

Muniga Alias and Abbaiah Another Vs. Muniraja and Others

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Court : Karnataka

Decided On : Mar-08-2000

Reported in : ILR2000KAR3564; 2000(5)KarLJ527

Judge : H.N. Narayan, J.

Acts : [Evidence Act, 1872](#) - Sections 50 and 112

Appeal No. : Regular First Appeal No. 395 of 1999

Appellant : Muniga Alias and Abbaiah Another

Respondent : Muniraja and Others

Advocate for Def. : Sri G.S. Visweswara and ;Sri J.M. Rajanna Setty, Adv.

Advocate for Pet/Ap. : Sri K. Suman, Adv.

Judgement :

1. This appeal by the plaintiff's is directed against the dismissal of their suit for partition and separate possession of the suit schedule properties which were agricultural lands but lost the character of agricultural lands in view of the Comprehensive Development Plan of Bangalore City.

2. The case of the plaintiffs is that Item 1 of the suit schedule properties was purchased by Munigiddamma, the grandmother of defendants 1 to 4 and that the second item of the suit schedule properties belonged to the joint family consisting

of themselves and defendants. It is their further case that one Krishnappa alias Munikrishnappa and Appaiah were the sons of Munigiddamma. The said Krishnappa had two sons viz., Annaiah and Abbaiah. Krishnappa's brother Appaiah had two sons viz., Muniga alias Abbaiah and Venkatesha, the plaintiffs. Annaiah had four sons viz., defendants 1 to 4 and 5th defendant is his wife and that his younger brother Abbaiah had one son viz., Krishna-defendant 6. The parents of plaintiffs and the father of defendants 1 to 4 and 6 are dead. It is contended that the property purchased by Munigiddamma, the grandmother of plaintiffs was in possession and enjoyment of joint family members so also the second item of the property and after the death of their parents, plaintiffs and defendants succeeded to own the movable and immovable properties and continued to enjoy them as joint family till recently when the defendants refused to partition and put them in separate possession of the suit properties. It is contended that the plaintiffs and defendants were the members of the mitakshara coparcenary and also the members of the Hindu undivided family. The properties mentioned in the schedule were acquired with the help of the ancestral property and also of the joint family of the plaintiffs and defendants. It is further submitted that the father of defendants 1 to 4 viz., Annaiah being the elderly person of the joint family was managing the entire property as kartha of the joint family who also died in Bangalore about a year ago. Thereafter defendants 1 to 5 took over the management of the property and started denying the plaintiffs' right to the suit schedule properties. It is thereafter that the plaintiffs claimed fair and equitable share in the suit schedule properties which was refused by defendants 1 to 5. Plaintiffs therefore convened a panchayat wherein the elders who are well-wishers to both the plaintiffs and the defendants advised the defendants not to misuse the illiteracy of the plaintiffs and further advised the defendants to give the plaintiffs' legitimate share which was refused by the defendants. Defendants 1 to 5 are acting prejudicial to the interests of the plaintiffs and therefore the plaintiffs were obliged to file the suit for necessary reliefs.

3. Defendants 1 to 5 and 6th defendant filed the written statements separately. Defendants 1 to 5 have assailed the suit as false, frivolous and not maintainable as the suit is barred by limitation. It is their contention that the genealogical tree furnished by the plaintiffs is false and cooked up with ulterior motives. The

defendants disputed the claim of the plaintiffs that they are the members of the joint family of which these defendants are members. The assertion of the plaintiffs that they are the children of Appaiah is denied as false. They have specifically disputed that the plaintiffs are the children of late Appaiah who was the son of Munigiddamma. However they admitted that the plaintiffs are the children of Vajramma but are not born to Appaiah. They further contended that the said Appaiah having passed away at an early age, the said Vajramma left the family, went elsewhere and later on married one Muniyappa alias Muniyappa Setty and the plaintiffs are the children of said Muniyappa alias Muniyappa Setty. Under the circumstances, the plaintiffs cannot claim to be the members of the joint family of which the defendants are members. According to them, the suit properties have been in exclusive possession continuously in their occupation. Hence the defendants have disputed the plaintiffs' right or title over the properties in any manner and contended that the plaintiffs are incompetent to prosecute the suit and therefore prayed for dismissal of the suit.

4. The written statement filed by 6th defendant also runs on the same lines. It is unnecessary for me to repeat the defence pleaded by the 6th defendant. 6th defendant has also prayed for dismissal of the suit. According to the defendants, plaintiffs are outsiders and they have nothing to do with the family of the defendants and they have no claim in the suit properties.

5. Upon these pleadings, the Trial Court framed as many as 9 issues which are as follows.-

1. Whether the plaintiffs prove that the genealogical table furnished in para 3 of the plaint is true and correct?
2. Whether the plaintiffs prove that they and the defendants constitute members of the joint Hindu undivided family?
3. Whether the plaintiffs prove that the suit schedule property is the Joint Hindu undivided property and they are in joint possession along with the defendants?

4. Whether the defendants prove that the plaintiffs are not born to late Shri Appaiah and that they are the children of one Shri Muniyappa alias Muniyappa Setty?

5. Whether the plaintiffs prove that they are entitled to partition and separate possession of their one-half share in the suit schedule property?

6. Whether the plaintiffs prove that the defendants are liable to account for the income of the joint family property?

7. Are the plaintiffs entitled to mesne profits?

8. Whether the suit is barred by time?

9. What decree, what order?

6. In proof of the respective contentions, 6 witnesses and 31 documents were relied upon by the plaintiffs while the defendants relied on the oral evidence of 4 witnesses and 27 documents.

7. The Trial Judge upon hearing both the sides and on consideration of the voluminous evidence produced by both sides found Issues 1 to 3, 5 to 8 in the negative for the plaintiffs and Issue 4 in the affirmative and passed the final order dismissing the suit for partition and separate possession. The plaintiffs have assailed the legality and correctness of the judgment and decree precisely on the question that the Trial Judge has erred in holding that the appellants-plaintiffs were not the children born to Appaiah, the husband of Vajramma and their mother but they were born to one Muniyappa alias Muniyappa Setty and therefore they are not entitled for claiming a share in the properties of the defendants.

8. Sri K. Suman, learned Counsel for the appellants contended that the Trial Judge has virtually accepted the defence of the defendants without a careful examination of oral and other evidence and the defence pleaded by the defendants to hold that the plaintiffs are not the children of late Appaiah and that the Trial Judge erred in relying upon the defence documents by discarding the oral and documentary evidence relied upon by the plaintiffs. He contended that a mere mention of the

name of Muniyappa alias Muniyappa Setty in the documents marked on behalf of the defendants does not give rise to any legal inference to establish the parentage of the plaintiffs. He therefore contended that the Trial Court clearly erred in answering those issues against the plaintiffs to dismiss the suit.

9. Sri G.S. Visweswara, learned Counsel for the defendants-respondents justified the judgment and decree of the Trial Court contending that plaintiffs by their conduct have in fact accepted the position that they are the children of Muniyappa alias Muniyappa Setty born through Vajramma and therefore they cannot go behind the documentary evidence produced by the defendants to assert that they were born to Appaiah, their father.

10. The precise questions to be considered in this appeal are:

1. Whether the plaintiffs are the children born to their father Appaiah?
2. Whether they are born to Muniyappa alias Muniyappa Setty as contended by the defendants?
3. If the answer to the first question is in the affirmative, whether the plaintiffs are entitled for partition and separate possession of their respective share in the suit schedule properties?

11. Regarding Point No. 1: The main controversy in the suit for consideration is the paternity of the plaintiffs. The maternity is always an admitted fact. It is undisputed that Vajramma was the mother of plaintiffs. It is also not disputed that Vajramma was married to Ap-paiah, the son of Munigiddamma. Therefore it is undisputed that Vajramma was the legally wedded wife of Appaiah. The defendants by contending that plaintiffs were not born to Appaiah but were born subsequent to the death of Appaiah to one Muniyappa alias Muniyappa Setty have virtually laid hard and thorny terrain for the Court to tread and it is for the Court to tread on this terrain carefully to find out the truth. It is unnecessary for me to state that the Courts have their well-defined paths to tread even in the hard and thorny terrains to reach the correct destination.

12. The parties have placed before the Court both oral and documentary evidence to ascertain the truth of the matter. The truth which has become the causality at the trial is the paternity of the plaintiffs. In a case where parties and witnesses seldom come out with truth and very often the whole truth, the Court has to find out where exactly the truth lies. It is in this context, the Court has to tread carefully. The plaintiffs have relied, principally on the evidence of P.W. 2, the second plaintiff and P.W. 4-Chinnamma who is none other than the sister of defendants' grandfather. Learned Counsel for the appellants relied on the provisions of Section 50 of the Evidence Act to make use of the evidence of these witnesses. The defendants have not examined any relative to substantiate their defence that the plaintiffs were born to Muniyappa alias Muniyappa Setty. The relationship of P.W. 4-Chinnamma with the parties to the proceedings is not in dispute. It is her say on oath that Appaiah married Vajramma. At the time of death of Appaiah, plaintiff 1 was aged 7 years and plaintiff 2 was aged one year. After the death of Appaiah, Vajramma has not remarried. She further asserted that the plaintiffs are the sons of Appaiah born through Vajramma. She has admitted in her cross-examination that the daughter of the second son of Vajramma was given in marriage to her husband's brother's son and that the daughter of plaintiff 1 was given in marriage to her son. She has also stated in the cross-examination that defendant 2 was present at the marriage and he has taken initiative in those two marriages. It is suggested that she was deposing falsely on account of difference of opinion between herself and defendant 2. It is further stated by the witness in the cross-examination that Appaiah, the husband of Vajramma died 15 years after the marriage. She has denied the suggestion that Vajramma had no issues from Appaiah at the time of death of Appaiah. The witness has also denied the suggestion that Vajramma subsequently married Muniyappa alias Muniyappa Setty and plaintiffs were born to him. She has further denied the suggestion that Appaiah died two months after the marriage with Vajramma and they had no children. P.W. 2-Venkatesh, the 2nd plaintiff, D.W. 1-Manjunath, the 2nd defendant have no personal knowledge of either the marriage of Vajramma with Appaiah or the birth of plaintiffs. They could not have deposed anything on a fact which took place long prior to their birth. The plaintiffs relied on Exs. P. 5-A, P. 16 to P. 21 to rebut the defendants' contention that the plaintiffs were not born to

Appaiah. The defendants in turn relied upon Exs. D. 2 to D. 5, D. 8 to D. 11, D. 13, D. 20 to D. 22.

13. The contentions canvassed for consideration in this appeal are required to be considered in the background of certain admitted facts. The fact that Appaiah married Vajramma is not in dispute. The contention of the plaintiffs-appellants is that Appaiah died when plaintiffs were aged 7 years and one and half years respectively. They have totally denied the defence that Appaiah died within a short time of his marriage with Vajramma and that Vajramma married Muniyappa alias Muniyappa Setty and the plaintiffs were born out of their relationship.

14. In view of the marriage of Vajramma with Appaiah, the burden of proving that plaintiffs were not born to Appaiah and were actually born to Muniyappa alias Muniyappa Setty lies on the defendants. The defendants have initially failed to place on record any evidence in proof of the date of death of Appaiah. They have also failed to prove the marriage of Vajramma with Muniyappa alias Muniyappa Setty. They have not examined any witness to show that Vajramma was not just living as a mistress or wife of Muniyappa. This is a very important circumstance for the Court to deny the defence that these two children were born outside the lawful wedlock of Appaiah and Vajramma. Before coming to the discussion of the documentary evidence relied upon by the defendants, let me find out whether in aid of Section 50 of the Evidence Act, the plaintiffs have shown that they were born to Appaiah. P.W. 1 is the power of attorney holder of 1st plaintiff. Non-examination of 1st plaintiff is really a handicap for the plaintiffs themselves as he was aged around 68 years at the time of filing the suit and that some relevant facts were within his knowledge. No reasons are assigned by the plaintiffs for not examining the 1st plaintiff. 1st plaintiff himself has not offered any explanation for not stepping into the witness-box specially when his birth itself was in controversy. He could not have stated anything better as even according to the plaintiffs, he was aged 7 years at the time of death of his father Appaiah. The other evidence let in by the plaintiffs viz., the evidence of P.Ws. 5 and 6 is not of much consequence to prove their relationship. Unfortunately, the defendants have not examined any relative of theirs in proof of their defence. The 5th defendant was their mother whose age was given as 50 years at the time of presenting the plaint and she

would have been a better person to speak in this regard. Even otherwise it is not the case of the defendants that no witness was available to speak to the marriage of Appaiah with Vajramma and their relationship thereafter. Therefore the evidence of P.W. 4-Chinnamma assumes some importance as she was sufficiently old and she was related to both plaintiffs and defendants. It is true that she is closer to plaintiffs in view of the fact that the daughter of 1st plaintiff was given in marriage to her son and she was really interested with the plaintiffs. As stated by me at the inception, the witness was not speaking the whole truth and therefore the Court has to infer whether the evidence given by such witness can be accepted. Section 50 of the Evidence Act provides that 'when the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person, who, as a member of the family or otherwise, has special means of knowledge on the subject is a relevant fact'. Illustration (b) to Section 50 of the Act illustrates this fact. It refers to a question whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

15. Except P.W. 4-Chinnamma, no other witness has deposed to this relationship of parties. As stated earlier, 2nd defendant-Manjunatha is not a competent person to speak about it as he was not born at the relevant point of time.

16. Much reliance is placed by the defendants upon the entries made in the revenue and other records. I will shortly refer to these documents relied upon by the defendants. One factor which the Court has to consider at this stage is that the 1st plaintiff, after attaining majority is stated to have left Bangalore, stayed at Karkala and carried on the construction work. The parties to the proceedings incidentally belong to Bovi caste which is categorised as scheduled caste. The evidence on record brought out by the parties also shows undisputably that 1st plaintiff married one Sundari Shetty, a lady who it is alleged belonged to Bunt's community of South Canara. Thus the 1st plaintiff married a girl outside his caste. His stay at Karkala for over 30 years may also be a factor to consider his subsequent surname as Appanna Shetty. We do not know when Vajramma's second husband became Muniyappa alias Muniyappa Setty. There is no evidence whether Muniyappa alias Muniyappa Setty married her in accordance with the

customs or she was taken as a concubine or mistress. The fact remains as disclosed from the records that she lived with Muniyappa alias Muniyappa Setty at Hosahalli near Bangalore after the death of her husband. So far as the entries made in the voters list, they do not assume the character of evidence at all as the person who prepared the voters list is not examined. Mere production of voters list is no proof of the particulars furnished and that no legal inference can be drawn only because some relationship is attributed to the person named in the voters list. It is no doubt a public document, but the said document cannot be relied upon to prove the relationship. Exs. D. 8, D. 9, D. 10 and D. 11 relate to the application made by the 1st plaintiff for grant of land at Yerlapadi village. In Ex. P-8, 1st plaintiff has given his name as Appanna Setty s/o Muniyappa Setty. The father's name is so entered in Exs. D. 9 to D. 11. In Ex. D. 20 also, the name of the father of 1st plaintiff is given as Muniyappa Setty. Since the application was made on behalf of 1st plaintiff, the Court has necessarily to infer that the particulars were furnished by the 1st plaintiff himself and the entry made therein is the basis for the defendants' contention that Muniyappa alias Muniyappa Setty was accepted as the father of 1st plaintiff.

17. Reliance is also placed by the defendants to the recitals in Exs. D. 2 and D. 3, the two sale deeds which are stated to have been executed by Vajramma and Venkatesha-plaintiff 2 respectively. The second plaintiff has disputed execution of these documents. These facts undisputably go to show that Muniyappa was shown as the father of plaintiffs 1 and 2. The plaintiffs in rebuttal of these documents relied on the letters written by 2nd defendant and his father as in Exs. P. 16 to P. 21. 2nd defendant has also disputed the handwriting in these documents. It is stated that these letters were sent to the handwriting expert to give his opinion about the disputed handwriting and the admitted handwriting of 2nd defendant. The handwriting expert has furnished the information that the letters-Exs. P. 16 to P. 21 are written in the hand of 2nd defendant.

18. It is contended that the opinion evidence is not the conclusive proof. The circumstances under which these letters were despatched to the 1st plaintiff clearly shows that the letters were in fact written by the 2nd defendant. The contents in those letters are disputed by the defendants. The plaintiffs have also

relied upon Ex. P. 5, the agreement of sale executed by the defendants and the 1st plaintiff in favour of one Harishchandra Sharma-P.W. 6 and one Munivenkatappa. The agreement of sale is in respect of suit properties only. The signature found in Ex. P. 5 has been disputed by the 2nd defendant. It is contended that this signature is not subjected to scrutiny of the handwriting expert. This document is relied upon to show that 1st plaintiff is described as the son of late Appaiah and that the defendants have not raised any objection for describing the 1st plaintiff as the son of Appaiah. As rightly contended by the learned Counsel, the truth lies somewhere and the parties have left it to the Court to find out what exactly the truth which refers to the paternity of plaintiffs. The important circumstance which heavily weighs with the plaintiffs is that when the paternity is disputed, the opposing party has to discharge the same by producing convincing evidence as it affects the character of a woman and the birth of the plaintiffs themselves. Unfortunately, in this case, the pleadings are vague. Unless it is proved that Appaiah died long prior to the birth of the plaintiffs, it cannot safely be taken as a concluded fact that plaintiffs were not born to him. It is no doubt true that Vajramma joined Muniyappa alias Muniyappa Setty after her husband's death. At what stage and in which year, she started living with Muniyappa alias Muniyappa Setty is not found in the evidence of the defendants. The argument that Vajramma joined Muniyappa alias Muniyappa Setty with the two young children after the death of her husband, that the children by practice accepted Muniyappa as their father has to be accepted under the circumstance. There is no other possible conclusion to be drawn from these proved facts. Therefore, the evidence of P.W. 4-Chinnamma under the circumstances assume importance though she was not prepared to speak about the relationship of Vajramma with Muniyappa alias Muniyappa Setty. Her evidence that 1st plaintiff was aged 7 years and 2nd plaintiff was aged about one year at the time of death of their father has some credence and cannot be discarded so lightly. The evidence of D.W. 1-Manjunath and D.W. 2-Jayaram, the Chairman of Subramanyapuram Village Panchayat who were examined to speak about the allotment of sites in favour of Vajramma and the 2nd plaintiff by Grama Panchayat and the subsequent sale by these two persons in my opinion do not help the defendants' case any better.

19. The discussion made by the Trial Judge in this regard is really difficult to accept. The Trial Judge heavily relied upon the voters list produced by the defendants and the application for grant of land by the 1st plaintiff. As stated earlier, the entries made in the voters list do not have any evidentiary value to prove the relationship. It is contended by the learned Counsel for the appellants that the admitted entries in Exs. D. 7 to D. 11 can only be explained in the context of the subsequent relationship of Vajramma with Muniyappa alias Muniyappa Setty. The law presumes strongly in favour of legitimacy of offspring as it is birth that determines the status of a person. Section 112 of the Evidence Act reads as follows.-

'The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten'.

20. I may add a rider in this case to the presumption under Section 112 of the Evidence Act. The presumption arises under Section 112 of the Act on proof of the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. The presumption of legitimacy is a rebuttable presumption of law and the only way of displacing it, is to show, as pointed out in the later part of the section, that the parties to the marriage had no access to each other at the time when the child was begotten and no other exception is allowed. That is, it must be proved that access was impossible on account of impotency, serious illness, absence etc., or by very convincing evidence that though opportunity existed, there was no sexual intercourse during the period when the child must have been begotten. The question whether there was access or non-access in the case on hand does not assume importance as the question requiring for consideration is

whether they were born to their father Appaiah or to Muniyappa alias Muniyappa Setty to whom it is alleged that Vajramma became his concubine or mistress. As stated earlier, the marriage of Vajramma with Appaiah is not in dispute. What is in dispute is the date of death of Appaiah and the date of birth of plaintiffs 1 and 2. During the subsistence of a valid marriage, legitimacy of the offsprings is presumed. The party who asserts that the children were not the legitimate children and were born outside the wedlock, has to prove the same. The question is whether the defendants have discharged this burden of proof placed on them. From the detailed discussion made supra, I find it hard to accept the defendants' contention that the plaintiffs are not the children of late Appaiah. The defendants have thoroughly failed to prove this fact to the satisfaction of the Court. Proof of relationship is not surfacing from the documents relied upon by the defendants as these documents surfaced after the birth of the plaintiffs. The Trial Judge is very much influenced by the entries made in these documents relied upon by the defendants. The conclusion which is based on these entries without reference to the other evidence on record in my opinion is difficult to accept. Therefore it is not difficult for me to affirmatively state that the plaintiffs are the children of late Appaiah and not the children born to Vajramma through Muniyappa alias Muniyappa Setty.

21. It is undisputed that the suit properties are ancestral to the parties to the suit. The defendants have not set up any defence claiming exclusive possession adverse to the interest of the plaintiffs. In view of the finding on Point 1, the plaintiffs are entitled for their half share in the properties. Therefore, in my opinion, the judgment of the Trial Court is quite not sustainable and is liable to be set aside.

22. In the result, this appeal is allowed. The judgment and decree of the Trial Court dismissing the suit is set aside. The suit is decreed as prayed for, however, without costs.