

Usman Sab Vs. Dastagir Sab

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Court : Karnataka

Decided On : Jul-12-1995

Reported in : ILR1996KAR484; 1995(4)KarLJ429

Judge : Hari Nath Tilhari, J.

Acts : Muslim Law; Hindu Law

Appeal No. : R.S.A. No. 226 of 1985

Appellant : Usman Sab

Respondent : Dastagir Sab

Advocate for Pet/Ap. : Rukmini Devi, Adv. for M.S. Gopal, Adv.

Disposition : Appeal allowed

Judgement :

Hari Nath Tilhari, J.

1. This is defendants' Second Appeal under Section 100 of the Code of Civil Procedure, from the Judgment and decree dated 22.9.1994, delivered by the District Judge, Kolar, In Regular Appeal No. 7/1979, arising out of Judgment and decree dated 14.12.1978, passed in Suit O.S. No. 59/1974, by the Principal Civil Judge & C.J.M., Kolar.

The plaintiffs had filed the suit for partition and for separate possession of their 1/4th share as claimed by them in the plaint properties mentioned in Schedules A & B. The Trial Court had dismissed the suit and the 1st Appellant Court having allowed the appeal by setting aside the Judgment and decree of the Trial Court and by decreeing the plaintiff's claim.

2. The parties to the litigation are Muslims or Mohammedans and according to the case of the plaintiffs, Shaik Sudan Sab, had five sons. That Plaintiffs 1 and 2, defendant No. 1, defendant No. 2 and defendant No. 3, were the five sons and whereas, plaintiffs 1 and 2, as per their pleadings claimed that the properties in Schedules A and B belonged to the joint family and were alleged to have been acquired from the income of ancestral properties and out of joint labour and income of the parties. Further, defendant No. 3 - Khasimsab released himself from the joint family by relinquishing all his rights in the schedule properties in favour of plaintiffs and defendants 1 and 2, by registered Relinquishment Deed. That plaintiffs and defendants 1 and 2, continued to live as members of the joint family and enjoyed the schedule properties jointly. The plaintiffs claim that after relinquishment of his share by defendant No. 3, the plaintiff Nos. 1 and 2 and defendant Nos. 1 and 2, are entitled to 1/4th share each in the property. That defendants 1 and 2, were trying to enter into an illegal transaction with certain strangers, namely defendants 4 and 5, in the original suit and as plaintiffs having apprehended likely injury and loss to their interest, they filed the suit for partition and separate possession of their share.

3. During pendency of the suit, first defendant died and his legal representatives had been brought on record, as defendant Nos. 1 (a) to 1(f). The defendant No. 1, filed the written statement and denied the plaintiffs' case. He denied that there was any such thing as joint family or joint family properties. The defendants submitted that the assertions or allegations that the joint family owned joint properties out of ancestral properties etc. are all false and incorrect. The defendant No. 1, claimed the property in dispute to be the self-acquired property. The case of the alleged Release was also said to be false, It was denied that defendant No. 1, was Manager of the joint family like plaintiffs, defendant No. 2, is not entitled to any share.

4. The Trial Court on the basis of the pleadings of the parties, framed the following issues:

1. Whether the above plaintiffs prove that they are the persons jointly in possession and are entitled to the 1/4 share of each of them?
2. Whether the 1st defendant proves that the schedule properties are his self acquisition and are in his exclusive possession?
3. To what share if any the plaintiffs are entitled to?

5. The Trial court after examining the evidence produced by the parties held that the properties in dispute, namely, Items 1 to 3 and 5 are joint or joint family properties of the parties to suit nor have been proved, as claimed, to have been purchased out of the savings which they collected from out of the income of the joint family. The Trial Court further held that properties - Items 1 to 3 and 5, were self-acquired properties of defendant No. 1, and of defendants 1(a) to 1 (f) and the Plaintiffs-respondents did not have any right or claim or share therein. He further held that item No. 4, is the property recorded in the name of Jainabi, who the plaintiffs claim was not their mother, but, their mother's name was Usmanbi and as such, the Trial Court held that Jainabi, is not the mother of the plaintiffs. Accordingly, the plaintiffs were held not entitled to any share in Item No. 4, thereby, the Trial Court recorded findings and came to the conclusion that plaintiffs - respondents did not have any claim or interest or share in the suit properties either of item Nos. 1 to 3 or 5 or Item No. 4. With these findings, the Trial Court dismissed the plaintiff's suit.

6. Having felt aggrieved from the Judgment and decree of the Trial Court, the plaintiffs filed the Regular Appeal No. 7/1979. The Lower Appellate Court allowed the plaintiffs' appeal, recorded the findings to the effect that the plaintiffs and the two defendants were living jointly and were enjoying the properties jointly and further, established that Usmanbi had made subsequent acquisitions from out of the funds of their family for which all of them used to contribute.

7. Having recorded the above findings, the Lower Appellate Court decreed the plaintiff's claim for partition and delivery of separate possession of their alleged 1/4th share. Having felt aggrieved from the Judgment and decree of the Lower Appellate Court, the defendants 1 & 2 have come up before this Court in this Second Appeal under Section 100 of the Civil Procedure Code.

8. I have heard Smt. Rukmini Devi, on behalf of the Counsel for the appellant - Sri M.S. Gopal, by holding brief for him. Smt. Rukmini Devi contended that under Muslim Law, there is no such concept applicable or available as that of Joint Hindu Family or anything as a Joint Hindu Family Property. She submitted that the concept of Joint Family Property is alien to Muslim Law and further that there is no evidence on record to prove that the property in dispute was the joint acquisition from funds of the joint family members. She further submitted that there is no property which may be said to be coming from the time of the father or forefathers of the joint family members to the litigation, namely, plaintiffs or defendants 1 & 2, that is, respondents 1 & 2 and appellants 1 & 2, respectively. She submitted that where a person claims the property or an item of property to be joint acquisition, it has to be shown and proved by him that it is acquired either in the joint names or out of joint funds or from the ancestral property. That in the present case, there is not the least evidence to indicate that there was any joint income or inheritance of ancestral property, that ancestral property provided any income etc. She submitted that if there is a case of joint income or income from the ancestral property, it should be such that it may provide sufficient funds to acquire the property in dispute alleged to be joint, but, the evidence on this point is lacking. That all the items of Schedule, except item No. 4, all being recorded in the Record of Rights relating to cultivating land in the name of defendant No. 1 only and item No. 4, had been recorded in the name of one Jainabi, whose husband's name is mentioned as Shaik Sudan Sab, but, the plaintiffs claim that she is not their mother, instead Smt. Usmanbi was their mother. She further submitted that no particulars have been adduced in the evidence such as the tentative income related to the joint family. That the burden was on the plaintiffs, who alleged the property in dispute to be the joint family, to prove the same by positive evidence. Having burden on them, until this is proved by plaintiffs - respondents by sufficiently admissible and reliable evidence that there was nucleus in the family to acquire those properties in

suit and said properties could not be held to be the joint family properties coming from father or forefathers. Even under Hindu Law, the property can be acquired by a joint family member, in his name and is to be treated to be his self-acquired property, unless the person claiming to be joint family property, only after giving the sufficient proof of nucleus or proof of existence of sufficient funds by which the property purchased, establishes it to be the property of the joint family. She submitted that there is no such nucleus shown at any stage. Smt. Rukmini Devi submitted that the finding of the Court below that the property had been acquired out of the joint income or joint nucleus, is a finding, purely based on conjectures and surmises and not on any legally admissible evidence, and that a finding of fact based on conjectures and surmises cannot be placed at par with the finding based on consideration of material evidence over the relevant facts. So, the properties standing recorded in the name of the defendant - appellant had been considered and presumed to be belonging to defendant No. 1, as the said properties are recorded in the name of defendant No. 1. Smt. Rukmini Devi submitted as Doctrine of Representation of the family is not applicable under the Muslim Law; whereas, the learned Appellate Court committed substantial error of law in taking the properties to be the joint family of plaintiffs and defendants and in decreeing the plaintiff's claim for partition of one portion. The Lower Appellate Court decree is liable to be set aside.

9. None has appeared on behalf of the respondents, inspite of notice having been sufficiently served on them.

10. I have applied my mind to the contentions made by the learned Counsel for the appellants and I find there is substance in the contention of the learned Counsel for the appellants. It is well settled principle of law that under the Mohammadan Law, there is no such thing as Joint Hindu Family nor the concept of Joint Hindu Family property applicable to Hindu Law is applicable to the parties of the case like the present case, where they are Muslims. So also, nor there is any concept of treating the properties, obtained through acquisitions of an individual in his own individual name, to be joint family properties, as being acquired representing the family. When I so hold, I find support for the view by the Madras High Court in the case MAIMOON BIVI v. O.A. KHAJEE MOHIDEEN, : AIR1970 Mad200 as well as

in the case of MOHAMMED IBRAHIM v. SYED MUHAMMAD ABUBAKKER, AIR 1976 Madras 84 and by this Court in C.K. KRISHNAMURTHY SETTY v.ABDULKHADER, AIR 1956 Mysore 14.

11. Leaving apart those properties which come down from the ancestors of the father of forefathers, and properties inherited by sons from the father in defined shares if there is no partition in regard to them the parties may claim partition on the ground that it has been inherited by them in their rights and to the extent of their share but the properties acquired by a Muslim under Deed of Acquisition and found to be recorded in the name of one of the parties to the case irrespective of the fact that they are all brothers, the properties ordinarily will be considered to be his self-acquired properties. Until and unless the persons claiming that the properties are joint acquisition prove by cogent and strong evidence that the property in dispute was acquired with their contributions and also to furnish sufficient good evidence to prove that there were other joint properties created by them, that the property was purchased by joint income or some part of the sale consideration was provided by contributions, that property was acquired as such and that enjoyed the property by him with the person in whose name the property was purchased as belonging to them jointly. In other words, in such cases the person contributing, may not be termed as a co-sharer, but, he might be advancing consideration, therefore, that person has to prove that by contribution, he has provided certain funds for purchase of the property by the person in his name and that transfer deeds stand in name of purchaser as co-sharer in the item purchased. Here, I find that this aspect of the matter has never been alleged or proved in the present case as the record shows and the deposition of P.W.1 does not indicate as how much contribution was made by either of the plaintiffs, when property was purchased. There is no cogent evidence in this regard, except, a bare statement. The Doctrine of Burden plays a very important role in such matter, where, evidence is balanced, then, it has to be looked whether the plaintiff had been able to discharge his burden sufficiently and if the oral evidence is balanced, the documentary evidence will have its play, i.e., if there is conflicting or balanced oral evidence, then evidence that finds support from documentary evidence is to be relied. Therefore, I am of the opinion, that the learned Appellate Court committed substantial error of law in holding the property in dispute to be by joint

acquisition and joint property of the plaintiffs and defendants. Really, in this case, neither joint possession appears to have been established with respect to Items 1 to 3 and 5, nor it has been proved that Smt. Jainabi was the mother of the plaintiffs. That being the position, in my opinion, the Lower Appellate Court committed error of law in allowing the Plaintiff's First Appeal and decreeing the plaintiffs' suit.

Thus considered, I hereby allow this Second Appeal and set aside the Judgment and decree of the Lower Appellate Court. No order as to costs.

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