

Devidas and Others

Vs

Shrishailappa and Others

Civil Appeal No. 112 of 1957

(J. C. Shah, M. Hidayatullah, J. L. Kapur JJ)

21.02.1961

JUDGMENT

SHAH J. -

The genealogy which sets out the relationship between some of the principal parties in this litigation is as follows :

Mallappa | ----- ||| |Balappa Shivappa
Basavanappa Chanamalappa ||| | ----- | Basalingappa Balappa |||
(ParvatewaRachappa Basalingappa | respdt. 12)deft. 9 (adopted by ||| Basavanappa) |
-----Chanamalappa ||| | Shrishailappa Shivappa | (plaintiff 1) (plaintiff
2) |-----||| |Mallappa
Chanabasappa Balappa Basavanappa Shrishailappa(deft. 5) (deft. 6) (adopted by
(deft. 7) (deft. 8) Chanamalappa)##

Mallappa had four sons Balappa, Shivappa, Basavanappa and Chanamalappa. These four sons formed a joint Hindu family. Chanamalappa separated himself from the joint family sometimes in the year 1909 and his other three brothers continued to remain joint. Shivappa was the Managers of the joint family after the death of Mallappa. Shivappa died in 1928 and Rachappa became the Manager of the family. The joint family possessed lands in seventeen villages and many houses in Khanapur. The family had also an extensive money-lending business. On Bashettappa Neeli - hereinafter referred to as Bashettappa - was married to the sister of Rachappa. On July 29, 1929, Bashettappa executed a deed of simple mortgage in favour of Rachappa in respect of certain parcels of lands and houses belonging to him to secure repayment of Rs. 1,73,000/-, Rs. 76,700/- out of which were received in cash and the balance represented amounts which Rachappa agreed to pay to Bashettappa's creditors. To one Gurappa, Bashettappa owed Rs. 8,000/- as an unsecured debt and Rachappa agreed to pay that debt. In Insolvency Application No. 22 of 1929 of the file of the First Class Subordinate Judge, Dharwar, Bashettappa was adjudicated as insolvent and receivers were appointed by the Insolvency Court to administer his estate. The receivers applied for a declaration that the mortgage deed in favour of Rachappa was in fraud of creditors and was accordingly void. The Assistant Judge, Dharwar, in Appeal No. 25 of 1934 from the order of the Insolvency Court held that Rachappa was entitled out of the mortgage amount to recover Rs. 45,700/- as a secured debt and Rs. 31,000/- as unsecured debt. Gurappa - creditor of Bashettappa - in the meanwhile filed Suit No. 84 of 1932 against Rachappa and other members of his family in the court of the First Class Subordinate Judge, Dharwar, for a decree for Rs. 8,000/- claiming that Rachappa had, acting on behalf of the joint family of which he was the manager, undertaken under the deed of mortgage to pay that amount and that he - Gurappa - had accepted that undertaking. A decree ex parte was

passed in that suit against Rachappa on February 28, 1933, and the claim against the other members of the family was either withdrawn or rejected. On July 23, 1939, the three branches of the joint family by mutual agreement severed the joint status and properties movable and immovables belonging to the family were divided. Pursuant to this division, lands and houses which fell to the shares of the three branches were mutated in the Revenue and Municipal records in the names of the managers of the respective branches. Movables were also divided. The mortgage amount recoverable from Bashettappa and a claim against one Desai were, it is the case of the plaintiff in the suit out of which this appeal arises, kept joint, Gurappa after making certain infructuous attempts to execute the decree filed dharkhast No. 176 of 1940 to recover Rs. 11,061-6-9 and prayed for an order of attachment and sale of the rights of Rachappa under the mortgage bond dated July 29, 1929. One Ganpatrao N. Madiman - hereinafter referred to as Madiman - offered the highest bid at the court auction and the mortgage bond was sold to him for Rs. 20,000/-. An application filed by Rachappa for setting aside the sale pleading that the sale was vitiated by material irregularities and fraud in publishing and conducting the sale was rejected.

The mortgage bond was delivered by the executing court to Madiman and orders were issued against Bashettappa and the receivers of his estate prohibiting them from making payments of the dues under the mortgage or any interest thereon to any person or persons except the purchaser Madiman. In Miscellaneous Application No. 57 of 1944, Madiman applied to the Insolvency Court to be recognised as an unsecured creditor for Rs. 31,000/-, and the application was granted on the footing that the entire interest under the mortgage bond was purchased by him. Receivers appointed by the Insolvency Court thereafter put up for sale the equity of redemption in the mortgaged properties and same was purchased for Rs. 15,500/- by Madiman. The sale deed in this behalf was executed by the receivers in favour of Madiman on January 28, 1947. Madiman accordingly became the owner of the equity of redemption and claimed to be entitled to the entire mortgagee right as a purchaser of the right, title and interest of Rachappa.

Basalingappa who was the natural brother of Rachappa and was adopted by his uncle Basavanappa died in 1946 leaving him surviving his widow Parvatewa and two sons Shrishailappa and Shivappa. The sons of Basalingappa who will hereinafter be referred to as the plaintiffs filed Suit No. 253 of 1947 for a decree for Rs. 1,23,400/- by enforcing the mortgage deed executed by Bashettappa claiming that Madiman had at the court auction acquired in the mortgagee right only the right, title and interest of Rachappa which was a third and the plaintiffs and defendants 5 to 8 sons of Shivappa continued to remain owners of the remaining two-third share. The plaintiffs prayed for a decree that the amount due under the mortgage be awarded to them and in default of payment the amount be realised by sale of mortgaged property. To this suit were impleaded Bashettappa as defendant No. 1, receivers of his estate as defendants Nos. 2 and 3, Madiman as defendant No. 4, sons of Shivappa as defendants Nos. 5 to 8 and Rachappa and his son as defendants Nos. 9 and 10. Madiman died after the institution of this suit and his sons were impleaded as defendants Nos. 4A to 4C and his widow as defendant 4D. Madiman's sons were the principal contesting defendants and the main contentions raised by them were : (1) that the mortgagee right was the separate property of Rachappa and it did not belong at any time to the joint family of Rachappa defendants 5 to 8 and the plaintiffs, (2) that in any event, at the partition between the three branches the mortgagee right had fallen to the share of Rachappa and that it was not kept undivided as alleged by the plaintiffs, and (3) that in Executive Petition No. 176 of 1940, the entire interest of the joint family was sold and it was purchased by Madiman and consequently, the plaintiffs could not enforce the mortgage.

The trial court negated the contentions raised by the sons of Madiman and held that only a third share in the mortgagee right was purchased at the court action by Madiman. The court accordingly

passed a decree against defendants Nos. 4A to 4D for payment of Rs. 60,933-5-4 and proportionate costs with future interest at 6% per annum on Rs. 30,466-10-8 from the date of the suit to the plaintiffs and defendants 5 to 8 within six months and in default of payment for sale of the mortgaged property. Against that decree, defendants 4A to 4C - hereinafter referred to as the appellants - appealed to the High Court at Bombay. The High Court held that the mortgagee right belonged to the joint family, that the agreement to pay Rs. 8,000/- to Gurappa was not binding upon that family and therefore in execution of the decree passed in favour of Gurappa only the right, title and interest of Rachappa was purchased by Madiman. The High Court further held that there was in 1939 severance of joint family status between the members of the family of Rachappa, plaintiffs and others, but as in the state of the record in the view of the court a finding on the question whether mortgage debt was kept undivided could not be recorded, they remanded the case for recording a finding on the following issue :

"Whether it is proved that the mortgage debt of 29th July, 1929, fell to the share of defendant No. 9 at the family partition of July, 1939," and

directed the trial court to allow both the parties to lead evidence upon this issue and to certify its findings thereon. The trial court recorded a negative finding on that issue. It held that the mortgage claim was kept undivided at the partition. The High Court confirmed this finding and dismissed the appeal filed by the appellants, subject to a slight modification as to the rate of interest awarded by the trial court. With special leave under Art. 136 of the Constitution, this appeal is preferred.

No serious argument was advanced before us on the plea that the amount due under the mortgage from Bashettappa was not the property of the joint family. At the material time when the mortgage deed was executed by Bashettappa, Rachappa was the manager of the joint family. In Suit No. 84 of 1932 filed by Gurappa it was alleged that Rachappa was the manager of the joint family consisting of himself and the branches of Shivappa and Basavanappa and that the mortgage transaction was for the benefit of the joint family and that Rachappa had entered into that transaction for and on behalf of the joint family, and in that suit Rachappa alone was declared liable to pay Rs. 8,000/-. Partition of the year 1939 is supported by evidence which has remained unchallenged. Intimation was given to the village and Municipal authorities pursuant to the partition for mutating the names of the different branches to whom the shares were allotted. The evidence of Rachappa and Mallappa that the partition took place also has remained uncontradicted.

The question which calls for consideration is whether at the partition, the mortgagee right under the deed executed by Bashettappa was kept undivided. Mallappa defendant No. 5 in his evidence when he was examined after remand stated that "an equal division was made of the lands according to the income and that Rachappa was not given a smaller share in the lands." He also stated that the houses were divided in equal shares and the outstandings in the money-lending business except two bonds - the mortgage bond executed by Bashettappa and one Desai - were kept undivided. He denied the suggestion that the mortgage debt due from Bashettappa was allotted exclusively to Rachappa. Rachappa in his evidence also stated that the mortgage bond was kept undivided between the three branches and that it was not true that it was allotted to his share at the partition. Devidas - defendant No. 4A - had evidently no personal knowledge about this partition or the terms thereof. His statement that Rachappa had told him at the time when Madiman offered his bid at the court auction that the mortgage bond was allotted exclusively to Rachappa's share could not in the circumstances of the case be true and was rightly disbelieved by the trial court and the High Court.

On an analysis of the various entries on the record of rights relating to the lands held by the three

branches, the trial Judge held that the plaintiffs' father had received at the partition lands admeasuring 203 acres 18 gunthas assessed at Rs. 233-1-0, defendants 5 to 8 had received 127 acres 29 gunthas of lands assessed at Rs. 262-6-0 and Rachappa had received 122 acres 18 gunthas of lands assessed at Rs. 232-6-0 "in addition to a number of lands whose areas and assessment were not known". In the view of the trial court, this supported the plea that the partition of lands was not unequal. It appears from entries in the record of rights that Rachappa received at the partition lands producing annually 86 bags of paddy, defendants 5 to 8 received lands producing 92 bags of paddy and Basalingappa received for his share lands producing 89 bags of paddy. It also appears from the village Panchayat extracts that the family was possessed in 1938-39, of 30 houses which stood in Rachappa's name as manager and the total rental of those houses was Rs. 1,262/-. These 30 houses were also divided : 16 houses were allotted to defendants 5 to 8, 10 houses to Rachappa and 3 houses to the plaintiffs and this division was not shown to be unequal. According to the trial Judge, the movables were also equally divided. The view of the trial judge as to the equality of the division of the houses, lands, movables and outstandings was confirmed by the High Court. The High Court accordingly held agreeing with the trial Judge that the mortgagee right was left undivided. Prima facie, the question whether at a partition between members of a joint Hindu family certain property was left undivided is a question of fact depending upon appreciation of evidence. Before the trial court and the High Court there was evidence of defendants 5 and 9 corroborated by the division of the properties movable and immovable, indicating that the mortgage claim was left undivided and this court according to its settled practice regards that conclusion as binding. But counsel for the appellants submitted that to certain important circumstances which appeared from the evidence, due weight was not attached by the trial court and the High Court.

[Their Lordships then considered the arguments urged on behalf of the appellants and concluded.]

We would not be justified in an appeal with special leave in discarding that finding because some other evidence which could have been brought before the court in support thereof was not tendered.

It was also urged that once it is proved that there is a partition of the joint family, it must be presumed that all the properties are partitioned and whoever alleges that any property was kept undivided, the burden of proving that fact lies upon him, and reliance in support thereof was placed upon the decision of the Judicial Committee of the Privy Council in *Rajah Kishen Dutt Ram Panday v. Narendar Bahadoor Singh* [(1875) L.R. 3 I.A. 85]. But the case of the plaintiffs here is not that the members of the family remained joint qua the mortgagee right but that it was not allotted to any member of the family because it was the subject-matter of pending litigation. Qua that property also the three branches were divided and it was since the partition of their tenancy-in-common. It was the case of the plaintiffs that the property was not divided by metes and bounds, as it could not be, pending the settlement of the disputes.

After the case reached the High Court after remand, counsel for the appellants raised an argument about non-joinder of Parvatewa - step-mother of the plaintiffs. It was urged that the suit as framed was defective and was bound to fail. Parvatewa was undoubtedly interested in the mortgagee right and was not joined as a party to the suit. But no objection as to non-joinder was raised in the trial court. After the finding of the trial court was received, Parvatewa applied to be joined as a party respondent in the appeal and that application was granted by the High Court. Relying upon the application and the order passed by the High Court, counsel for the appellants urged that the suit filed by the plaintiffs was not properly constituted because all persons having an interest in the mortgage security were not joined as parties within the period of limitation prescribed for a suit to enforce the mortgage. The partition of 1939 was between three branches of Rachappa, Shivappa and

Basavanappa, and there is no evidence that the joint family status between members of these three branches inter se was severed. Plaintiff No. 1 was the manager of the branch of Basavanappa and when he filed the suit for enforcement of the mortgage, he must be deemed to have filed it as manager of that branch, and the allegations in the plaint especially in paragraph 4 make it abundantly clear that the suit was filed on behalf of the branch of Basavanappa. Plaintiff No. 1 therefore represented all the members of that branch having an interest in the property.

In *Guruvayya Gowda and Others v. Dattatraya Anant and Others* [(1904) I.L.R. 28 Bom. 11], it was held that the question of the right of a manager to sue in that capacity is one of authority. If the other co-sharers are adults and the right to insist on the other coparceners being brought on the record is for the benefit of the defendant to insure himself against further litigation and is therefore dependent on the objection being taken at an early stage, the objection on the score of want of authorisation being one of a character which it is clearly open to the defendant to waive. Parvatewa was in the suit as constituted not a necessary party. It is true that she was interested in the mortgage security and could have been joined as a proper party; but failure to join a person who is a proper but not a necessary party does not affect the maintainability of the suit nor does it invite the application of s. 22 of the Indian Limitation Act. The rule that a person who ought to have been joined as a plaintiff to the suit and is not made a party will entail dismissal of the suit, if the suit as regards him be barred by limitation when he is joined, has no application to non-joinder of proper parties. In *Guruvayya's case* [(1904) I.L.R. 28 Bom. 11] a suit to recover possession of a house was originally brought by two plaintiff, the second plaintiff being described as the manager of the family. At a late stage of the suit, defendants raised an objection that the other members of the family had not been joined. The trial court allowed the application filed by the other members to be joined as parties and decreed the suit; but the appellate court dismissed the suit holding that it was barred because of s. 22 of the Limitation Act. The High Court held that s. 22 of the Limitation Act does not in itself purport to determine directly whether the joinder of the parties after the institution of a suit in all cases necessarily involves the bar of limitation if the period prescribed for such a suit has then expired. Such a result must depend upon whether the joinder was necessary to enable the court to award such relief as may be given in the suit as framed. If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination of the date of the institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and will not attract the application of the general provisions of the Limitation Act.

Plaintiff No. 1 did not describe himself as a manager in the plaint; but failure to so describe himself is not decisive of the question whether the suit was instituted by him in his capacity as a manager. It must depend upon the circumstances of each case whether the suit was instituted by the manager in his personal capacity or as representing the family. In paragraph 4 of the plaint, it was averred by the plaintiffs that in the consideration for the mortgage, they had a third share, that defendants 5 to 8 had a third share and defendants 9 and 10 had the remaining share. These averments clearly indicate that according to the plaintiffs there was no division between the members of each of the individual branches and that the shares of the branches collectively were determined. Plaintiff No. 1 was the only adult member in his branch and he must be presumed to be the manager. The suit in these circumstances must be regarded as instituted by plaintiff No. 1 in his capacity as manager and he must be deemed to represent all the members of his branch of the family, males as well as females. Addition to the suit of any member of the branch to which the plaintiffs belonged would only mean setting out the name of such a person *eo nomine*.

All the objections raised by the appellants therefore fail and the appeal is dismissed with costs.

Appeal dismissed.

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