JJ.

Acts : Hindu Law

Appeal No. : R.F.A. No. 40 of 1977

Appellant : Gopal Purushotham Bichu

Respondent : Purushotham Govind Bichu

Advocate for Def. : N.A. Mandgi, Adv. R-2 to R-9

Advocate for Pet/Ap. : Govinda Bhat, Adv. for S.G. Sundaraswamy Adv.

Disposition : Appeal dismissed

Judgement :

K.A. Swami, J.

1. This appeal by the plaintiff is directed against the Judgment and decree dated 30th August, 1976, passed by the learned Principal Civil Judge, Belgaum in O.S. No. 11 of 1972, dismissing the suit for partition and separate possession.

2. The respondents are the defendants. During the pendency of the appeal Defendant No. 1 (Respondent No. 1) and also defendant No. 9 (Respondent No. 9) died. Defendants 2 to 7 are shown as the legal representatives of the deceased 1st defendant. The legal representatives of Defendant No. 9 are also brought on record. In this Judgment the parties will be referred as the 'plaintiff and 'defendants'.

3. The aforesaid suit was filed for partition and separate possession of the 1/8th share of the plaintiff in the suit schedule properties. The suit schedule properties consist of the following properties:

'1. Joint family firm called 'Dnyanaraj Mining Company.'

2. The Sarafi shop at Bombay situated at Sardar Graha, Carnic Road, Bombay.

3. A Building at Dombiwali, District Thana, bearing CTS. No. situate at Sriramanagar.

4. CTS. No. 996, Sarafi Galli, Shahapur, Belgaum.'

4. The relationship between the parties is not in dispute. Defendant Nos. 1 and 7 are the husband and wife respectively. The plaintiff and defendants 2 to 6 are their children. Defendant No. 8 is a partnership firm in which admittedly the plaintiff and defendants 1 to 3 are the partners. Defendant No. 9 is not related to the parties. But he is made a party to the suit because he is a partner with defendants 1 to 3 in the Sarafi business at Bombay, which is Item No. 2 in the Schedule.

5. The case of the plaintiff is that he and defendants 1 to 7 were members of the joint family. It possessed ancestral properties and from that the joint family business was started at Bombay and also at Shahapur, Belgaum and other properties were acquired and so also the joint family firm (Defendant No. 8) was started and Items 3 and 4 of the suit schedule properties were also acquired with the joint family funds.

6. The defendants contested the suit and contended that no doubt the plaintiff and defendants 1 to 7 were the members of the joint family but the. joint family did not

possess any property. To start with, the 1st defendant worked as a clerk and thereafter, started the business in his individual capacity. The joint family did not inherit any joint family business. The suit items are the self-acquired properties of the 1st defendant, that the plaintiff is a partner in Dnyanaraj Mining Company, he is entitled to have his share worked out as per the law of partnership.

7. On the basis of the pleadings of the parties, the trial-Court framed the following issues:

1. Does plaintiff prove that the suit schedule properties are joint family properties?
2. Is he entitled to partition of the suit schedule properties? If so, what is his share?
3. Is the Court-fee paid not proper?
4. Is Narayan Damodar Ginde a necessary party to this Suit?
5. What order and decree?

8. The plaintiff examined himself as P.W. 1 and produced 10 documents as Exhibits P-1 to P-10. The defendants in support of their defence examined Defendants 2, 7 and 9 and one more witness and also produced 23 documents Exhibits D-1 to D-23.

9. The trial-Court held that the 1st defendant did not inherit any ancestral property; that he started on his own; that the plaintiff failed to prove that the suit properties were the joint family properties. It accordingly, dismissed the suit.

10. Sri. Govinda Bhat, learned Counsel appearing for the plaintiff-appellant, contended that the plaintiff, being the son of the 1st defendant admittedly worked in the partnership firm at Bombay as well as at Belgaum for nearly 10 years. So also the other sons namely defendants 2 and 3 also worked in the partnership business, therefore, the 1st defendant treated it as a joint family business and the other properties were acquired from the income earned in the business; that the trial Court was not justified in holding that the plaintiff failed to prove that the suit schedule properties were the joint family properties; that even if the trial Court is

right in holding that there was no ancestral property inherited by the father, there is enough evidence on record to show that the business was treated as a joint family business. Therefore, the trial Court ought to have held that the business was treated as a joint family venture and ought to have awarded a share to the plaintiff. Sri Mandagi, learned Counsel for the 2nd defendant disputed the correctness of the contentions raised by the plaintiff and further contended that there was no plea of blending raised by the plaintiff; therefore no such plea can be allowed to be raised for the first time in the appeal.

11. Having, regard to the contentions of the parties, the points that arise for consideration are as follows:

1. Whether the trial Court is justified in holding that the plaintiff has failed to prove that the suit schedule properties are the joint family properties?
2. Whether the plea of blending or treating the business as joint family business by the 1st defendant can be allowed to be raised in the appeal?

POINT NO. 1

12. Learned Counsel appearing for the plaintiff in the trial Court has conceded that the 1st defendant did not inherit any joint family property. The evidence on record also does not disclose that the 1st defendant inherited any joint family property. Thus the father of the plaintiff started his career on his own. He worked as a clerk in the beginning and thereafter, he acquired in the name of his wife (defendant No. 7) in the year 1931 a site at Shahapur, Belgaum on which a residential house was constructed in about the year 1933. At that time, plaintiff and defendant No. 2 were born. They were of tender age. Therefore, the acquisition of the site at Shahapur, Belgaum and construction of the house thereon were made on the earnings of defendant No. 1 and as such suit Item No. 4 is the self-acquired property of defendant No. 1.

13. However, it is contended by Sri Govinda Bhat learned Counsel for the plaintiff-appellant that suit Item No. 4 was transferred in the name of the 1st defendant under Ex.D.16 in the year 1946 on receiving a sum of Rs. 6,500/- and this amount

was paid out of the joint family business, therefore, suit Item No. 4 was acquired out of the joint family funds. In order to decide this contention, we have to decide the question as to whether the business started by defendant No. 1 was accepted by the sons of defendant No. 1 as joint family business. As already pointed out, the 1st defendant did not inherit any joint family property. There was also no running business of the joint family. The 1st defendant started the business on his own afresh. In the case of a new business started by a kartha of a Hindu joint family, the principle is that the kartha as the manager of a joint Hindu family cannot, impose on, or is not entitled to expose the interest of, the members of the coparcenary, to the risk and liability, of a new business. Therefore a new business started by the kartha or manager of a joint family is not considered to be the business of a joint family, unless it is started or carried on with the express or implied consent of adult coparceners or it is proved that the joint family funds are utilised for the business to the advantage of the joint family or its continuation was found to be beneficial to the joint family or it was adopted as a joint family business by the other members of the family who continued to enjoy the benefits of the same. The case of a coparcener who was a minor on the date of commencement of the new business by the kartha of the joint family stands on a different footing in as much as the minor's interest cannot be exposed to risk and liability. However, the minor members of the family who are born subsequent to the commencement of the business, are not entitled to say that the risk of the new business cannot be imposed on them in as much as the risk and liability having been already taken by family, the newcomers must share them along with the other assets and liabilities of the family. The law on this point is well-settled. (See BANARES BANK LTD. v. HARI NARAIN AND ORS(1932) 54 Allahabad 564 59 Indian Appeals, 300. and SANYASI CHARAN, MANDAL v. KRISHNADHAN BENERJI AND ORS AIR 1922 PC 237. SEETHARAM RAJU v. PULLAM RAJU : AIR 1963 AP403 , CANARA BANKING CORPORATION v. SOUTH INDIA : AIR1958 Mad132 ; and ANGNEY LAL NARAIN DAS v. ANGNEY LAL MUNNI-LAL : AIR1951 All400 .

In para 234(2) of Mulla's Hindu Law, Fifteenth Edition, the law on the point has been summarised as follows:

'234(2): New Business. - In *Sanyasi Charan Mandal v. Krishnadhan Banerji* (AIR 1922 P.C. 237), a Dayabhaga case, the Judicial Committee held that the manager of a joint family the risk and liability of a new business started by himself and the other adult members. On the ground that the reasons for the decision equally govern Mitakshara families also, this principle has been applied to them by the Indian High Courts and in *Benaras Bank Ltd., v. Hari Narain* (1932) 54 All. 564 = 59 I.A. 300) by the Judicial Committee. Where a father was carrying on brokerage business in agricultural commodities and the son was doing similar business though the commodities were not exactly identical, it was held that the latter business was not a new business. The extension of a joint family business for the manufactures of articles, ejusdem generis with the articles previously manufactured i.e., when the class of persons who manufacture the one usually manufacture the other is not a new business, A family carrying on trade in a particular commodity may legitimately extend it to another commodity, and whether such extension would amount to a new business or not depends upon the nature or type of the extended business and not on the particular commodities it deals with. If the family is a trading family and the extended business is not more hazardous. or speculative than the one previously existing, it may not be regarded as a new business. Even where the father is the manager, he is not entitled to mortgage the joint family estate in order to provide money for one of his sons to start a new business. Such a mortgage is wholly invalid against minor coparceners.

XXX XXX XXXAs regards adult members, it has been held in India that the manager cannot impose even upon them the risk and liability of a new business started by him unless the business is started or carried on with their consent express or implied or though started by the manager only, joint funds were afterwards utilised for the business to the advantage of the joint family or its continuance was found beneficial to the family or it was adopted as a family business by the other members who continued to enjoy the benefits of the same.'

14.1. In the instant case, no doubt the evidence discloses that defendant No. 2 was taken as a partner in the suit Item No. 2 firm in the year 1946 after he became major and defendant No. 3 was taken as a partner in 1964 and plaintiff was not

taken as a partner at any time. The partnership was evidenced by the Deed of Partnership - Ex.D-5 dated 24th January -1964 pertaining to suit Item No. 2. In this defendant No. 1 had 30% share and defendant No. 9 had 20% share and defendants 2 and 3 each had 25% share. The recitals in the partnership deed show that the business was not treated as a joint family business in as much as a stranger to the joint family was taken as a partner and each one of the partner was given a definite share in the partnership. In the case of a joint family firm, there is no question of any stranger becoming a partner. So also there would be no question of quantifying the share of coparceners because the business belongs to all the coparceners of the joint family. Further, in the instant case, there was no consent taken either of the plaintiff or the other sons of the 1st defendant, to conduct the new business under the aforesaid partnership. In the absence of any consent of the other coparceners and the plaintiff, and in the absence of any evidence to show that they must be deemed to have consented, to carry on the business as joint family business, it is not possible to hold that the new business started by the father of the plaintiff was a joint family business. It was not treated as a joint family business. Defendant No. 2 who is examined as D.W.4 in his evidence has specifically stated that he and defendant No. 3 contribute a definite share to the partnership. The plaintiff was never treated as a partner and he was only an employee in the partnership firm for that he was paid a salary of Rs. 200/- per month and it was in respect of the salary payable to him, in his account there was a credit balance to the extent of Rs. 3,000/-. This evidence of defendant No. 2 (D.W.4) has not been assailed. There is no other evidence worth mentioning which supports the case of the plaintiff that the business was a joint family business.

14.2. When once it is held that the plaintiff has failed to prove that the business was a joint family business, the contention of Mr. Bhat, learned Counsel for the appellant (plaintiff) that the house constructed in Shahapur, Belgaum was out of the funds of the joint family business loses all its efficacy. Therefore, it will have to be held that Item No. 4 of the suit properties namely, the house constructed in Shahapur, Belgaum by the 1st defendant was his self-acquired property.

14.3. As far as suit Item No. 3 is concerned, it was a site in Dombiwali acquired through a Housing Co-operative Society. The 1st defendant was member of the

Housing Co-operative Society and in that capacity the site was allotted to him. For the purpose of construction of building over it, there was an agreement entered into by defendants 2 to 6. That agreement is produced as Ex.D.22. From this agreement, it is clear that defendant No. 1 was the holder of building plot bearing No. 28 of Dombiwali Housing Co-operative Society as a member of that society. It is also further clear from this agreement that due to old age, the 1st defendant was not in a position to comply with the requirements of the Society. Further, the building was proposed to be constructed on obtaining advances from the tenants to whom the building was proposed to be let out. In order to attend to these tilings, this agreement was entered into by defendants 2 to 6. The terms of the agreement are as follows:

'1. It is agreed that a building suitable for being let out for residential purposes be constructed on plot No. 28 of Dombiwali Cooperative Housing Society at a cost of not more than Rs. 80,000/-.

2. It is agreed that the parties to this agreement should bear the cost of the proposed building in equal proportions and should also equally share the net income there from left after payment of the ground rent of Rs. 600/-per annum to Shri Purushotham G. Bichu and after defraying Municipal taxes and other incidental expenses.

3. It is agreed that the proposed building, when completed, should for the sake of convenience, stand in the name of Shri Purushotham G. Bichu in the Municipal and Revenue Records it being understood that the said Purushotham G. Bichu is to be regarded only as a benamidar of the parties to this agreement, who would be real owners in equal shares of the building so constructed.'

As the site was in the name of the 1st defendant i.e., Purushotham Govind Bichu, in order to enable defendant Nos. 2 to 5 to deal with it, the 1st defendant also executed a General Power of Attorney in favour of defendants 2 to 5. Exhibits D-22 and D-23 establish that suit Item No. 3 was also the self-acquired property of the 1st defendant. Because he was old and was not in a position to attend to the requirements of the Society and also to raise funds from the proposed tenants, he executed the General Power of Attorney. If really suit Item No. 3 was the joint

family property, there was no question of either defendants 2 to 6 entering into an agreement as per Ex.D-22 or execution of General Power of Attorney by the 1st defendant. The existence of these documents are inconsistent with the property being a joint family property. In addition to this, if it was a joint family property, there was no question of defendants 2 to 6 accepting the 1st defendant as the exclusive owner. Hence the plaintiff has failed to prove that suit item No. 3 was a joint family property.

14.4. As far as suit Item No. 1 viz., Dnyanaraj Mining Co., is concerned, it is a partnership firm in which the plaintiff and defendants 1 to 3 are the partners. The case of the defendants is that this is also not a joint family property. The plaintiff is a partner of the firm. It is open to him to have his interest quantified in the partnership in accordance with the provisions of Partnership Act and that cannot be the subject of the suit for partition as the said firm is not a joint family firm. The mining business was not a joint family business. It has been started as partnership in which all the coparceners are not partners. Therefore, it is not possible to hold that Dnyanaraj Mining Company - suit Item No. 1 - is not a joint family firm. Ext.D-7 is dated 5-4-1956. In this each partner has contributed a capital of Rs. 5,000/-. The terms of partnership clearly go to show that it is not a joint family venture. The right, title and interest of the plaintiff in suit item No. 1 are left open to enable him to seek adjudication in accordance with Partnership Act.

That being so, the suit Item No. 1 cannot at all be held to be a joint family business. The trial Court has not considered in detail in respect of each of the suit items and it has only dealt the issue in general terms and has held that the plaintiff has failed to prove that the suit schedule properties are joint family properties. On considering the evidence on record afresh, with reference to each one of the suit items, we are satisfied that the plaintiff has failed to establish the suit items that the plaintiff has failed to establish the the suit items are the joint family properties. Accordingly, we hold point NO.1 in the affirmative.

15. The contention of Sri Bhat, learned Counsel for the plaintiff-appellant is that having regard to the fact that two sons of defendant No. 1 were made partners and the plaintiff also worked in the partnership firm, both at Belgaum and Bombay and

he being the son of the 1st defendant, the business run at Belgaum and Bombay must be held to have been treated as a joint family business. This plea was not raised in the plaint. There was no issue in this regard. Blending or treating the new business as a joint family business is a question of fact depending upon the intention and conduct of the parties. Unless specific plea is raised and an issue is framed and tried, it is not possible for the parties to know the case of blending. No doubt in a case where the issue is raised without a proper plea, it may be presumed that the parties were aware of the plea involved and had adduced the evidence even in the absence of a plea, therefore, such a contention could be allowed. (See BHAGAWATI PRASAD v. CHANDRAMAUL : [1966]2SCR286) . Such is not the case here. In the instant case, there is neither a plea nor an issue is raised and tried. However, during the course of arguments, it was raised in the trial Court. The trial Court has not accepted this plea. In the absence of the plea and the issue raised in this regard and tried by the trial Court, in our considered view, it is neither just and proper, nor permissible in law, to allow the plaintiff-appellant to canvass this contention in the appeal. Accordingly, point No. 2 is answered in the negative.

16. For the reasons stated above, the appeal fails and the same is dismissed. Having regard to the facts and circumstances of the case, we direct the parties to bear their own costs throughout.