

Thammegowda Vs. Siddegowda

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Court : Karnataka

Decided On : Oct-09-1991

Reported in : ILR1991KAR4506; 1992(1)KarLJ459

Judge : K.A. Swami and ;Murlidher Rao, JJ.

Acts : Hindu Law; [Code of Civil Procedure \(CPC\), 1908](#) - (Central Act No. 8 of 1908) - Order 20 Rule 12

Appeal No. : R.F.A. No. 305 of 1991

Appellant : Thammegowda

Respondent : Siddegowda

Advocate for Def. : M. Shivappa, Adv.

Advocate for Pet/Ap. : Shankaranarayana Bhat, Adv. for ;B.M. Krishna Bhat, Adv.

Judgement :

K.A. Swami, J.

1. At the stage of admission the respondent has put in appearance. Necessary records are also produced before us. Therefore, this Appeal is admitted and heard for final disposal.

2. This Appeal is preferred against the Judgment and decree dated 30th January 1991 passed by the learned Principal Civil Judge, Mandya in O.S. No. 139/1986. The Appeal is preferred by defendants 1 and 2. The respondent is the plaintiff. The 1st defendant is no other than the father of the plaintiff. The suit was for partition and separate possession of the 1/3rd share of the plaintiff. The suit properties consisted of movables and immovables. 'A' schedule consisted of immovable properties and 'B' schedule consisted of movable properties. At the outset Sri M. Shivappa, learned Counsel for the respondent submitted that even though the trial Court has passed a decree and awarded 1/3rd share in the moveable properties as described in 'B' schedule, to the plaintiff, in the light of the evidence on record, the plaintiff gives up his claim for his share in the moveables. In view of this submission, we do not consider it necessary to examine the correctness of the finding recorded by the trial Court in respect of moveables comprised in 'B' Schedule. We proceed to decide this Appeal on the basis that 'B' schedule does not form part of the suit claim, in the light of the aforesaid submission that the plaintiff gives up his claim for moveables.

3. The trial Court has held that the properties comprised in 'A' Schedule are the joint family properties; therefore, the plaintiff is entitled to 1/3rd share. Sri Shankaranarayana Bhat, learned Counsel for the appellant submitted that the finding of the trial Court that Items 4, 6, 8, 11, 12 and 16 are joint family properties is not correct both on facts and in law. It is contended that items 12 and 16 were granted by the Government under the Land Grant Rules on an upset price to the 1st defendant and therefore, they could not be considered as joint family properties inasmuch as a grant made by the Government is always made in the name of an individual and not to the family. The other properties comprised in items 4, 6, 8 and 11 are the self-acquired properties of the 1st defendant. Therefore, it is contended that the trial Court is not justified in holding that these properties are also joint family properties. It is also contended that in a suit for partition and separate possession, the direction to enquire into mesne profits issued by the trial Court is not justified.

3.1. In the light of these contentions, the following points arise for consideration:

- 1) Whether the trial Court is justified on facts and in law in holding that the suit properties comprised in items 4, 6, 8, 11, 12 and 16 are the joint family properties?
2. Whether in a suit for partition and separate possession, a direction to enquire and determine the mesne profits is justified in law?

POINT No. 1

4. The evidence on record discloses that the joint family possessed sufficient nucleus. The 1st defendant was the kartha of the joint family which was an agriculturist's family. Apart from the income of the joint family, there was no other source of income to the 1st defendant. However, the 1st defendant tried to contend that he was rearing sheep and was also supplying construction material to the contractors. Therefore, he had a separate income from these sources. The evidence on record does not establish this claim of the 1st defendant. On the contrary the evidence on record establishes that the 1st defendant was the 'Kartha' of the joint family which possessed the immovable properties such as wet and dry lands. Though the extent was not vast but the income derived from these properties according to the evidence given by D.W.3 Ningamma, who is none other than the daughter of D.W.1 and the evidence given by P.Ws.1 to 3 was sufficient to hold that the joint family had sufficient nucleus to enable the 'Kartha' of the family to pay consideration amount for purchasing items 4, 6, 8 and 11 and upset price pursuant to the grant of lands comprised in items 12 and 16. Therefore, we are of the view that the trial Court is correct in recording a finding that the consideration amount for purchasing items 4, 6, 8 and 11 was paid out of the joint family funds. If that be so, these properties cannot be held to be self acquired properties of the first defendant who was none other than the 'Kartha' of the joint family. In a case where the joint family possessed sufficient nucleus and the property was purchased by the Kartha' of the family the burden shifts upon the Kartha' of the family to prove that he had purchased the properties in his name which he claimed to be his self acquired properties through an independent source of income and not from the income derived from the joint family properties. The 1st defendant has failed to discharge this burden.

5. The next question for consideration is whether items 12 and 16 by a mere fact that they were granted in the name of 1st defendant should be held to be self acquired properties of the 1st defendant. If the upset price for the grant of these lands had not been paid out of the joint family funds and these properties had not been enjoyed as the joint family properties of the joint family, there was no difficulty for us in accepting the contention of Sri Shankaranarayana Bhat, learned Counsel for the appellants that these properties were granted in the name of the 1st defendant by the State Government under the Land Grant Rules on an upset price and therefore, they should be considered as granted in the name of individual and as such they could not become the joint family properties. But in a case where the grant is in the name of 'kartha' of the family and the upset price is paid out of the joint family funds and the properties are enjoyed as the properties of the joint family, we are of the view that the contention does not hold good in such cases. Hence, we are of the view that the finding recorded by the trial Court that items 12 and 16 are also the joint family properties is correct and does not call for interference. For the reasons stated above, Point No. 1 is answered in the affirmative.

POINT No. 2

6. In the Judgment as well as in the preliminary decree drawn by the trial Court, it has been stated that the plaintiff is entitled to future mesne profits in respect of his share in the joint family properties. Therefore, an enquiry into future mesne profits has been ordered. In a suit for partition and separate possession, the question of mesne profits does not arise. The coparcener who will be in possession of the joint family property will be liable to account for the profits derived from the joint family property in excess of his share. The possession of a coparcener of the joint family property is not unlawful because his right extends over the entire joint family property until it is divided by metes and bounds. The possession of a coparcener of the joint family property until it is divided by metes and bounds does not become unlawful so as to make him liable for mesne profits. Therefore, the question of mesne profits does not arise. Of course, he has to account for the income of the share of the plaintiff from the date of the suit till the date of delivery of possession. Therefore, the trial Court is not justified in directing that the plaintiff is entitled to

future mesne profits from the date of suit. It ought to have directed that the plaintiff is entitled to accounts of the profits of his share from the date of the suit till the date of delivery of possession. Point No. 2 is answered accordingly.

7. For the reasons stated above, this Appeal is allowed in part. The decree of the trial Court in so far as it relates to moveables is set aside. In so far it relates to immoveable properties, it is affirmed. The Judgment and decree are further modified in so far they make the defendants liable for mesne profits. It is ordered that the plaintiff is entitled to the accounts of the profits of his share from the date of the suit till the date of actual delivery of possession. Accordingly, it is further directed under Order 20 Rule 18 of the C.P. Code that the defendants shall account for the profits in respect of the share of the plaintiff from the date of the suit till the date of actual delivery of possession. The actual division by metes and bounds in terms of the decree be made; actual possession of the share of the plaintiff be delivered to him according to the nature of the property either through the Deputy Commissioner or the Court Commissioner as the case may be.

8. In the facts and circumstances of the case, there will be no order as to costs.