Mudi Gowda Gowdappa Sankh

Vs

Ram Chandra Ravagowda Sankh

Civil Appeal No. 399 of 1966

(J.C. Shah, A.N. Grover, V. Ramaswami - I JJ)

07.01.1969

JUDGMENT

RAMASWAMI, J. -

1. This appeal is brought by special leave from the judgment of the Bombay High Court, dated 12th December, 1962, in First Appeal No. 436 of 1958 by which the High Court dismissed the appeal and allowed the cross-objections filed by the respondents in the said appeal.

2. The relationship of the parties will appear from the following pedigree :

Nenappa | ---------- | |Gowdappa = 1. Kashibai Apparaya = Sidgangawa II 2. Sidgangawa I (died on (wife of Apparaya (Widows of Gowdappa) 20-12-53) died during life time of Apparaya) | | ---------- ---------- | | | |Gangabai Nenappa II Nenappa II Revogowda Subhadrabai(widowed daughter (adopted in = Sidgangawa (daughterof Gowdappa) 1930 died III (wife of Apparaya)Appellant No. 5 in 1944 of Revogowda) Appellant | Respondent No. 3 | No. 2. Neelagangawa = Mudigowda | (daughter of (alleged to have | Nenappa II have been adopted Ramchandra (adopted to Appellant by Gowdappa in revogowda by Sidgangawa No. 2 1948; and became III) Respondent No. 1 the husband of since deceased. Neelaganawa) Appellant No.1##

3. Gowdappa had one daughter by name Gangabai, while Apparaya had three children (i) Nenappa II, (ii) Revagowda and (iii) Subhadrabai. In 1930 Nenappa II was given in adoption to Goudappa. He had two wives Kashibai and Sidgangawa. Revagowda married another Sidgangawa. In 1938 Revagowda was murdered. Thereafter Goudappa and Apparaya purported to effect a partition between themselves. At the time of the death of Nenappa I, six plots of lands belonged to the joint family. Five of these plots are survey Nos. 43, 59, 65, 66 and 69 measuring 137 acres and 15 gunthas and assessed at Rs. 126/12/- and are located in Borgi Khurd. The other plot survey No. 77 which was in Borgi Budruk measured 14 acres and 24 gunthas and was assessed at Rs. 16/14. The total area of the ancestral lands was, therefore, 151 acres and 27 gunthas assessed at Rs. 143/-. Between 1911 and 1940, 12 other pieces of lands in both these villages measuring 137 acres and 39 gunthas and assessed at Rs. 18/10/- were acquired in various names. After Nenappa II was murdered in 1944, both the brothers denied his adoption by Goudappa and purported to effect a partition on 28th April, 1944. After the partition deed was executed various alienations were made by the two brothers. On 25th September, 1944, by Ex. 161 Goudappa gifted Serial Nos. 61 and 62 of Borgi Budruk and Survey No. 45 of Borgi Khurd to defendant No. 4, Subhadrabai. By Ex. 162, dated 1st October, 1946, Goudappa made a gift of plot survey Nos. 62 and 63 of Borgi Khurd and Survey No. 11/3 of Borgi Budruk to defendant No. 3 who is the daughter of Nenappa II. On 20th April, 1948,

by Ex. 159 Apparaya sold survey Nos. 77 and 43 to defendant No. 3 for a sum of Rs. 5,000/-. On the same day by Ex. 160 Goudappa sold survey No. 79 for Rs. 1000/- to Apparaya. Again on 17th May, 1948, by Ex. 158 Goudappa made a gift of plot survey Nos. 59 and 60 of Borgi Khurd to defendant No. 3. By Ex. 117, dated 7th December, 1948, Goudappa by a Vardi transferred survey No. 66 of Borgi Khurd to defendant No. 6 his widowed daughter. On 15th December, 1948, Goudappa gave a portion of plot No. 96 to Sidgangawa, wife of Apparaya for maintenance. By Ex. 166, dated 25th may, 1950, Goudappa and defendant No. 1 together sold to defendant No. 5 portion of survey No. 23 for a sum of Rs. 3000/-. Finally on 19th November, 1953, Apparaya executed his last will which is Ex. 168 whereby he bequeathed survey No. 79 to defendant No. 4 and one house to his daughter, defendant No. 4. The plaintiff claimed to be the adopted son of Revagouda and brought the present suit on 10th June, 1954, challenging the partition deed as fraudulent. He alleged that it was intended to defeat the rights of the widows, that it was never acted upon and that the family continued to be joint. The defendants contested the suit on the ground that the partition deed Ex. 157 was a genuine transaction and was acted upon, that Apparaya and Goudappa became separate in status and managed their properties separately. The defendants supported all the alienations as being genuine and effective. The trial court came to the conclusion that the 12 pieces of lands which were acquired between 1911 and 1940 formed part of the joint family properties, that the partition deed, Ex. 157, was not intended to be acted upon but was executed to defeat the rights of the widows. The trial court held that none of the alienations except the sale deed, Ex. 159, executed by Apparaya in respect of survey plots Nos. 43 and 77 in favour of defendant No. 3 was binding on the plaintiff. The trial court accordingly made a decree for partition with appropriate directions. The defendants took the matter in appeal in the High Court. The plaintiff also filed a cross-objection with regard to the sales-deed, Ex. 159. By its judgment, dated 12th December, 1962, the High Court dismissed the appeal of the defendants and allowed the cross-objection of the plaintiff holding that the sale-deed, Ex. 159, regarding survey plots No. 43 and 77 was also not binding upon the plaintiff.

4. The first question to be considered in this appeal is whether the partition deed executed by Goudappa and Apparaya on 28th April, 1944, was a sham transaction and not intended to be effective. Both the trial court and the High Court have reached a concurrent finding after an elaborate examination of the evidence that the partition deed was not genuine, and that it was effected for an ulterior purpose in order to defeat the rights of the widows in the joint family. It is manifest that the finding of the lower courts upon this question is essentially a finding upon a question of fact, and in an appeal by special leave it is the normal practice of this court to accept such a concurrent finding of fact as correct. It was, however, contended by Mr. Sanghi that the finding of the lower courts is vitiated in law because there was no evidence in support of that finding. In our opinion, there is no justification for this argument. In the partition deed it is recited that the lands were partitioned with the help of Panchas but the names of Panchas are not mentioned in the document and none of the Panchas has signed it. As to the division of the properties, Goudappa has been given 101 acres and 39 gunthas while Apparaya has been given 50 acres and 10 gunthas only. The total assessment of lands given to Goudappa is Rs. 82/3/- while the assessment of the lands given to Apparaya is Rs. 61/7/-. There appears to be no division of the house at all, since nothing is mentioned in the partition deed about the house. The unequal division of the lands in the so called partition deed is a strong circumstance which indicates that the transaction was not genuine. It should also be noticed that at the time of the partition deed there were widows of two sons in the family, Nenappa the second and Revagouda. At about this time, after Nenappa's death, the adoption of Nenappa by Goudappa was denied. The scheme of the partition was, therefore, to deprive the two widows of any claim for maintenance out of the joint family properties but to limit

their rights to about 50 acres of land given to Apparaya. There is also evidence that after the partition deed, the two brothers continued to be in joint possession of the lands and they lived joint in the same house as before. It appears that the two brothers had a joint mess even after the date of partition. It was contended by Mr. Sanghi that there was no evidence that the two brothers continued to be in joint possession of the lands. But it is not possible to accept this argument as correct. On a perusal of the evidence it is apparent that P.Ws. 1 to 4 all supported the case of the joint possession of the two brothers and their evidence has been believed by both the lower courts. There is another circumstance which strongly lends support of the plaintiff's case on this point. It was one time supposed that the doctrine of Mitakshara law was that if the last surviving coparcener died and the property passed to his heir, such as a widow or a collateral, the power of the widow of a predeceased coparcener to adopt was at an end. (Chandra v. Gojarabai (ILR 14 Bom 463) and Adivi Suryaprakasarao v. Nidamarty Gangaraju. (ILR 33 Mad 228). The cases on on this point were considered in 1936 by the Full Bench of the Bombay High Court in Balu Sakharam Powar v. Lahoo Sambhaji Tetgura. (AIR 1937 Bom 279). It was held in that case that where a coparcenery exists at the date of the adoption the adopted son becomes a member of the coparcenary, and takes his share in the joint property, but where the partition takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her. But the decision of the Full Bench of the Bombay High Court was expressly overruled by the Judicial Committee in Anant v. Shankar. (AIR 1943 PC 196). It was held that the power of a Hindu widow does not come to an end on the death of the sole surviving coparcener. Neither does it depend upon the vesting or divesting of the estate, nor can the right to adopt be defeated by partition between the coparceners. The rights of the adopted son relate back to the date of the adoptive father's death and the adopted son must be deemed by a fiction of law to have been in existence as the son of the adoptive father at the time of the latter's death. If, therefore, there was a coparcenary in existence when the adoptive father died, then whether it came to an end by the death of the last surviving coparcener or by subsequent partition among the remaining members, an adoption validly made by the widow of the deceased coparcener would have the effect of divesting the estate in the hands of the heir to the last surviving coparcener in the first case and of putting an end to the partition in the second case and enabling the adopted son to claim a share in the family properties as if they were still joint. The decision of the Judicial Committee in Anant v. Shankar (AIR 1943 PC 196) was unexpected and revolutionary in character. It is likely that in view of the fluid and uncertain state of the law on this point the two brothers Goudappa and Apparaya decided to execute a bogus deed of partition in order to avoid any legal consequence which may follow if either of the widows should take a son in adoption. We are accordingly of the view that there is proper evidence to support the concurrent finding of the lower courts and there is no reason to disturb that finding.

5. It was also contended on behalf of the appellants that even though the partition deed was bogus there was in law a severence of joint family status and the family could not continue to be joint after 20th April, 1944, which was the date of the partition deed. In other words, the argument was that there was a declaration by the coparceners of their intention to separate and that the declaration was sufficient to put an end to the joint family status of the two brothers. In our opinion, there is no substance in this argument. It is now well established that an agreement between all the coparceners is not essential to the disruption of the joint family status, but a definite and unambiguous indication of intention by one member to separate himself from the family and to enjoy his share in severalty will amount in law to a division of status. It is immaterial in such a case whether the other members assent or not. Once the decision is unequivocally expressed, and clearly intimated to his co-sharers,

the right of the coparcener to obtain and possess the share to which he admittedly is entitled, is unimpeachable. But in order to operate as a severance of joint status, it is necessary that the expression of intention by the member separating himself from the joint family must be definite and unequivocal. If however the expression of intention is a mere pretence or a sham, there is in the eye of law no separation of the joint family status. See for instance the decision of the Judicial Committee in Merla Ramanna v. Chelikani Jagannadha Rao and Others. (AIR 1941 PC 18).

6. We pass on to consider the next question arising in this appeal, viz., whether the High Court was right in holding that the 12 pieces of lands were joint family properties and were not the self-acquisition of Goudappa. The case of the appellants was that these lands were self-acquisition of Goudappa, but the respondents contended that they were joint family properties. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance, upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. In Appallaswami v. Suryanarayanamurti, (ILR 1948 Mad 440) Sir John Beaumont observed as follows :

> "The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. See Babubhai Girdharlal v. Ujamlal Hargoyandas (ILR 1937 Bom 708); Venkataramayya v. Seshamma (ILR 1937 Mad 1012) and Vythianatha v. Varadaraja. (ILR 1938 Mad 696).
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> 7. In the present case, both the lower courts have found that there was an adequate nucleus of joint family properties from which the acquisitions could have been made. It is admitted that when Nenappa I died, the joint family was possessed of 151 acres and 27 gunthas of land assessed at Rs. 143/-. It is further admitted by defendant No. 1 that out of the four ancestral lands, one land was Bagayat land. Witnesses on behalf of the plaintiff assessed the income between Rs. 5,000/- to Rs. 6,000/- before the First World War. It is also conceded that the family had between 8 to 12 bullocks for the purposes of cultivation and most of the lands were cultivated personally by the family members. Between 1911 and 1940, 12 other pieces of lands measuring 137 acres and 39 gunthas assessed at Rs. 18/10/- were acquired in various names. The total price of the sale deeds is Rs. 4,800/- spread over a period of 30 years. In view of this evidence, we see no reason to differ from the finding of the lower courts that the income from the nucleus was more than sufficient for the purchase of the properties on the different dates. The respondents alleged that these properties belonged to the joint family, and unless it is shown by the appellants that Goudappa carried on any other business and that these properties were acquired out of that income, the appellants must fail.

The case of defendant No. 1 was that Goudappa made these acquisitions out of his business. D.W. 1, however did not state the nature of the business. In cross-examination he said that Goudappa was trading in cotton and this information he had got from Goudappa after his adoption. D.W. 1 was however unable to say with whom Goudappa had dealings in cotton. If Goudappa was doing cotton business it should not have been difficult for the defendants to have produced more direct evidence of persons with whom he had business dealings. The High Court had rejected the evidence of D.W. 3, Imamsaheb as worthless. It is manifest that there is no proof that Goudappa had any separate income of his own out of which he could have acquired the 12 pieces of land. The lower courts were, therefore, right in reaching the conclusion that the 12 pieces of lands belonged to joint family and that the plaintiff was entitled to a share thereof in the partition.

8. It was lastly contended on behalf of the appellants that in any case the High Court should have allowed the cross-objection of the respondents with regard to survey plots Nos. 43 and 77. Reference was made to paragraph 5 of the plaint in which there was no specific mention of the sale deed executed by Apparaya in favour of defendant No. 3 of survey plots Nos. 77 and 43. But Paragraph 4 should be read along with Paragraph 7 of the plaint in which the plaintiff challenged the alienations made in favour of the several parties to the suit and had claimed relief in respect of all the lands mentioned in the schedule to the plaint. Survey plots Nos. 77 and 43 are expressly mentioned in the schedule. It is, therefore, not possible to accept the contention of the appellants that the plaintiff had not challenged the sale deed, Ex. 167, with respect to survey plots Nos. 77 and 43. The High Court has pointed out that defendant No. 3 was a minor at the time of sale, that Goudappa had acted as her guardian and that defendant No. 3 had no property of her own. The High Court therefore rightly held that the sale must be held to be without consideration and not genuine and was, therefore, not binding on the plaintiff.

9. For these reasons we hold that the judgment of the Bombay High Court, dated 12th December, 1962, is correct and this appeal must be dismissed with costs.

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