SUPREME COURT OF INDIA

U.R. Virupakshaiah

Vs.

Sarvamma

C.A.No.7346 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

17.12.2008

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Whether the High Court, while exercising its jurisdiction under Section 100 of the Code of Civil Procedure, could, while dictating the judgment, frame an additional question of law and allow the same without even referring to the questions of law formulated at the time of admission thereof, arises for consideration herein.

3. Before, however, adverting to the said question, we may notice the factual matrix involved in the matter. One Nanjappa was the owner of the property. The admitted genealogical table of the family is as under: Nanjappa (Propositus)

4. Virupakashappa filed a suit for partition claiming share in Survey No.197/2 measuring 11 acres 22 guntas, Survey No.203/3 measuring 3.2 Channapasappa Mallappa Revanna acres, Survey No.203/6 measuring 2 acres 21 guntas and a house property situated at Chikkathotulkere, Tumkur Taluk, District Tumkur in the year 1996. Defendants-Respondents, inter alia, in their written statements denied

Revanns Siddappa (Dead)	Chikkasiddappa Shetty (Dead)	Dead and unmarried and issueless

and disputed the said genealogical table. It is profitable to refer thereto : "It is false to state that land bearing survey No.197/3 measures 11-22 guntas, schedule T.C. Nanjappa properties are not appropriate with the existing Virupakashappa (Original Defendant- one. The plaintiff with a mala fide intention filed Plaintiff/Petitioner Dead this suit. Plaintiff has not got any kind of blood relationship with the defendants. The defendant's grand father was enjoying the properties since long days back in the year 1946 when the grand father Sarvamangalarevenue entries were changed was died the Kathayni into (Widow) (D.1)(a)/ defendant's father's

name, D.1(b)/Present since 1956 the defendant Respondent Present is enjoying the Respondent No.2 entire schedule properties No.1 together with other properties as the absolute owner with title and possession. The defendant has sold piece of land for family maintenance. He has improved the said lands and he raised coconut trees with water supply some time he has raised loans by mortgaging the schedule properties. Plaintiff is utter stranger and he has no relationship with this defendant. He has filed this suit to gain by an unlawful way."

> "It was furthermore contended that revenue entries throughout stood in the name of the father of the defendant and they have been exercising ownership rights over the lands in suit since time immemorial."

5. The learned Trial Judge, in view of the abovenoted rival contentions of the parties, inter alia, framed the following issues:

> "1. Whether the plaintiff proves that the suit schedule properties are the ancestral and joint family properties of the plaintiff and defendants and they are in joint possession of the same?
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> 2. Whether the plaintiff further proves that the defendant has unlawfully got the revenue entries of the suit schedule property to his own name, with ulterior motive and refused to allot the half share to the plaintiff in the suit schedule property?
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> 3. Whether the plaintiff further proves that he is entitled for half share in the suit schedule property and mesne profits?"
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> Parties not only adduced oral evidence before the learned Trial Judge but placed on record a large number of documents to prove their respective cases. Before the learned Trial Judge a Deed of Mortgage purported to have been executed by Chennapasappa and Revenna was brought on record to show that they had been entering into separate transactions in regard to portions of the purported joint family property. The learned Trial Judge opined that the plaintiff is entitled to a decree for partition against the defendants except the property mortgaged by his father to one Krishnappa. It was held that there was no evidence regarding any further transaction."

6. An appeal preferred thereagainst by the respondent was dismissed holding that the plaintiff was not able to prove that the properties in suit continued to be the joint family property.

7. A second appeal was preferred thereagainst by the respondent. Two substantial questions of law were framed at the time of admission of the appeal:

> "1. Whether the Courts below were justified in holding that the recital in the mortgage deed Ex.D1 which is one of the year 1922 which came into existence at an undisputed point of time, do not establish the partition between Channabasappa, Mallappa and Revenna, sons of Nanjappa?

2. Whether the First Appellate Court was justified in rejecting the application filed under Order 41 Rule 27 and also application for amendment of written statement setting up the plea of prior partition?" However, the High Court, after hearing the counsel for the parties and at the time of dictating a judgment, sought to frame a new question of law which reads as under :

"Whether the Courts below are justified in holding that there exists a joint family and the suit schedule properties are joint family properties in the light of the admitted fact that the plaintiff and defendant belonged to 4th generation and the plaintiff has admitted in categorical terms in his evidence that there was a partition in the family 80 years back and in the absence of any material placed by the plaintiff to show either the existence of the joint family or that the schedule properties are joint family properties.?"

8. So as to enable the appellant herein to make submissions on the said additional substantial question of law, an opportunity was sought to be granted. Appellant sought for eight days' time which, having been found to be unreasonable, was declined. The learned Judge proceeded with the judgment and allowed the respondent's appeal.

9. Mr. S.B. Sanyal, learned senior counsel appearing on behalf of the appellant, urged:

"1. The additional substantial question of law having been framed during the course of the judgment without recording reasons, therefore, must be held to be impermissible in law and as no reasonable opportunity was given to the appellant to show that no such question of law arose for consideration before the High Court, the impugned judgment cannot be sustained.

2. A new issue and/or point cannot be allowed to be urged for the first time before the High Court, particularly when, by reason thereof, it would be entering into the forbidden arena of appreciation of evidence for the purpose of reversal of the concurrent findings of fact arrived at by two courts.

3. The question as to whether there had been a previous partition or not being a pure question of fact, the High Court could not have entered into evidences adduced by the parties to hold that the predecessors, in interest of the parties, had partitioned the properties.

4. The High Court proceeded to determine the issue as regards jointness of the property on a wrong premise that the parties belong to fourth generation of the properties."

10. Mr. G.V. Chandrasekhar, learned counsel appearing on behalf of the respondent, on the other hand, would contend that the learned Trial Judge as also the First Appellate Court having not taken into consideration the vital admission of the plaintiff as regards previous

partition as also other evidences brought on record which clearly show that the parties had been in separate possession for a long time, the impugned judgment should not be interfered with.

11. It is well settled that the presumption in regard to existence of joint family gets weaker and weaker from descendant to descendant and such weak presumption can be rebutted by adduction of slight evidence of separate possession of the properties in which even the burden would shift to the plaintiff to prove that the family was a joint family. The High Court's jurisdiction to interfere with a finding of fact may not be limited in a case of this nature where the finding of fact had been arrived at upon taking into consideration inadmissible evidence and based on presumptions which could not have been raised.

12. The Code of Civil Procedure was amended in the year 1976 by reason of *Code of Civil Procedure (Amendment) Act, 1976*. In terms of the said amendment, it is now essential for the High Court to formulate a substantial question of law. The judgments of the Trial Court and the First Appellate Court can be interfered with only upon formulation of a substantial question of law, if any, which has arisen for its consideration by the High Court. It, furthermore, should not ordinarily frame a substantial question of law at a subsequent stage without assigning any reason therefor and without giving a reasonable opportunity of hearing to the respondents. {See *Nune Prasad & Ors. v. Nune Ramakrishna*[1]; *Panchugopal Barua & Ors. v. Umesh Chandra Goswami & Ors.*[2] *paras 8 and 9]; and Kshitish Chandra Purkait v. Santosh Kumar Purkait & Ors.*[3] paras 10 and 12]}.

13. The High Court, in this case, however, formulated a substantial question of law while dictating the judgment in open court. Before such a substantial question of law could be formulated, the parties should have been put to notice. They should have been given an opportunity to meet the same. Although the court has the requisite jurisdiction to formulate a substantial question of law at a subsequent stage which was not formulated at the time of admission of the second appeal but the requirements laid down in the proviso appended to Section 100 of the Code of Civil Procedures were required to be met. The High Court did not record any reason for formulating the additional question. The prayer of the appellant to grant some time to deal with the said question was declined. The High Court failed to take into consideration the fact that by framing the additional substantial question of law, a new case is sought to be made out.

14. Principal contention raised on behalf of the defendant-respondent, in their written statement, as noticed hereinbefore, was non-existence of any relationship between the parties. We, however, do not mean to suggest that defendants cannot raise inconsistent pleas but the same should have been kept in mind by the High Court. It might or might not have been possible for the High Court to consider the question of law raised on the basis of the facts found by the courts below, but, indisputably, the High Court without recording sufficient reasons, could not allow the appellant to raise absolutely a new contention which was beyond the pleadings of the parties.

15. The High Court furthermore proceeded on the presumption that the plaintiff and the defendants belong to the fourth generation of Nanjappa. In holding so, the High Court wrongly included the propositors as the first generation. The plaintiff and the defendants were the third generation of the propositors.

> In Mulla's Hindu Law (17th Edn) Article 212(2), 213, it is stated :
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> "' 212. Joint Hindu family - (1) ... (2) The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily joint not only in estate but also in food and worship. The existence ofjoint estate is not an essential requisite to constitute a joint family and a family, which does not own any property, may nevertheless be joint. Where there is joint estates, and the members of the family become separate in estate, the family ceases to be joint. Mere severance in food and worship does not operate as a separation. Possession of joint family property is not a necessary requisite for the constitution of a joint Hindu family. Hindus get a joint family status by birth, and the joint family property is only an adjunct of the joint family."
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> ' 213. Hindu coparcenary - A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons, grandsons and great-grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent. See ' 217. The above propositions must be read in the light of what has been stated in the note at the top of this chapter. To understand the formation of a coparcenary, it is important to note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father or father's fathers' father, is ancestral property. Property inherited by him from other relations is his separate property. The essential feature of ancestral property is that if the person inheriting it has sons, grandsons or great-grandsons, they become joint owner's coparceners with him. They become entitled to it due to their birth. These propositions also must be read in the light of what has been stated in the note at the top of this chapter."

16. The premise on which, therefore, the High Court reversed the judgment of the courts below was non-existent. Mr. Chandrasekhar may be right in his submission that the presumption with regard to the existence of joint family gets weaker and weaker from descendant to descendant. It has been so held by this Court in Bhagwan Dayal (since deceased) and thereafter his heirs and legal representatives *Bansgopal Dubey & Anr. V. Mst. Reoti Devi (deceased) and after her death, Mst. Dayavati, her daughter*[4] in the following terms :

> "16. The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by

course of conduct. It is also settled that there is no presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time."

[See also *Bhagwati Prasad v. Shri Chandramaul*[5]. But it is evident that no such contention was raised. No substantial question of law in this behalf was framed.

17. Mr. Chandrasekhar would contend that the jurisdiction of the High Court to interfere with the findings of fact is not limited. Reliance has been placed on *Hero Vinoth (Minor) v. Sheshammal*[6] wherein it was held :

"19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence."

It was furthermore held :

"23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and

impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari.)

24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) ...

(ii) The High Court should be satisfied that the case involves a substantial question of law, not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law."

The principles laid down therein do not advance the case of the respondents as the High Court did not arrive at any finding which could involve their application to the facts of the present case. In *Makhan Singh (Dead) By Lrs. V. Kulwant Singh*[7] whereupon again reliance has been placed by Mr. Chandrasekhar, this Court held :

"9. The High Court has also rightly observed that there was no presumption that the property owned by the members of the joint Hindu family could a fortiori be deemed to be of the same character and to prove such a status it had to be established by the propounder that a nucleus of joint Hindu family income was available and that the said property had been purchased from the said nucleus and that the burden to prove such a situation lay on the party, who so asserted it. The ratio of K.V. Narayanaswami Iyer case2 is thus clearly applicable to the facts of the case. We are therefore in full agreement with the High Court on this aspect as well. From the above, it would be evident that the High Court has not made a simpliciter reappraisal of the evidence to arrive at conclusions different from those of the courts below, but has corrected an error as to the onus of proof on the existence or otherwise of a joint Hindu family property."

18. The instant case does not come within the purview of the aforementioned dicta. The High Court did not deal with the substantial questions of law formulated at the time of admission at all. We, therefore, are of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly and the matter is remitted to the High Court for consideration of the matter afresh. In the event, the High Court opines that any substantial

question of law should be framed suo motu or at the instance of the appellant before it, viz., respondent herein, it shall give an opportunity of hearing to appellant.

19. Appeal is allowed on the aforementioned terms. In the facts and circumstance of the case, however, there shall be no order as to costs.

[1]2008 (10) SCALE 523 *[2](1997) 4 SCC 713* *[3](1997) 5 SCC 438* *[4]AIR 1962 SC 287*
[5](1966) 2 SCR 286 *[6](2006) 5 SCC 545* *[7](2007) 10 SCC 602*