Mallappajaiah Vs. Muddanna

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SooperKanoon Citation : sooperkanoon.com/378179

Court : Karnataka

Decided On : Aug-16-1989

Reported in : ILR1990KAR336

Judge : K.A. Swami, J.

Acts : Hindu Law; Code of Civil Procedure (CPC) , 1908 - Order 20, Rule 12

Appeal No. : R.S.A. No. 171 of 1987

Appellant : Mallappajaiah

Respondent : Muddanna

Advocate for Def. : T.N. Raghupathy, Adv.

Advocate for Pet/Ap. : G. Lingappa, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Swami, J.

1. Though this appeal has come up for orders, having regard to the short question involved in this appeal both sides have agreed that production of paper books may be dispensed with and the appeal may be taken up for final hearing. In the light of the submission made by learned Counsel on both sides this appeal is taken up for

final hearing.

2. The appellant is the plaintiff. This appeal was admitted to consider the following substantial question of law:

'Has the lower Appellate Court failed to properly understand the relief claimed by the plaintiff while modifying the decree and awarding separate possession of 1/3rd share in the suit properties, except items 4 and 5, jointly in favour of the plaintiff, his uterine brother - second defendant and their mother - fourth defendant?'

3. In the light of the contentions urged on both sides, the following points arise for consideration:

i) Whether the lower Appellate Court is justified in law in holding that Items Nos. 4 and 5 are not joint family properties?

ii) Whether the Courts below are justified in not awarding, specific share to which the plaintiff is entitled to in the suit schedule properties?

iii) Whether the lower Appellate Court is justified in not issuing a direction for enquiry into future mesne profits?

POINT NO. (i): The following geneology which is not in dispute proves the relationship of the parties:

Late Doddaiah

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Mallaih Chikkanna Doddaiah

died in 1935 Defendant No.1 (dead)

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Wife No. 1 Wife No.2 Shivanna

Puttamma Gengamma (Deft. No. 3

died in 1934 Deft. No.4 Respondent No.3

Respondent No.4

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M.Muddanna Mallappajaiah

Deft. No. 2 Plaintiff

(Respondent No.1) (Appellant)

The date of death of Mallaiah and his wife Puttamma as mentioned in geneology are also not in dispute. Thus from the aforesaid geneology it is established that the plaintiff and Defendants Nos. 2 and 4 represent one branch, viz., the Branch of Mallaiah. Defendant-1 is dead. His legal representatives are Respondents 2(a) to 2(d). They represent another branch, viz., the Branch of Chikkanna. Defendant-3 represents the other branch, viz., the Branch of Doddaiah. Doddaiah is no more.

4. The suit properties are 8 in number. These properties are described as Items 1 to 8 in the schedule to the plaint. It is not in dispute that Items Nos. 1 to 3 and 6 to 8 are the joint family properties. Defendant-2 disputed that Items Nos. 4 and 5 are joint family properties. The case of the plaintiff is that Items Nos. 4 and 5 are also the joint family properties. Both are agricultural lands. Item No. 4 is a dry land bearing Survey No. 56/1B measuring 1 acre and 16 guntas and Item No. 5 is a wet land bearing Survey No. 112 measuring 1 acre and 10 guntas. Both the properties situate at Kambalu village, Sompura Hobli, Nelamangala Taluk. In the plaint, the plaintiff did not plead that though Item No. 5 was gifted by one Thimmakka under a registered Gift Deed dated 23-8-1942 (Exhibit D-4) in favour of Defendant-2, it was blended with the joint family properties. He merely claimed that Item No. 5 was also a joint family property. Similarly, the plaintiff claimed that Item No. 4 was also

one of joint family properties. The case of the plaintiff in this regard was that Item No. 4 was purchased by Defendant-2 in his name with the aid of the joint family fund.

5. The trial Court on an appreciation of the evidence on record held that Item No. 4 was the self acquired property of Defendant-2 and Item No. 5, though it was gifted by Thimmakka in favour of Defendant-2, it was blended along with joint family properties and, therefore, it was also a joint family property. There was no dispute as far as the share to which each branch was entitled to. The trial Court awarded 1/3rd share in all the suit schedule properties, except Item No. 4, to the plaintiff along with Defendants 2 and 4 as they together represented one of the three branches. It also declared that the plaintiff was entitled to mesne profit and reserved liberty to the plaintiff to make an application for the said purpose under the appropriate provision of law. Thus the suit of the plaintiff stood dismissed in respect of the property described at Item No. 4. The plaintiff did not go up in appeal. It was the 2nd defendant who went up in appeal before the lower Appellate Court. The learned Appellate Judge held that, as Item No. 5 was gifted to Defendant-2 by Thimmakka, it continued to be the separate property of Defendant-2 as there was no plea of blending and as such the plaintiff and Defendants 2 and 4 were not entitled to any share in it. As far as Item No. 4 was concerned, the contention was negatived as there was no appeal preferred by the plaintiff. The lower Appellate Court also modified the decree pertaining to mesne profits thus:

'The appeal is hereby allowed and the impugned Judgment and decree stand modified as under:The plaintiff, the second defendant and the fourth defendant together are entitled for partition and separate possession of 1/3rd share in the suit properties, except Item Nos. 4 and 5, which exclusively belong to the second defendant. L.Rs. of the first defendant together are entitled for l/3rd share and the third defendant is entitled for l/3rd share in the suit properties barring Item Nos. 4 and 5.'

6. Sri. Lingappa, learned Counsel for the appellant, contended that Items Nos. 4 and 5 ought to have been held to be the joint family properties. It is not possible to

accept this contention. As far as Item No. 4 is concerned, the appellant plaintiff himself did not feel aggrieved by the decree of the trial Court, as he did not prefer an appeal or cross objections in respect of item No. 4 which was held to be the self acquired property of Defendant-2 as it was acquired by him without any aid from the joint family funds. The trial Court recorded a finding that Defendant-2 was running his own business and out of the income from the business he acquired the property comprised in Item No. 4. The plaintiff ought to have challenged that portion of the decree either by way of an appeal or cross objections. As he did not challenge the decree in respect Item No. 4 property, the decree became final. Even otherwise, the learned Counsel took me through the finding recorded by the trial Court in this regard. The trial Court on a consideration of the evidence of the plaintiff has held that the plaintiff failed to prove that Defendant- 2 acquired Item No. 4 property out of the joint family funds and, therefore, it was of the view that the income earned by Defendant No. 2 out of his own business he acquired' the property (item No. 4) and accordingly held that Item No. 4 was his self acquired property. The conclusion so reached by the trial Court cannot be held to be erroneous. It is also not possible to hold that it suffers from error of law.

7.As far as Item No. 5 is concerned, as already pointed out, it was gifted to Defendant-2 by Thimmakka. The Gift Deed (Ex.D-4) specifically recited that it was gifted to Defendant-2 and not to the joint family through Defendant-2. A member of a Joint Hindu Family when acquires a property by way of gift, it becomes his self-acquired property and devolves as his self-acquired property and the burden is on the other members of the joint family who claim that such a property is a joint family property to plead and prove that such a property was blended with the other joint family properties. As far as the blending of self acquired property with the joint family properties is concerned, it has to be specifically pleaded and an issue has to be raised and evidence has to be adduced in that regard. Mere plea that the property obtained by way of gift is a joint family property is not sufficient to hold that it amounts to claiming such property as a joint family property by reason of blending the same with the joint family property. Further an issue regarding blending has to be raised and evidence has to be adduced on such a plea. The learned Appellate Judge has rightly placed reliance on a decision of the Supreme Court in LAKKIREDDI CHINNA VENKATA REDDI AND ORS. v. LAKKIREDDI

LAKSHMANA, : [1964]2SCR172 . The relevant portion is as follows:

'Law relating to blending of separate property with joint family property is well settled. Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of a joint Hindu family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein; but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support, or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation.'

In the absence of a plea of blending, the mere fact that Defendant-2 allowed in other members of the joint family to enjoy the benefits of Item No. 5 which was gifted to Defendant-2 by itself is not sufficient to hold that it was blended by Defendant-2 with other joint family properties. Therefore, the conclusion reached by the Appellate Court that the trial Court committed an error in holding that Item No. 5 was blended by Defendant-2 with the other joint family properties is correct. Accordingly, Point No. (1) is answered in the affirmative.

8.POINT No.(ii): No doubt the relief sought for by the plaintiff was not clear and it was not unambiguous. However, in a suit for partition the Court has to determine the share of the plaintiff in the suit properties to which he is entitled. Therefore, the Courts below ought to have declared the exact share of the plaintiff and passed a preliminary decree in respect of such share of the plaintiff. It is already pointed out that Items No. 1 to 3 and 6 to 8 are undisputedly the joint family properties. The area from which the parties come is governed by Hindu Law Women's Rights Act, 1933 (Mysore Act No. X of 1933). Mallaiah, father of the plaintiff and Defendant-2 had 2 wives, viz., Puttamma and Gangamma. Puttamma pre-deceased Mallaiah and Gangamma survives. Mallaiah died in the year 1935. Plaintiff and Defendant-2 are the sons of Mallaiah through Puttamma and Defendant-4 who is the 2nd wife of Mallaiah has no issue and she is the step mother of the plaintiff and Defendant-

2. Defendant-1 is the paternal uncle of the plaintiff and Defendant-2, Defendant-3 is cousin brother of the plaintiff and Defendant-2. In a partition between the plaintiff and Defendants 1 to 4, having regard to the relationship between the parties, Clause (c) of Sub-section (1) of Section 8 of Mysore Act No. X of 1933 is attracted. Even to such a case also Clauses (a) and (b) of Sub-section (1) of Section 8 of the Mysore Act of 1933 apply mutatis-mutandis. Defendant-4, as already pointed out, is the step mother of the plaintiff and Defendant-2. For the purpose of Section 8 of Mysore Act X of 1933 and having regard to the provisions contained in Sub-section (3) of Section 8 thereof she has to be considered as the mother of the plaintiff and Defendant-2. Defendant No. 4 has no issues. As per Clause (b) of Sub-section (1) of Section 8 of the Mysore Act X of 1933 she is entitled to 1/2 share of what her husband Mallaiah would be entitled to have in the suit properties if he was alive on the date of filing of the suit. Mallaiah's Branch, as already pointed out, is entitled to 1/3rd share in the suit properties, except Items Nos. 4 and 5. In that 1/3rd share which Mallaiah was entitled to Defendant-1 would be entitled to 1/3rd of it i.e., 1/9th share in the joint family properties. Thus Defendant-2 would be entitled to 1/18th share in the suit properties, except items Nos. 4 and 5. If 1/18th share is deducted out of 1/3rd share, what remains is 5/18 out of this 5/18th share plaintiff would be entitled to 1/2. Thus the share of the plaintiff is 5/36th share in the entire suit properties except Items Nos. 4 and 5. Accordingly, it is held that the plaintiff is entitled to 5/36th share in the suit properties except Items Nos. 4 and 5. Point No. (ii) is answered accordingly.

9. Point No. (iii): The plaintiff is not entitled to claim profit in respect of his share in the suit properties prior to the date of the suit. Because, he has not averred in the plaint that he was deprived of possession and enjoyment of the joint family properties. On the contrary, his case in the plaint is that he has been in possession and enjoyment -of the joint family properties. That being so, he is entitled to have the profits accounted to him regarding the income from his share from the date of the suit. Whosoever is found to be in possession and enjoyment of the property will be liable to account for it. That being so, the Court below ought to have directed an enquiry into the accounting as to the profits from the date of the suit will be the date of delivery of possession. Point No. (iii) is answered accordingly.

10. For the reasons stated above, this appeal is allowed and the Judgments and Decrees of the Courts below are modified. The suit properties, viz., Items Nos. 1 to 3 and 6 to 8, are declared to be the joint family properties and are available for partition. The plaintiff is entitled to 5/36th share in all the suit properties except Items Nos. 4 and 5. Defendant-4 is entitled to 1/18th share in all the suit properties except Items Nos. 4 and 5. Defendant-2 is also entitled to 5/36th share in all the suit properties except Items Nos. 4 and 5. There shall be an enquiry into the profits in respect of the share of the plaintiff from the date of the suit and whosoever is found to be in possession of the properties shall be liable to account for it and pay the profit to the plaintiff from the date of the suit till the date of delivery of actual possession. The suit properties except Items Nos. 4 and 5 shall be got divided either by the Deputy Commissioner under Section 54 of the Code of Civil Procedure or through a Commissioner, according to the nature of the properties. There shall be no order as to costs throughout.