Subramonian Vs. Radhakrishnan

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Court : Kerala

Decided On : Mar-18-2004

Reported in : 2004(2)KLT539

Judge : R. Bhaskaran, J.

Acts : Hindu Law

Appeal No. : S.A. No. 599 of 1994

Appellant : Subramonian

Respondent : Radhakrishnan

Advocate for Def. : M. Balagovindan, Adv.

Advocate for Pet/Ap. : S. Venkatasubramonia Iyer, Sr. Adv.,; V. Giri and; B. Ja

Disposition : Second appeal allowed

Judgement :

R. Bhaskaran, J.

1. This second appeal is filed by defendants 1 to 6 in a suit for partition. According to the plaintiffs, the plaint schedule properties and other items originally belonged to Madan. After his death, the property is inherited by his children Krishnan, Padmanabhari, Pappi Pillai and Parvathi. They partitioned the properties and the

plaint schedule properties were allotted to the share of Padmanabhan. According to the plaintiffs, since Padmanabhan obtained the property from his father, they are co-parcenery properties. Sixth plaintiff, Sarojini, Devaki and 1st defendant are the children of Padmanabhan. Plaintiffs 1 to 5 are the children of Devaki and plaintiffs 7 to 10 are the children of Sarojini. Defendants 2 to 5 are the children of 1st defendant. According to the plaintiffs, as the plaint schedule properties are joint family properties of plaintiffs and defendants, they are entitled to equal shares by birth as the suit was filed for partition. The plaintiffs claimed 10/16 shares.

2. Defendants 1 to 6 filed a joint written statement contending that Padmanabhan executed a settlement deed in 1960 in favour of the 1st defendant in respect of the plaint schedule properties and he has become the absolute owner of the properties. He sold IS cents from plaint schedule item No. 2 to one Eapen. He also sold other items in plaint schedule item No. 5 to Yohannan Daniel and Daniel Johnson. With regard to item No. 6, it is stated that the 1st defendant did not get any right over the same as per the settlement deed. The 1st defendant also sold 12 cents in item No. 8 to one Zachariah, who transferred the same to one Raveendran Nair. One Ayyan Thankan has got kudikidappu right over item No. 9. Defendants 2 to 6 are also in possession of portions of properties as per settlement deed executed by the 1st defendant. They also contended that the plaint schedule properties are not co-parcenery properties. Padmanabhan died on 26.9.1963. Plaintiffs and defendants are not co-owners. Plaintiffs 1 to 5 are residing in one building situated in Sy. No. 192 of Madathuvilakam Village. Their mother Devaki was a tenant of the building to whom 1st defendant let out the building on a monthly rent of Rs.15/-. Fourth defendant is in exclusive possession of 30 1/4 cents in Sy No. 192 of Madathuvilakam Village.

3. In the trial court, the plaintiffs did not adduce any evidence. The 1st defendant himself was examined as DW.1 and Ext.B1 was marked on the side of defendants 1 to 6.

4. The trial court dismissed the suit. It was found that Padmanabhan executed Ext.B1 settlement deed in favour of the 1st defendant. The 1st defendant also gave evidence stating that as per the customary law, the female children are not

entitled to any share and they were given in marriage after providing dowry and ornaments. The trial court found that since the plaintiffs did not adduce any documentary or oral evidence, they have not substantiated the plaint claim. On the other hand, the contention of the contesting defendants have been substantiated by adducing oral and documentary evidence. It was also found that a reading of Ext.B1 discloses that items 2 to 10 therein were the self-acquisitions of Padmanabhan. It was found that even if the plaint schedule properties are treated as co-parcenary properties of deceased Padmanabhan, 1st defendant was the sole surviving co-parcener at the time of the death of Padmanabhan. Therefore, Ext.B1 can be construed as a release in respect of 1/2 share of Padmanabhan to the 1st defendant. Therefore, the claim of the plaintiffs was found to be without any merit and the suit was dismissed.

5. In appeal, it was found that the contesting defendants have no case that Padmanabhan had independent income and with that fund the remaining items in the plaint schedule were acquired. It was held that when there was already a nucleus subsequent acquisition is presumed to be with common fund. It was found that the plaint schedule properties have to be taken as co-parcenary properties since Padmanabhan died after the commencement of the Hindu Succession Act. The parties are governed by S.6 of the Hindu Succession Act and under S.6 all the persons in the family who are alive on the death of Padmanabhan are entitled to get a share in the plaint schedule properties. According to the 1st appellate court, a gift of an undivided share is invalid. The appellate court also relied on the decision of the Supreme Court in Gurupad Khandappa Magdum v. Hirabai Khandappan Magdum (AIR 1978 SC 1239) to hold that females are also entitled to get a right in the co-parcenary properties under S.6 of the Hindu Succession Act. The appellate court passed a decree declaring 1/8 share to the plaintiffs instead of 10/16 claimed in the plaint.

6. In the second appeal, it is contended that the 1st appellate court should have held that most of the items of the plaint schedule are self-acquisitions of Padmanabhan. It is also contended that the plaintiffs who claimed right under females are not entitled to 'any right in the properties. It is also argued that there was no prayer for setting aside Ext.B 1 document. It is also contended that the suit

is barred by limitation as the 1st defendant is in possession of the properties adverse to the plaintiffs' title. The substantial questions of law raised in the second appeal read as follows:

1. Was the court below justified in holding that the plaint schedule property is partible?

2. Was the court below justified in holding that the plaint schedule property is coparcenary property and that females are also entitled to a share?

3. Whether the lower appellate court was right in law in decreeing the suit without considering the issue regarding adverse possession and limitation pleaded by the defendants and left open by the trial court?

4. Is not suit barred by adverse possession and limitation?

5. Was the lower appellate court justified in decreeing the suit reversing the well considered judgment of the trial court?

6. Is the finding of the lower appellate court that the plaint schedule property is coparcenary property is supported by any evidence?

7. The original records of this case have been lost by fire in this Court and the learned counsel for the appellant has produced a paper book containing the essential pleadings and judgments of the courts below.

8. The suit is filed on the allegation that the entire plaint schedule properties were owned by Madan and after his death they devolved on his children and in subsequent partition, the plaint schedule properties are allotted to Padmanabhan. The plaintiffs are the children of two daughters of Padmanabhan. 7th defendant is the brother of plaintiffs 1 to 5. The plaintiffs claimed the property since Padmanabhan died after coming into force of the Hindu Succession Act. Defendants 2 to 5 are the children of the 1st defendant, son of Padmanabhan. Padmanabhan executed a settlement deed in favour of the 1st defendant as per which the 1st defendant was given absolute right and possession over the plaint schedule properties. He sold portions of some of the items to various persons the

details of which are given in the written statement. The trial court noticed that the plaintiffs did not adduce any evidence. The trial court found that it was for the plaintiffs to prove that the plaint schedule properties are co-parcenary properties of Padmanabhan and they have failed to prove the same. It is also noticed that the suit is filed after 28 years of execution of Ext.B 1 settlement deed in favour of the 1st defendant and the settlement deed shows that items 2 to 10 are self-acquired properties of Padmanabhan. The trial court also found that even if the property was co-parcenery properties, after the death of Padmanabhan 1st defendant was the sole surviving co-parcener and the plaintiffs have no right in it.

9. In appeal, the appellate court found that Ext.Al partition deed shows that Padmanabhan got 2 items in partition after the death of his father Madan. According to the appellate court, since there was nucleus available with Padmanabhan all the subsequent acquisitions of Padmanabhan must be deemed to be on behalf of the joint family. The appellate court also noticed that no evidence has been adduced to show that Padmanabhan had independent means. This reasoning of the appellate court is seriously challenged by the learned senior counsel Mr. S. Venkitasubramania Iyer for the appellants. It is contended that merely because Padmanabhan obtained 2 items in partition, there cannot be any presumption that all his subsequent acquisitions must also be joint family properties. He contended that it is only when the plaintiffs show that the two items which Padmanabhan obtained in partition yielded sufficient income to form a nucleus for acquiring properties that such a presumption can be drawn. For that purpose, the burden is entirely on the plaintiffs to establish the same. If it is shown that Padmanabhan had sufficient income from the properties obtained by him in the partition to acquire other properties, then the burden shifts to the defendants to show that these properties were acquired out of the individual income of Padmanabhan. I find considerable force in the argument of the learned senior Advocate. The legal position is now beyond doubt as settled by the Apex Court in D.S. Lakshmaiah v. L. Balasubramanyam (2003 AIR SCW 4347). An almost identical case arose in that decision also. The Supreme Court held as follows:

'7. The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu family property or self-

acquired property of the 1st appellant.

8. There was evidence and it has been established that item No. 2 measuring 15 guntas of land was joint Hindu family property but, admittedly, no evidence has been led that the said joint Hindu family property was yielding any income or that any nucleus was available with the aid whereof item No. 1 property could be purchased by the 1st appellant. Admittedly, no evidence has been led on behalf of the respondents/plaintiffs to show income from item No. 2 property or value of the property. At the same time no evidence has also been led by the 1st appellant to prove that he had any separate income so as to acquire item No. 1 property. In the absence of evidence either way which party would succeed and which fail, is the question. The legal position is well settled as we will presently notice.'

Finally the Supreme Court concluded as follows:

'17. In view of the aforesaid discussion, the respondents having failed to discharge the initial burden of establishing that there was any nucleus in the form of any income whatsoever from item No. 2 property and no other nucleus was claimed, the burden remained on the respondents to establish that item No. 1 property was joint family property. In this view, the fact that the first appellant has not led any evidence to establish his separate income is of no consequence, for failure to lead evidence, the respondents claim of item No. 1 to be joint family property would fall as rightly held by the first appellate court.'

In that case, there were two items to be partitioned and one item was admittedly joint family property. The Supreme Court found that there is no evidence adduced to show that there was income from one of the items which could be used for acquiring the other items and in the absence of such evidence the claim of partition of the other item was found to be unsustainable.

10. In this case, Padmanabhan obtained only three items, as per Ext.A1 partition deed and out of them only item 10 having an extent of 12 cents was in direct possession at the time of partition and no evidence has been adduced by the plaintiffs to show that item 10 yielded any income to form a nucleus for subsequent acquisitions of other properties. As held by the Supreme Court, there is no

presumption of a joint family property. It is only in case where there is sufficient nucleus the income from which could be used for acquisition of other properties that a presumption could be raised and the burden shifted to the person who claims the property as self-acquisition. Therefore, the reasoning of the first appellate court that merely because Padmanabhan obtained joint family property, there is a presumption that all the subsequent acquisitions will enure to the benefit of the joint family is unsustainable and is only to be set aside. Though the learned senior counsel relied on various other decisions and passages from Mulla's Hindu Law, there is no necessity to refer to all of them as the question is now concluded by the decision of the Supreme Court which has referred to some of the decisions relied on by the learned senior counsel. After filing the plaint, the plaintiffs did not adduce any evidence to show that Padmanabhan had sufficient income from the joint family property to acquire other items. Padmanabhan died in 1963 and the suit is filed only in 1988 after 25 years of his death. Therefore, it was difficult for the defendants to adduce evidence with regard to other means of Padmanabhan to earn properties. If the plaintiffs wanted partition of properties which were dealt with as early as in 1960 by Padmanabhan as if they are not self acquired properties, they should have adduced some evidence in support of their claim.

11. The learned counsel for the respondents relied on the decision in Srinivas Krishnamo Kango v. Narayan Devji Kango and Ors. (AIR 1954 SC 379) and Mukund Singh v. Wazir Sing (1972) 4 SCC 178). He also contended that if nucleus is shown the burden shifts to the person claiming the property to be self acquired property to establish the same. The decision of the Supreme Court in Srinivas Krishnarao Kango's case (AIR 1954 SC 379) is referred to in the latest decision of the Supreme Court in D.S. Lakshmaiah's case (2003 AIR SCW 4347) and it is found that only if the plaintiff adduces sufficient evidence to show that there is a nucleus the income from which was sufficient to acquire other properties that a presumption can be raised that the subsequent acquisitions are also joint family properties. In the light of the above discussion, the questions of law formulated as questions 1, 2 and 6 are answered in favour of the appellants except in respect of items 4, 10 and 11 which were obtained by Padmanabhan as an ancestral property.

12. The only other contention raised in the memorandum of appeal is with regard to the plea of adverse possession and limitation. The trial court had no occasion to consider this issue because even otherwise the trial court found that the suit was liable to be dismissed. 'The appellate court has also not considered the plea of adverse possession and limitation. Before me also, there is no serious contention with regard to the plea of adverse possession and limitation as plaintiffs are also in occupation of one of the items scheduled in the plaint. The burden of proof with regard to the plea of adverse possession and limitation is entirely on the defendants to set up the same and in the absence of any conclusive evidence to show ouster of the other co-owners the plea of adverse possession and limitation cannot be accepted. There is no case of ouster pleaded or proved in this case. Therefore the plea of adverse possession cannot be entertained at this stage.

13. Since Padmanabhan died after the coming into force of the Hindu Succession Act, his legal heirs are also entitled to a share over the property obtained by him as a member of the joint family. The only other question that arises for consideration is the quantum of shares to which the plaintiffs are entitled in case partition is allowed. As I have found that three items are available for partition, the question of shares has to be decided. The appellate court found that the plaintiffs are entitled to 1/8 share in the plaint schedule properties. The plaintiffs have filed a cross-objection in this second appeal. It is contended in the cross-objection that plaintiffs 1 to 5 and 7th defendant are the children of Devaki. They are entitled to 1/8 shares and plaintiffs 7 to 10 are also entitled to 1/8 share. Similarly, the 6th plaintiff is entitled to 1/8 share and the judgment of the appellate court granting 1/8 share can go all to the entire plaintiffs is incorrect.

14. As per S.6 of the Hindu Succession Act, if a Hindu male dies having at the time of his death an interest in a Mitakshara co-parcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary provided that if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the co-parcenary property shall devolve by testamentary or intestate succession and the interest of the co-parcener shall be deemed to be the share in the property if a

partition of the property had taken place immediately before his death. If a partition had taken place immediately before the death of Padmanabhan there were only 3 sharers and Padmanabhan was entitled to 1/3 right in the three items. The 1/3 right of Padmanabhan has to be divided among his 4 children. Therefore, the 6th plaintiff is entitled to 1/12 share and defendants 2 to 5 as legal heirs of 1st defendant are entitled to 1/12 share. Plaintiffs 1 to 5 and 7th defendant altogether are entitled to 1/12 share and plaintiffs 7 to 10 are also entitled to 1/12 share.

In the result, the judgment and decree passed by the first appellate court are set aside and the suit is decreed in respect of items 4, 10 and 11 in the plaint schedule and plaintiffs 1 to 5 and 7th defendant together are entitled to 1/12 share. 6th plaintiff is entitled to 1/12 share and plaintiffs 7 to 10 are entitled to 1/12 share. In respect of the other items, the suit will stand dismissed. The plaintiffs are at liberty to apply for a final decree in terms of this preliminary decree. The second appeal and the cross-objection are allowed as stated above. Parties shall bear their costs in this appeal.