SUPREME COURT OF INDIA

Thimmappa Rai

Vs.

Ramanna Rai

(S.B. Sinha and Markandey Katju JJ.)

09.05.2007

JUDGMENT

S.B. SINHA, J.

1. Defendant in the original suit is the appellant before us being aggrieved by and dissatisfied with the judgment and decree dated 4.3.1999 passed by the High Court of Karnataka at Bangalore in RFA No. 377 of 1992 affirming the judgment and decree dated 31.3.1992 in a suit for partition filed by the respondents herein passed by the Court of Civil Judge, Puttur, D. Kannada.

2. The relationship between the parties herein is not in dispute which would appear from the genealogical table given hereinafter.

Narayana Rai | | _____ | | | | | | | | | | | | | (Thimmappa Raielder son) (def.1- Appellant) (Aithappa Rai Younger son-since deceased (Subbayya Rai (son since deceased) = Sunanda) (wife) (defendant no.

4- respondent no. 4 (Ramanna Rai son) (plaintiff- respondent No. 1 (Padmavathi daughter) (Def. No. 2- Respondent No. 2 (Savithri (daughter) (deft. No. 3 respondent No. 3 3. Wife of Narayana Rai whose wife pre-deceased him.

4. Respondent herein filed a suit for partition in respect of the properties described in schedules "B", "C" and "D" of the plaint. The property described in schedule "B" of the plaint belonged to one Muddekatta Ramappa Gowda. The same had been taken on lease by Narayana Rai on 'chalageni' basis long back. Allegedly parties hereto were holding the same jointly with the said Narayana Rai. Improvements have allegedly been effected therein. The parties had been living together.

5. In or about 1960 a deed of lease was, however, executed in favour of the appellant. He was aged about 17 or 18 at that point of time. After coming into force of the Karnataka Land Reforms Act, 1961 he filed a suit for declaration that he had been cultivating the said leasehold property for and on behalf of all the heirs and legal representatives of Narayana Rai.

Occupancy right was granted in his favour by an Order dated 6.6.1979. A patta was also granted in his favour by the State of Karnataka on or about 21.12.1980. It is not in dispute that Aithappa died intestate without leaving any heir and his 1/5th share devolved on plaintiff and defendant Nos. 1 to 3 as well as defendant No. 4 (widow of Subbayya Rai).

6. So far as the "C" Schedule property is concerned, there is not much dispute in respect thereof. It

belonged to Aithappa. He applied for grant of sanction of the State therefor, which having been granted, the same was assigned in his name. It was the self acquired and thus, absolute property of Aithappa Rai. On his death, it devolved upon all his heirs.

7. Insofar as the properties described in Schedule "D" of the plaint, are concerned, Narayana Rai obtained the same in a partition by and between him and his sisters which took place on 8.8.1962. Thus, on his death the same devolved upon his children. It was furthermore the case of the first respondent that late Subbayya Rai relinquished his share and right in favour of the defendant No. 1 in terms of a registered deed dated 9.3.1978. In a similar manner, defendant No. 2 who inherited 1/5th share in the "D"

Schedule property exchanged his share with the plaintiff and defendant No.

1 under a deed of exchange dated 15.9.1976. The plaintiff, therefore, claimed 2/5th share in the said property.

8. The learned Trial Judge rejected the claim of the appellant holding that the settlement made in his favour by grant of occupancy right in the year 1974 enured to the benefit of all the heirs and legal representatives of Narayana Rai. Admission on the part of the appellant who examined himself as D.W. 1, according to the learned trial judge, established that it was Narayana Rai who had taken the said property on lease and only on his advice and at his instance the deed of lease was executed by the landlord in favour of the appellant. The said finding of the learned trial judge has been affirmed by the High Court.

9. Ms. Kiran Suri, the learned counsel appearing on behalf of the appellant, however, would draw our attention to the fact that grant of lease in favour of a tenant at the material time was governed by the provisions of the Madras Cultivating Tenants Protection Act, 1955 to contend that by reason thereof, the appellant alone became the lesser in respect of the property in suit as Section 4-B of the said Act provides for the mode and manner in which a deed of lease is to be executed, from a perusal whereof, it would appear that it was only the lessee named in the said deed would retain with him a copy of the deed of lease towards the point at to show that each such demise must be held to be made in favour of the tenant.

10. It was urged that upon coming into force of the Karnataka Land Reforms Act, 1961 the tenants were required to file declaration and as the Land Tribunal has the exclusive jurisdiction to determine the question as to whether the lease in terms of 1955 Act had been granted in favour of the appellant for the benefit of the entire joint family or not, even could not have been determined by the Civil Court. The learned counsel would submit that occupancy right could not have been granted in favour of Narayana Rai although he might have been the original lessee. Ms. Suri submitted that the parties admittedly are governed under Aliyasanthana Customary Law and not under the Mitakshara School of Hindu Law and in that view of the matter, the concept of joint family property as is ordinarily understood could have been applied for determination of the issues involved in the suit. The learned Trial Judge as also the High Court, therefore, have committed a serious error in passing a decree for partition in respect of Schedule (B) property.

11. Findings of the courts below, so far as Schedule (C) property is concerned, is not in issue. A finding of fact has been arrived at that same belonged to Aithappa and thus it devolved upon all the parties in equal shares. The said finding cannot be disturbed.

12. Finding of the courts below in respect of Schedule (D) appears to be that although same was the exclusive property of Narayana Rai and thus on his death the same devolved upon his heirs and legal representatives in equal shares. As the appellant herein was held to be in cultivating possession of the Schedule (B) property, the amount of consideration paid to Subbayya Rai for the purpose of obtaining relinquishment of his share was held to have been met from the joint family fund.

13. Madras Cultivating Tenants Protection Act, 1955 was enacted for protection from eviction of cultivating tenant in certain areas in the then State of Madras. Cultivating Tenant has been defined in Section 2(a) of the said Act to mean;

2 (a) "Cultivating tenant" in relation to any land means a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied; and includes (i) any such person who continues in possession of the land after the determination of the tenancy agreement, and (ii) the heirs of such person, but does not include a mere intermediary or his heirs."

14. Thus, inter alia a person, who thus, carries on personal cultivation of said land under a tenancy agreement expressed or implied, including one who continues in land after determination of the tenancy agreement in terms of the provisions of the Act, would be a cultivating tenant under the said Act and a landlord is prohibited from evicting him whether in execution of a decree or an order of a court or otherwise.

15. The properties described in Schedule (B) of the plaint was, thus, subject matter of mortgage. Narayana Rai allegedly had become weak and was not in a position to cultivate the lands personally. The cultivation work, therefore, was entrusted to and carried on by his eldest son, the appellant herein. He however, on his own showing, was cultivating the said lands not only on his own behalf, but also on behalf of his brothers and sisters.

Section 4-B of 1955 Act to which our attention was drawn by Ms. Suri provides for the mode and manner in which a deed of lease is required to be executed. The said Act, however, does not contain any prohibition from obtaining a lease by the cultivating tenant for and on behalf of other members of family.

16. In absence of any public policy having been laid down under the statute, we are of the opinion that the said Act cannot be construed to provide of exclusive title only upon the lessee named in the deed of lease irrespective of the fact as to whether he himself was a cultivating tenant or had been continuing in the cultivating possession on behalf of all members of his family.

17. Karnataka Land Reforms Act came into force in 1961. Joint family has been defined in Section 17 therein to mean not only an undivided Hindu family in the case of persons governed by Hindu Law but also a group or a unit, the members by which are by custom joint in estate or residence. A finding of fact has been arrived at by the learned Trial Judge that the parties herein as also the said Narayana Rai had been in joint possession of the properties and were having a joint residence at all material times.

18. Section 4 of the 1961 Act provides that a person lawfully cultivating any land belonging to another person shall be deemed to be a tenant, if such land is cultivated personally by the owner.

19. We have noticed hereinbefore that upon constitution of the Land Tribunal, a declaration was filed by the appellant himself categorically admitting and acknowledging his possession to be for and on behalf of all the members of the family. There was no lis pending before the Land Tribunal

on the said issue and the Court was not required to enter into the question as to whether the said properties belong to the parties hereto jointly or the appellant herein exclusively. It is on the basis of the said declaration and keeping in view the fact that lease had been granted in favour of the appellant herein, it was declared to be an occupancy right in terms of Section 45 and Section 48A of the said Act. Form No. 7 to which our attention has been drawn does not militate against the contention of the plaintiff that such a declaration on the part of the appellant is not impermissible in law.

20. A certificate of registration granted in favour of a tenant as an occupant under Section 55(1) of the Karnataka Land Reforms Act, 1961 and Rule 21 of the Karnataka Land Reform Rules, 1974 as specified in form 10 also is not of much significance. Submission of Ms. Suri that the Civil Courts have no jurisdiction in this behalf cannot be accepted. It may be true that in terms of Section 48A of the 1961 Act, the Tribunal has jurisdiction to go into all questions of tenancy, grant or refusal of occupancy right and rival claims in respect of their leasehold right, but this would not mean that although there had been no determination as such by the learned Tribunal and parties proceeded on the basis of the admission made by the appellant himself that the Schedule (B) Properties were jointly possessed by the parties, a suit for partition would not be maintainable.

21. Strong reliance has been placed by Ms. Suri on a full bench decision of the Karnataka High Court in Booda Poojary v Thomu Poojarthy reported in ILR 1992 Kar. 1359, wherein it was held;

"... The legal position that emerges is, while deciding the rights of rival claimants, if it becomes necessary to decide questions incidental and or ancillary to the main question to be decided, the main question being who is entitled to be registered as an occupant, the Tribunal has to necessarily examine the question as to whether the applicant is a tenant or not and without deciding such question it cannot effectively discharge its duty of disposing of the applications filed under Section 48A of the Act. The grant of occupancy rights by the Tribunal to an individual in respect of joint family tenanted lands will not have the effect of converting that into a separate property of that individual nor the occupancy rights granted in respect of personal tenancy of that individual would acquire a different character."

22. The said decision therefore does not assist the appellant.

23. On the other hand in Veerabhadrappam & Ors. v Virupaxappa Totappa Bilebal [ILR 1998 Kar. 2508], it was categorically held;

"6. This Court has already taken the view that once the tenancy is granted even to one member of the family, it is for the benefit of the family. In this case, admittedly, it is the joint tenancy. The Tribunal has declared that it is a joint tenancy or in the eye of law it is a joint tenancy, even if it is given to one of the members. In my opinion, it is only an acquisition of the property by two members of the joint family, and certainly the Civil Court has jurisdiction to decide the same is the view expressed by me in SRI RUDRAYYA vs BASAYYA AND OTHERS."

24. We have noticed hereinbefore the definition of a joint family. It is not correct to contend that the courts below wrongly proceeded on the basis that the parties are governed by the Mitakshara School of Hindu Law. A joint family, as its definition show, may consist a group of persons, and, thus, they need not be joint tenants. They may be tenants in common but still then if they are in joint possession of a property, the same would vest in all of them, although certificate may be granted in favour of only one.

25. An admission made by a party to the suit in an earlier proceedings is admissible as against him. Such an admission being a relevant fact, the courts below in our opinion were entitled to take notice thereof for arriving at a decision relying on or on the basis thereof together with other materials brought on records by the parties. Once a party to the suit makes an admission, the same can be taken in aid, for determination of the issue having regard to the provisions of Section 58 of the Indian Evidence Act.

26. In this view of the matter, the findings of the learned Trial Judge as affirmed by the High Court, in our opinion, could not be held to be bad in law only because the parties are not governed by the Mitakshara School of Hindu Law.

27. We may, furthermore, notice that in a case involving 'Shet Sanadi' land despite Karnataka Village Offices Abolition Act, 1961, it was held that re-grant in the name of the eldest son would not take away the right of the junior member of the family who has interest in village office to seek partition and for possession of his share therein. [See Mohamadsa & Others v Allisa & Others , 1988 (2) KLT 89].

28. To the same effect, a division bench of this Court in Balawwa and Another v Hasanabi and Others [(2000) 9 SCC 272], wherein the law was stated in the following terms;

"7. Having examined the provisions of the Karnataka Land Reforms Act and the aforesaid two judgments of this Court, we have no doubt in our mind that the civil court cannot be said to be ousted of the jurisdiction, in granting the relief sought for. It is too well settled that when a Special Tribunal is created under a special statute and the jurisdiction of the civil court is sought to be ousted under the said statute, it is only in respect of those reliefs which could be granted by the Special Tribunal under the special statute, the jurisdiction of the civil court cannot be said to be ousted.

8. Looking at the provisions of Section 48-A of the Karnataka Land Reforms Act and the relief which is sought for in the present case, it is difficult to hold that the Tribunal had the jurisdiction to grant the said relief so as to oust the jurisdiction of the civil court. Under Section 48-A, the Tribunal can only grant the relief of declaring the occupancy right in favour of an applicant provided the preconditions for the same are satisfied, namely, that the land was in the possession of the tenant concerned on the relevant date. That being the position and the Tribunal under the Land Reforms Act not having the jurisdiction to grant relief of partition, the civil court itself has the jurisdiction to entertain the suit for partition.

The first contention of the learned counsel for the appellants is, therefore, devoid of any force."

29. Reliance, however, has been placed by Ms. Suri on Mudakappa v Rudrappa and Ors.[(1994) 2 SCC 57]. The said decision has been noticed in Balawwa (supra). In Mudakappa (supra) itself it was held that such a question can be gone into by the Tribunal. It was no doubt opined that civil court's jurisdiction under Section 99, Code of Civil Procedure by necessary implication stood ousted, but, apart from the fact that it was rendered in a case where the decision of the Land Tribunal was in question but in this case the tribunal had proceeded to grant certificate of occupancy right having regard to the declarations made by all the members of the family, the suit for partition in our opinion was maintainable. Furthermore, the question as to whether the Civil Court had jurisdiction or not was not in issue in the suit.

Such a contention has also not been raised before the High Court.

30. We, therefore, are of the opinion that the finding of the courts below in respect of Schedule (B) properties cannot be interfered with.

31. Sofar as Schedule (D) properties are concerned, we are, however, of the opinion that the learned Trial Judge was not correct in arriving at the conclusion that only because the appellant herein was in possession of the Schedule (B) properties on behalf of other co-owners, the same would itself give rise to a presumption that the amount of consideration paid for acquisition thereof, was not from the joint family fund. There being absence of any 'joint family' governed by the School of Hindu Law, there could not have existed any joint fund, which conceptualizes existence of a nucleus. The parties were tenants in common. They had definite share in the properties in suit. Only because they were residing together or possessing some cultivating lands jointly, the same by itself would not give rise to a presumption that there existed a joint family fund having a joint nucleus.

32. It was, for the plaintiff to specifically plead and prove the same. There is neither any pleading in that behalf, far less any proof. A presumption has been raised by the learned Trial Judge wherefor there existed no legal basis.

The finding of the learned Trial Judge or the High Court in this behalf, therefore, cannot be upheld.

33. For the foregoing reasons, the appeal is allowed in part namely in respect of the properties described in Schedule (D) of the plaint to the effect that the appellant herein was also be entitled to 1/5 share of the Subbayya Rai as also property obtained by him and the first defendant herein jointly from one of the sisters.

34. The judgments of the Trial Court as also the High Court in respect of the properties described in Schedule (B) and (C) of the plaint are affirmed.

However, in respect of Schedule "D" property, it is set aside. Appeal is allowed in part. In view of the facts and circumstances of the case, the parties shall pay and bear their own costs.