

Nagaraja Shetty Vs. Krishna

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Court : Karnataka

Decided On : Jun-21-1995

Reported in : ILR1996KAR1156

Judge : M.F. Saldanha, J.

Acts : Hindu Law

Appeal No. : R.F.A. No. 328 of 1984

Appellant : Nagaraja Shetty

Respondent : Krishna

Advocate for Def. : Hegde Associates for R-1, 2 and 4

Advocate for Pet/Ap. : P. Subha Rao, Adv.

Disposition : Appeal dismissed

Judgement :

Saldanha, J.

1. The basic issue involved in this Appeal is with regard to the true complexion and connotation of the concept of partition under Hindu Law in relation to joint family property or for that matter assets of a Hindu Undivided Family. The controversy centres around that question as to whether a mere act of separation from the

family for purposes of separate residence or for that matter, for the setting up of an independent business for means of livelihood along with evidence of some amount of money or property having been obtained at the point of time when the alienation took place can be determined as an act of partition. The facts as will be set out by me hereinafter, in brief, are hardly in dispute and the solitary point involved in this Appeal is as to whether the plaintiff/appellant is entitled to claim his share out of the original joint family assets or whether he is liable to be excluded from them on the ground that he is bound by the arrangement or partition that had taken place when he left his father's home.

2. The plaintiff filled a suit for partition in the year 1976. It was his case that he was the first son of deceased Seshu Setty who died intestate in the year 1956 leaving behind an estate consisting of movable and immovable properties. We are not much concerned with the real nature of the properties in dispute because the learned Trial Judge has basically proceeded on the footing that on 21.6.1948 a partition had in fact taken place between father and son and that this partition virtually excluded the plaintiff from the Hindu Undivided Family in so far as his share had been carved out and handed over to him and that consequently, he no longer formed part of the Hindu Undivided Family and as a necessary result was precluded from asking for partition in respect of what survived of the joint family. The learned Trial Judge placed heavy reliance on the document Ex.D-1, the execution of which is not disputed which is dated 21.6.1948 and which records the fact that as and from that date the plaintiff left the common residence and went to live elsewhere and that he was also given various items of money, jewellery, property etc. The explanation put forward before the Trial Court as far as this transaction was concerned was that the defendant No. 1 was the step-mother of the plaintiff being the second wife and defendants 2 to 4 were her children. The plaintiff was the son of the pre-deceased first wife and there was the inevitable family friction between his family and the defendants and a situation had come up whereby there was no option except for the plaintiff and his wife to live and reside separately. The family business essentially consisted of a shop and in view of the prevailing domestic situation, the plaintiff stated that he considered it best to start some business of his own for which purpose his father gave him some amount of assistance to start off in life and that this transaction merely came to be recorded

in the document Ex-D-1. One of the contentions pleaded before the Trial Court was that Ex.D-1 does not constitute a total and complete apportionment of all the family assets which would have been done had it been a partition within the eye of the law in which case the plaintiff would have got a much higher share and in which case all family assets would have been reflected therein and even if several of them were not, a pro-rata equivalent value would have been given to the plaintiff. The learned Trial Judge rejected this last contention. He held that the document Ex.D-1 was a conclusive proof of a family partition and that as a consequence thereof the plaintiff ceased to be part of the Hindu Undivided Family and that consequently, there was no question of his once again asking for a partition of the remaining property. The learned Trial Judge placed reliance on certain other circumstances which in his opinion were significant, the most important being that the arrangement in question had taken place in the year. 1948, that the father of the plaintiff died in the year 1956 which was after a lapse of 8 years and that the plaintiff ultimately moved the Court exactly 20 years thereafter in the year 1976. In the opinion of the learned Trial Judge, had the plaintiff not been a party to the partition, he would most certainly have asserted his right to the family property and his having moved the Court in the year 1976 was in an obvious attempt to try and stake his claim for the family properties which had by then considerably appreciated. In the light of these findings, the suit was dismissed and it is that order that has given rise to the present Appeal.

3. The principal point canvassed at the hearing of this Appeal by the appellant's learned Advocate is that the learned Trial Judge has erred on a point of law. It is submitted that separate residence on the part of one member of a joint family and that too, a grown-up son in the background of a situation whereby there has been a re-marriage and a second wife and her children forming part of the family, is nothing unusual and further more, in a background where there is a small family business, the desire on the part of a grown-up son to start something on his own is not only understandable but justified and that such an action can never be construed as a partition within the framework of law. Appellant's learned Advocate has drawn my attention to the Case Law on the point but more importantly, to the principles of Hindu Law that governs the real concept of partition and it is his submission that for purposes of upholding an arrangement as one constituting a

partition, it must be demonstrated that there has been a total evaluation of the corpus that formed part and parcel of the Hindu Undivided Family estate and that there has been a rational, fair and correct division thereof. The emphasis was mainly on the last aspect of the matter because the learned Advocate submitted that merely divesting some part of the assets and handing them over to one of the children cannot in law constitute a partition unless it is demonstrated that the share in question is strictly on par with what that member of the Hindu Undivided Family would have got had the aforesaid formula been pressed into operation. In the light of this background, he has interpreted the document Ex.D-1 as merely a record of what was given to the plaintiff for purposes of enabling him to set up his new move and his new business and according to the learned Advocate it is perfectly understandable because there were other children through the second wife at that point of time and therefore it was necessary to keep an account of what had been given to the eldest son so that this could be taken into consideration at a point of time when the property had to be apportioned. He has seriously found fault with the reasoning of the learned Trial Judge in holding that the document Ex.D-1 is a Partition Deed and he submits that once the Court accepts this view, that there is nothing to stop the passing of a decree in favour of the plaintiffs. As far as the second head of argument is concerned, he has briefly submitted that nothing has been brought on record to indicate that any of the family assets were self-acquired property or that they were purchased through outside sources of income and that consequently since they form part of the joint family assets, there would have to be a pro-rata division with the plaintiff getting his rightful entitlement in law.

4. The respondents' learned Advocate has strongly opposed this argument. His first submission is that the learned Trial Judge is very correct within the framework of law in having taken into account the document Ex.D-1 at face value, the time factor, all the surrounding circumstances and has rightly come to the conclusion that the partition had taken place between the father and the eldest son namely the plaintiff in June 1948. He has sought to draw my attention to the recitals in that document and the clauses thereof and he submitted that all of these put together can lead to only one irresistible conclusion namely that it was a simple clear cut partition or apportionment to the plaintiff's share. He states that having taken his share and physically and otherwise separated from the Hindu Undivided Family,

that the plaintiff was estopped from demanding any partition by way of the present suit.

5. As indicated by me above, the basic question that arises in this Appeal devolves around what precisely in law constitutes a partition within the framework of Hindu Law. Before proceeding further, it would be useful to call attention to a few of the Decisions relied on by the appellant's learned Advocate. The first of these Decisions is a case reported in : ILR 1985 KAR3062 , Fakirappa v. Krishnappa. That was a Division Bench Decision, wherein the Court held that it is the overall intention of the parties that is predominant in determining as to whether when an arrangement for some sort of sub-division or separate residence has taken place, that has to be taken into account, Merely because one or more of them had agreed to separate possession and enjoyment of family properties without partition or disruption of the joint family property, that it was not permissible to hold that a partition had taken place. In that case, the lands in question continued to be jointly held and having regard to the overall complexion of the case, the Division Bench recorded the finding that a partition had not been effected. In : AIR1977 Kant175 , Gooty Thotappa and Ors. v. Gooty Gurusiddappa and Anr. the Court once again had occasion to carefully analyse the nature of the transaction and held that the intention to separate must be clear and unequivocal and that this must be accompanied by ascertainment of the shares. The appellants' learned Counsel has emphasised both these aspects of the matter in support of his submission that neither of the two were present in the year 1948 when Ex.D-1 came to be executed. In the next case reported in A.I.R. 1972 MYSORE 81, Lakshminarayana Udupa v. Padmanabha Udupa this Court had occasion to consider a situation whereby there was evidence of alienation of a prescribed determined share of the property in so far as 1/3rd share in the joint family property had been mortgaged and the contention was raised that this constitutes severance of the joint family status. That was a case in which admittedly the 1/3rd share constituted the whole of the share in question and the alienation of that share which was undisputed was sought to be used as evidence of severance of status. The Court had occasion to rely on the principles of Hindu Law laid down in two of the earlier Decisions of the Supreme Court i.e. : [1967]1SCR93 and : [1969]3SCR245 and to reiterate the position in law that the severance of joint family status can only be held to be

complete when there is an unequivocal intention of the parties to that effect. A mere act in relation to some share in that property was held to be insufficient and the Court therefore upheld the position that the joint family status continued.

6. The provisions of Hindu Law as far as the act of partition is concerned are well defined and I only need to restate them very briefly. As repeatedly laid down by the Courts in the aforesaid Decisions, it is only by act of parties namely the coparceners that a partition can take place and in a case where one or more members of a Hindu Undivided Family decide to sever the joint family status, that intention must be very clear from the material before the Court. The fact that the party decides to reside separately or to start business separately or to dispose of his share of the joint family assets is strong supportive evidence of an intention to put an end to the joint family status but each of these by themselves may not necessarily be conclusive. Invariably the Court will look to the totality of the circumstances at the point of time when the severance has taken place and one of the predominant factors would be the question as to whether a pro-rata share has been carved out of the assets and whether that share has in fact been taken away by the separating party. A partition is not to be confused with a mere domestic or family arrangement whereby for a variety of reasons some sort of loose divisions may take place, unless all the necessary ingredients as laid down by law namely the definite intention to separate, the carving out of shares and the physical division thereof and the separating or handing over or taking away of that share. It is the totality of these factors alone that can lead to the conclusion that partition has in fact taken place.

7. A subsidiary argument was pressed by the defendants both before the Trial Court and before me namely that the plaintiff admits having gone to live separately in the year 1948 and it was only as late as in the year 1976 that a suit was filed for partition and that consequently, this abnormally long delay is fatal to his case. Appellant's learned Advocate submitted that there was a valid reason for this namely that the appellant left the house when his father was alive and that after the death of his father in 1956, the appellant has been asking for his share to which, there was no definite refusal and only evasive replies were being given. It was a matter within the family and a delicate one and it is his case that it was only

shortly before the suit was filed that he addressed a legal notice and when there was a clear cut refusal to give him his share, that he filed the present suit. Appellant's learned Advocate has placed reliance on the Decision of the Supreme Court reported in A.I.R. 1960 S.C. 235, Rukmabai v. Lala Lakshminarayana and Ors. wherein the Court held that the right to sue accrues only when there is a clear refusal on the part of the defendants which in turn gives right to a compulsory cause of action. It is unnecessary for me to labour with this point because what transpired through this long period of time is not very clear nor is it very relevant but the learned Trial Judge has not held the bar of limitation against the present plaintiff and neither do I propose to do so because his evidence on that limited point namely that he approached the Court only after there was a clear cut refusal has gone unchallenged.

8. The plaintiff has in his deposition justified his leaving the family house in 1948 on the ground that it became essential since there were too many family quarrels and since he desired to start some business on his own. He states that his late father fully supported this line of action and being the elder son, that he gave him some amounts of money personally, jewellery belonging to him and his wife and few other items set out in Ex.D-1 which was nothing more than what a father would give to his son when he was starting his new home and his independent business. He contended that there was no intention on his part to separate from the joint family nor had he done so and that consequently, he was entitled to claim his share from the joint family properties. He has also contended that what he received was only a portion of what he would normally have been entitled to had a regular partition taken place. As far as the document Ex.D-1 is concerned, it is his case that it was only a recording arrangement. The oral evidence of the plaintiff will have to be read as being subsidiary to the document Ex.D-1 because it is well settled law that documentary evidence in situations such as this will prevail over oral evidence. More over, the other party to the document namely the deceased father is no longer available to give evidence before the Court. There is no ambiguity with regard to the recitals in the document. It sets out very clearly that the plaintiff desires to reside separately and to do business separately. It also records that the father had agreed to this and that he was making provision through what transpired at that time not only for present times but also for the

future. The preamble also records that it is from joint family assets and earnings that the apportionment is being done. Thereafter, through Clause (1) there is a distinct share that is apportioned, valued and given to the plaintiff in the shop. In Clause (2) there is even an apportionment of the loan outstanding. As far as Clause (3) is concerned, there is a detailed description of all the gold jewellery which is over 11 tholas that came to the share of the plaintiff. Clause (4) records that silver items of the value of 108 tholas has been given to the plaintiff and Clause (5) records that copper utensils that were 98 seers have been given to him. Clause 6) refers to certain other miscellaneous issues and Ex.D-2 is a detailed inventory of the various items. This document will have to be carefully construed. To my mind, if it was just a question of giving the plaintiff some money and a few household items to start his life and business, there would not have been such a formal procedure and there would not have been such a precise and accounting procedure that had resulted in definite items being apportioned and handed over to the plaintiff. The division has gone all the way down right upto the jewels, silver, copper utensils, assets, liabilities etc. and in these circumstances, to my mind the only irresistible conclusion was that the plaintiff told his father that he desires to separate completely from the family that he expressed his intention to put an end to his being a member of the joint family, that he asked for his share, that his share was carefully ascertained and that it was given to him. To my mind, this was fully understandable because the father had remarried and the second wife had three children and it was quite obvious since he was getting on in years that he desired to make a final settlement with the eldest son who was virtually leaving the household in order to avoid any complications so that the rest of the properties could be left to the wife and the remaining children. The joint family status may have continued with the father and the rest of the family but it is clear that it ceased to exist as far as the present plaintiff is concerned. That he physically went to stay separately and started his own business is admitted and there is nothing on record to show that he continued his association with the family thereafter. Under these circumstances, if one were to apply the various tests that the law prescribes, the facts would very clearly and conclusively establish that the plaintiff did sever himself from the joint family on 21.6.1948 and that the transaction which took place was a partition in law.

9. Having regard to this position, the finding of the learned Trial Judge that the partition has taken place on 21.6.1948, that the plaintiff had received his share of the joint family assets and that consequently he is not entitled to claim anything more at this point of time are all correct and liable to be upheld. The fact that assets may have appreciated is no justification and can never entitle the plaintiff to once again ask for a second partition. With regard to this aspect of the matter appellant's learned Advocate did argue that the Court will have to ascertain from what is set out in Ex.D-1 as to whether at all that was the rightful share that could have come to the plaintiff and if not, that he would certainly be entitled to sue for partition with the exception that out of his share that is carved out, he would have to give credit for what has already been received by him. I need to point out here that in such cases there can be no mathematical precision. So far as the Court is satisfied that the division was fair and correct the strongest evidence of which is that the concerned parties accepted it without complaint, then it would be unnecessary and improper to re-examine the question as to whether the share was precisely and mathematically a fair and proportionate one. I have taken note of the fact that the plaintiff did not make any grievance after the year 1948 and there is nothing on record to show until the year 1976 that he raised the issue with regard to what should rightfully be his share. Also, one needs to take account of the fact that the family assets were considerably smaller in the year 1948 and if the plaintiff exercised his option at that point of time to take his share, the fact that the family assets grew later on is no argument for seeking to question the value of what he got at that point of time.

10. On a careful consideration of the material adduced in this case and the principles of law that apply thereto, I find no ground to interfere with the findings and conclusion recorded by the learned Trial Judge. Under these circumstances, the Appeal fails and stands dismissed. In the circumstances of the case, there shall be no order as to costs. The interim orders, if any, to stand vacated.