SUPREME COURT OF INDIA

Y.Nagaraj

Vs.

Smt. Jalajakshi

C.A.Nos. 6714-6715 of 2002

(G.S. Singhvi and Asok Kumar Ganguly JJ.)

05.01.2012

JUDGMENT

G. S. SINGHVI, J.

1. These appeals filed against judgment dated 22.2.1999 of the learned Single Judge of the Karnataka High Court represent culmination of the dispute among the heirs of Shri D. Yellappa, who died intestate on 27.03.1978, in relation to his properties.

2. Appellant, Y. Nagaraj, is the son of the deceased and respondent Nos.1 to 3 - Smt. Jalajakshi, Smt. Y. Susheela and Smt. Y. Nirmalakumari are his daughters. They are governed by Mitakshara School of Hindu Law as also the provisions of the Hindu Succession Act, 1956 (for short, `the Act'), for the sake of convenience, they shall hereinafter be referred to with the same description.

3. Respondent No. 1 filed O.S. No. 286 of 1979 (renumbered as O.S. No. 4528 of 1980) impleading the appellant and respondent Nos. 2 and 3 as defendants for partition of the properties specified in Schedules `A' and `B' into four equal shares by metes and bound and for allotment of one share to her with absolute title and possession. She further prayed that the appellant be directed to give account of the income of the suit schedule properties with effect from 27.3.1978 and pay 1/4th share to her. In the alternative, she prayed that an inquiry be ordered under Order XXIX Rule 12 of the Code of Civil Procedure (for short, `the CPC') for determination of mesne profits. The schedules appended to the plaint are extracted below:

:Schedule `A':

(1) Vacant land bearing Kaneshumari No. 130, of Dommasaacha Village, Surjapura Hobli, Anekal Taluk bounded on the East by : Nagi Reddy House West by : Konda Reddy House North by : Road South by : Erappa's land Measuring East West about 42' North-South about 45'. :

Schedule `B':

(1) S. No. 96/1, measuring 2 acres and 5 guntas

(2) S. No. 108/2, measuring 1 acre 28 guntas

(3) S. No. 79/2, measuring 3 acres 35 guntas all these properties situated at Thigala, Chowdadenahalli, Sarjapur Hobli, Anekla Tq, Bangalore Distt.,

(4) S.No. 205, measuring 1 acre 22 guntas situated at Dommasandra village, Anekla, Taluk.

(5) A house bearing D.No. 100, and new Nos. 100/1 and 100/2, measuring about 82' x 21' situated at Susheela Road Doddamavalli, Bangalore.

(6) Any other property standing in the name of late D. Yellappa, or any of his family members.

(7) Jewels worth about Rs. 10,000/-

(8) Household utensils worth about Rs. 10,000/- (9) Bank deposits.

(As extracted from the judgment of XVII Additional City Civil Judge, Bangalore.)

4. The claim of respondent No. 1 was founded on the following assertions:

(a) That late Shri D. Yellappa, who retired as Revenue Inspector from the Corporation of the City Bangalore, was an affluent person and possessed some ancestral properties (described in Schedule `A') and self-acquired movable and immovable properties (described in Schedule `B').

(b) That Shri D. Yellappa died intestate on 27.3.1978 and being his Class II heirs, the parties are entitled to share in his estate.

(c) That respondent Nos. 2 and 3 are unmarried and by taking advantage of his position as the son of the deceased, the appellant is wasting the property and trying to alienate the same.

5. In the written statement filed by him, the appellant denied that Shri D. Yellappa had only a bit of ancestral property. He pleaded that the suit properties are joint family properties because the same had been acquired out of joint family income and respondent No. 1 had erroneously characterized the same as self-acquired properties of the deceased. The appellant further pleaded that his father had sold some properties to one Papaiah; that the agricultural lands shown in the plaint schedule were subject matter of the proceedings pending before Land Tribunal, Anekal for grant of occupancy rights; that Item No. 3 of plaint Schedule `B' had been purchased in his name vide sale deed dated 29.4.1961 and he was absolute owner thereof and that the jewellery, utensils, bank accounts, etc., mentioned at Item Nos. 7 to 9 of Schedule `B' were not available for partition because after the death of the mother, the deceased had divided the same among three sisters. In paragraph 6 of the written statement, the appellant averred that Item No.5 of Schedule `B' properties is an ancestral property and respondent No.1 has no right to claim any share in it.

6. Since the High Court has, while disposing of the appeals filed by the appellant and respondent No. 2 relied upon some of the averments contained in the written statement and made observations adverse to the interest of the appellant, it will be appropriate to notice the contents of paragraphs 2, 4 and 6 of the written statement which are extracted below:

2. Late Sri. D. Yellappa had ancestral properties. It is incorrect to say that he has only a bit of ancestral property. He was getting a meagre salary, while he was in service, but he was having sufficient income from the joint family properties and out of the income-from joint family properties he purchased properties in his name as he was the head of the family. It is absolutely false that items mentioned in `A' Schedule are the ancestral properties and the items mentioned in `B ' schedule are the separate properties of the father of this defendant. The plaintiff is put to strict proofs of the same. The plaintiff with a view to claim larger share in the properties has characterised the ancestral properties as self acquired properties. The plaintiff in her anxiety to claim a larger share in the properties has included the items which are

already sold by the father of the defendant. Thus it is clear that the plaintiff is not at all in joint possession of the properties. The item mentioned in `A' schedule was sold to one Papaiah by the father of the defendant during his life time and put him in possession. Inspite of it, the plaintiff has claimed this property which is in possession of Sri Papaiah. Hence, the said Papaiah is a necessary and a proper party. The suit is bad for non-joinder of proper parties and the suit is liable to be dismissed.

4. There is no self-acquired property of Sri Yellappa, for the plaintiff to claim any share in the property. The plaintiff is not entitled to any share in the properties detailed in the schedule and further the plaintiff has not brought the entire joint family properties for the purpose of division, though she is fully aware of the same. The pretentions ignorance of the plaintiff is a make believe one and is deliberately made to appear as such only to help the plaintiff's uncle against whom the suit has been filed for the recovery of this defendant's share in the property. The plaintiff is actively supporting her uncle in the said litigation in O.S.31/1979 on the file of the Munsiff, Anekal . Thus the suit as brought is not maintainable and liable to be dismissed in limine.

6. Item No.5 of the `B' Schedule properties is an ancestral property. The plaintiff has no manner of right, title or interest to claim any share therein.

7. Respondent Nos. 2 and 3 filed separate written statement. They admitted the claim of respondent No. 1 qua the properties specified in Schedules `A' and `B' except Item No. 5 of `B' Schedule, i.e., house No. 100 (new nos. 100/1 and 100/2). Respondent Nos. 2 and 3 pleaded that the house was purchased by their father in the name of the mother by registered sale deed dated 20.12.1943; that, subsequently, the mother transferred the house to the father, who executed Will dated 28.3.1977 and bequeathed a portion of the house to them but, later on, he cancelled the Will and executed registered Settlement Deed dated 18.7.1977 in their favour.

8. The trial Court took cognizance of the pleadings of the parties and framed the following issues (the issues have been extracted from the impugned judgment):

1. Whether plaintiff proves that the `A' schedule properties are the ancestral properties and the `B' schedule property were self acquired property of late D. Yellappa?

2. Whether defendant nos.2 and 3 proves that they are the absolute owners in possession and enjoyment of a portion of item no.5 of schedule `B' property by virtue of a registered settlement deed dated 18.7.1977 executed by late D. Yellappa?

3. Whether the defendants further prove that the plaintiff is not entitled to claim a share in items no.1 to 5 of the `B' schedule property as contended in their written statement?

4. Whether defendants further prove that the jewels in item no.7 of `B' schedule was divided in between defendants 1 and 2 and after the death of their mother as contended?

5. Whether defendant no.1 proves that item no.8 in `B' schedule was taken away by the plaintiff and the utensils now in his possession belong to him exclusively?

6. To what share is the plaintiff entitled to and in what all properties?

7. Whether the plaintiff is entitled to the mesne profits and if yes, at what rate?

8. What relief and what order?

9. Whether the defendants prove that the 3rd item of `B' schedule is the self acquired property of defendant no.1 as contended in para 6(b) of the written statement?

10. Whether the defendants prove that item nos.1,2 and 4 of `B' schedule property are the subject matter of tenancy rights pending before the Land Tribunal and that the plaintiff cannot claim anything in them?

9. In support of her claim, respondent No. 1 appeared as PW-1 and produced 13 documents, which were marked as Ex. P1 to P13. The appellant examined himself as DW-1 and produced one document, which was marked as Ex. D1.

10. After considering the pleadings of the parties and evidence produced by them, the trial Court partly decreed the suit. The trial Court answered issue Nos. 1 and 7 in the negative and issue Nos. 2, 4, 5, 9 and 10 in the affirmative. It held that Item Nos. 6 to 9 of Schedule `B' were not available for partition and respondent No.1

has miserably failed to prove her case qua those items. The trial Court further held that Item No.3 of Schedule `B' is also not available for partition because the same had been purchased in the name of the appellant vide sale deed Ex. P6 and mistake in the boundaries specified therein was rectified vide Ex. P7. Issue No.3 was answered by the trial Court by declaring that respondent No.1 will be entitled to 1/8th share in the compensation in lieu of agricultural land which was subject matter of the proceedings pending under the Land Reforms Act. The relevant portions of the judgment of the trial Court except those relating to Item Nos. 6 to 9 of Schedule `B' about which no controversy survives between the parties are extracted below:

> Though the plaintiff claims her 1/4th share in the agricultural lands being Item Nos. 1 to 4 of schedule `B' of the plaint, admittedly by the parties during the course of evidence, item Nos. 1 2 are the ancestral properties of this D. Yellappa and this D. Yellappa has purchased item No. 4 by a registered sale deed as per Ex. P8 in the year 1966 and only because this D. Yellappa purchased that land, it cannot be classified as self-acquired property of Yellappa unless there is material or evidence produced by the plaintiff to show that he treated that property as self-acquired and separate property and was never meant for enjoyment of the joint family during his life time. Therefore, when there is material to show that D. Yellappa had some agricultural and being the ancestral property measuring 4 5 acres in Anekal Taluk and in addition to the same, he has retired in the year 1961 and got some retirement benefits and similarly, he had purchased some house properties in Bangalore and sold them for the benefit of the family for a sum of Rs. 26,000/- or so as admitted by DW1 himself and which is not disputed by the plaintiff, it can be safely said that item No. 4 was purchased by D Yellappa, out of the joint family funds and it was for the benefit of the family and it cannot be self-acquired and separate property of Yellappa. Similarly, he has purchased item No. 5 being the house property bearing Door No. 100 which is re-numbered as 100/1 and 100/2 in the name of his wife only in the year 1950 and the same was subsequently transferred in the name of D. Yellappa and thereafter, he has mortgaged the same by Ex. P13 and therefore, the plaintiff cannot contend that the said property belonged to her mother and therefore, she is entitled to a share in the same. The recitals of the mortgage deed in Ex. P13 go to show that D. Yellappa had purchased that property in Bangalore in the name of his wife and that fact is clinched by the fact that he has subsequently treated the same as joint family property and not as of his wife. With these observations, I hold that it is a joint family

property and not self-acquired property of D. Yellappa and about the settlement of the property in favour of defendants 2 3, I will discuss later.

So far as the item No. 3 of `B' schedule property is concerned, it can be seen that it was purchased in the name of the first defendant by a sale deed Ex. P6 and there has been a rectification deed also regarding some mistake in the boundaries etc., as per Ex. P7 and this land is also said to be the subject matter of occupancy right before the Tribunal. But all the same, there is no material to show that it is a joint family property and the plaintiff has not produced any material to show that as to whether her father financed this first defendant to purchase this item no. 3 of schedule `B' nor is it the case of the plaintiff that it was actually purchased by D. Yellappa in his own name. As already pointed out, the land was purchased by the first defendant somewhere in the year 1961 and he got rectification deed in the year 1967 and therefore, in the absence of any evidence produced by the plaintiff to show that it was purchased out of the income of the ancestral properties, it can be safely said that the first defendant has treated that property as his self-acquired property because, there was no joint family as such after the death of his father. Because, the first defendant is the only son and the other issues of this D. Yellappa all are daughters and are married and staying with their husbands. Therefore, this item No. 3 will have to be treated as self-acquired property of defendant No 1.

Admittedly item Nos. 1 and 2 of schedule `B' are agricultural lands and were ancestral properties of D. Yellappa and if at all the plaintiff or defendants Nos. 2 and 3 are entitled to any share in those 2 lands (illegible) in the compensation to be awarded by the land tribunal, under the Hindu Succession Act and not under the General Hindu Law.

If these two lands are agricultural properties, the plaintiff as well as the defendants 2 and 3 would get their share either in the compensation or by metes and bounds only in = share of the deceased-father of Yellappa because he has died somewhere in the year 1978 after coming into force of the Hindu Succession Act. In that undecided = share of properties they cannot claim 1/4th share as of right by birth. In the notional partition it is only the coparceners under the General Hindu Law who get a share each and the ladies cannot be co-parceners of the Joint Hindu Family and therefore in the notional partition, it is this D. Yellappa and Nagaraj alone get half and this 1/ share of Yellappa goes to the plaintiff and defendants 2 and 3 under the Hindu Succession Act as their mother had pre-deceased this Yellappa having

died in the year 1960. Thus, I hold that the plaintiff cannot claim 1/4th share. But they can claim only 1/8th share each in the entire item Nos. 1 and 2 either by metes and bounds or by way of compensation if any by the land tribunal.

Though the plaintiff has claimed share in item No. 5 the residential house of Bangalore Town, on the ground that it was her mother's property, her own document Ex. P. 13 negatives her contention because, as per the recitals, the finance has flowed from this Yellappa himself though it was purchased in the name of his wife. But it was subsequently transferred in the name of joint family and he treated it as his own property and mortgaged the same to some person by Ex. P. 13 and subsequently gifted the portions of those properties in favour of plaintiff herself and also defendants 2 and 3 and defendants 2 and 3 so also the first defendant stayed in those houses till they got married and therefore, at the most it can be said that house No. 100/1 and 100/2 alone are available for partition between the plaintiff and defendants except the settled properties in favour of the plaintiff and defendants 2 and 3. Thus, the plaintiff cannot claim share in the portions that are settled in favour of defendants 2 and 3 and there has been a settlement deed by Yellappa himself between defendants 2 and 3 by a registered deed dated 18.7.77 as this fact is admitted by PW1 as well as DW1 though there is no evidence produced by the plaintiff and therefore, I am persuaded to answer issue No. 2 in the affirmative.

Now coming to `A' schedule property which according to the plaintiff is ancestral property and is a grame tana area and a residential house bearing Khaneshumari No. 130 in Anekal Taluk. This PW1 during the course of cross-examination admits that her father had gifted half of schedule property in favour of his own brother-Veerappa and also admits that her father might have sold remaining half schedule property in favour of one Papaiah. But, however, a suggestion is made that this first defendant took possession of half of `A' schedule property from Papaiah by filing suits. But the plaintiff has not produced any judgment copy of such suit nor is there any evidence produced to show that this defendant-1 has taken possession of the half of the `A' schedule property that was sold by D. Yellappa himself during his life time.

So therefore, if that is the position, it cannot be said that the plaintiff has proved the facts that `A' schedule property is available for partition and also that she is entitled for mesne profit also. There is no material to show that

> `A' schedule is in the possession of the first defendant and they cannot also contend that the first defendant has got income from the agricultural lands because, in view of the Land Reforms Act, tenanted lands vest in Govt. with effect from 1974 and when there is material to show that the matter of occupancy rights in respect of agricultural lands at item -1 to 4 of schedule `B' is pending before the Land Tribunal, the plaintiff cannot seek accounting from the first defendant. But however, the contentions of the defendant-1 in the written statement that the plaintiff has not produced the record of rights and index of lands etc., in respect of agricultural land and that if partition is allowed, the same would hit provisions of Prevention of Fragmentation Act etc., are devoid of any merit and thus, in view of my discussions, I am persuaded to answer issue No. 1 in the negative.

11. The operative portion of the judgment passed by the trial Court (as contained in the paper book of the special leave petitions) is extracted below:

> The suit of the plaintiff is hereby partly decreed. The suit of the plaintiff for partition and actual possession in `A' schedule property and also for partition and possession of item Nos. 1 to 9 of schedule `B' by metes and bounds is hereby dismissed. It is hereby declared that the plaintiff is entitled to 1/8th share in the compensation to be paid by the Govt, in respect of item Nos. 1, 2 and 4 and she is also entitled to 1/8 th share in the un-sold portion of item No. 5 in as much as there are entitlement deeds of vacant sites in favour of plaintiff herself and also in favour of defendants 2 and 3. The plaintiff shall get her share partitioned by appointing a Commissioner in the Final Decree Proceedings in item No. 5. Similarly, the suit of the plaintiff for mesne profits is hereby dismissed. But costs of the suit shall come out of the assets of the joint family properties. It is hereby declared that defendants 2 and 3 are also entitled to 1/8th share like the plaintiff in all the properties that are available for partition as discussed above. Draw a preliminary decree accordingly.

12. During the pendency of the suit filed by respondent No. 1, respondent No. 2 filed O.S. No. 2062 of 1981 for declaration of title in respect of house bearing No. 100/2, Susheela Road, Doddamavalli, Bangalore and possession thereof and also for mesne profits. Respondent No.2 relied upon registered Settlement Deed dated 18.7.1977, which is said to have been executed by Shri D. Yellappa giving separate portions to her and respondent No.3, and pleaded that she was residing in the portion allotted to her and was paying taxes etc. but the appellant was trying to interfere with her possession.

13. The appellant contested the suit filed by respondent No. 2. He pleaded that the suit property was joint family property and the deceased had no right to execute settlement deed in respect of the joint family property. He further pleaded that the settlement deed was a fabricated document and the same cannot be relied upon for declaring respondent No.2 as owner of the suit property. He also raised an objection of limitation and pleaded that the suit filed by the respondent No.2 was barred by time.

14. In the second suit, the trial Court framed nine issues and one additional issue. The same (as contained in para 10 of the impugned judgment) are extracted below:

> 1. Whether the plaintiff proves that during the suit schedule property was the self acquired property of D. Yellappa?
>
> 2. Whether the plaintiff proves that during the lifetime of D. Yellappa, D. Yellappa has executed a registered settlement deed dated 18.7.1977 and registered Will dated 28.3.1977 in her favour pertaining to the suit schedule property as alleged in the plaint?
>
> 3. Whether the plaintiff proves that the defendant trespassed into the suit schedule property and proves further that she is entitled for possession as alleged?
>
> 4. Whether the plaintiff proves that she is entitled for Rs.1,440/- and also for mesne profits with costs thereon?
>
> 5. Whether the defendant proves that the alleged Will is a got up one when Yellappa was not in a fit condition to execute in favour of the plaintiff?
>
> 6. Whether the defendant proves that the suit schedule property is not self acquired property of D. Yellappa?
>
> 7. Whether the defendant proves that he is in possession of the property in his own right and not as a trespasser?
>
> 7(a) Whether the defendant proves that the suit is not maintainable in law?
>
> 8. To what relief the parties are entitled?

9. Whether the plaintiff is entitled for the declaration claimed?

Additional Issues :

1. Whether the defendant proves that the suit is barred by time as he had taken a plea in O.S. No.151 of 1978 itself denying the title of the plaintiff as alleged?

15. Respondent No.2 examined herself as PW-1 and produced 8 documents marked Ex. P1 to P8. The appellant examined himself as DW-1 and produced 16 documents marked Ex. D1 to D16.

16. The trial Court answered issue Nos. 1 to 4, 7(a), 9 and additional issue No.1 in the negative and issue Nos. 6 and 7 in the affirmative. As regards issue No.5, the trial Court observed that the same does not survive for consideration. In conclusion, the trial Court dismissed the suit by observing that respondent No.2 has failed to prove that the suit property was purchased in the name of the mother vide Sale Deed dated 1.2.1950 and she had transferred the same to her father. The trial Court also held that respondent No.2 has failed to prove that the suit property was the self- acquired property of her father and he had the right to settle the same in her favour. The relevant portions of the judgment rendered by the trial Court in O.S. No. 2062 of 1981 are extracted below:

> It is elicited in the cross examination of PW-1 that the suit property was transferred by her mother to her father but she does not know by what mode it was transferred. She does not know when her mother had purchased the property. There must be document of title regarding the purchase made by her mother and the plaintiff has denied ignorance about the mode under which the property was transferred by her mother to her father. The contents of Ex.P.l show that the property was purchased by sale deed dated 1.2.1950. The said sale deed dated 1.2.1950. The said sale deed has not been produced by the plaintiff and therefore the plaintiff has failed to prove that it is belong to her mother and her mother has transferred the property to her father.
>
> On the other hand, the evidence of the defendant and the documentary evidence produced by him show that the property was the joint family property as it was purchased out of the amount received by mortgaging the family properties to Salem Bank under Ex.D-7. DW-l has stated in his evidence that the suit schedule property was purchased out of the joint family funds. The property was purchased in the name of his mother during

December 1943. In December 1943 joint family property was mortgaged to Salem Bank for purchasing the property and he has produced Ex.D-7 the mortgage deed and he has further stated that the said amount obtained by mortgaging was repaid out of the income derived from the suit house. Nothing has been elicited in the cross-examination of DW.1 to disbelieve his evidence that the suit property was purchased out of the amount received by mortgaging the joint family properties. Ex. D-7 shows that on 17.12.1943 D. Yellappa and his brother Erappa mortgaged the properties for borrowing Rs.600/- for the purpose of purchasing a house at Siddegowda Lane, Lalbagh, Doddamavalli Bangalore City in the name of the wife of D. Yellappa and the schedule to the said mortgage deed reads as follows:

> I. All the piece and parcel of land with the dwelling houses and outhouses, wells, trees and drains thereon built and planted and situated together with all rights and easements appertaining thereto now and hereafter enjoyed and acquired bearing Municipal Door No. Old 8 and New No. 13. Chintala Venkatappa Lane, Lalbagh, Doddamavalli, Bangalore City, bounded on the North by Sarambigamma's house and Chinnayya's backyard, South by Municipal Road, East b y Ratnakka and her b r o t h e r Anjariappa's house and open space and West by land with public water t a p , measuring East to West 3 5 1 /2 feet and North to South 1 2 ' x 1 2 ' and admeasurements 4 4 3 square feet. Chintala Venkatappa Lane is now called Siddegowda Lane.
>
> II. And house bearing Municipal Door No. 2 (Old) New No. 3 . Aliraju Munisumappa Road, Thigalarpet, Bangalore City, bounded on North b y Jaragana-halli Muniswamy's house and Yellamma Temple, South by Lane and Yengatappa Gowda's house and Rangamma's house, East by Municipal Road and Muni Siddappa's house and West by Waste land belonging to choultry, measuring East to West 2 4 ' . 4 , North to South 25 ' . 1 0 b y admeasurements 6 2 6 square feet and which are at present in possession of the said mortgagors,

1. D. Yellappa and 2 . Erappa.

It is clear from the above said evidence of DW-1 and Ex. D-7 which clearly corroborates his evidence that the suit schedule property was purchased out of the money obtained by mortgaging the joint family properties. PW-1 has feigned ignorance as to whether her father had any other source of income

except salary and as to whether the family had any other joint family property at the time of purchase of the suit schedule property. Therefore, it is clear that plaintiff has failed to prove that the suit schedule property was the self acquired property of her father and that her father had right to settle the property in favour of the plaintiff. On the other hand, the above said evidence on record clearly shows that the suit property was the joint family property of D. Yellappa and the defendant. I have already given a finding that plaintiff has failed to prove that the suit schedule property was the self acquired property of D. Yellappa and defendant has proved that the suit schedule property was the joint family property. Therefore, the burden is upon the plaintiff to prove the execution of the Settlement Deed. PW-1 has stated in her cross-examination that she does not know who were the witnesses that have signed Ex. P.l as they were acquaintance of her father. She does not know who was the scribe of the Settlement Deed. It is further elicited that she found some corrections in the Settlement Deed but she does not know who wrote it. The witnesses have not signed in her presence and she does not know if her father had intimated the defendant about the Settlement Deed. The plaintiff has not signed the Settlement Deed and the and the witnesses who have attested the Settlement Deed have not been examined by the plaintiff. The scribe who wrote the Settlement Deed has also not been examined by the plaintiff. There are some corrections in the Settlement Deed and PW-1 has stated that she does not know who had carried out the said corrections and she does not know who wrote the contents of the Settlement Deed as she has feigned ignorance as to who was the scribe of the Settlement Deed. Even the contents of the Settlement Deed have not been proved and the evidence on record clearly proba- bilities the version of the defendant that the Set- tlement Deed has been concocted by the plaintiff. It is mentioned in the Settlement Deed Ex. P.l that the property was the self acquired property of D. Yellappa. I have already held that suit property was not the self-acquired property of D. Yellappa.

17. The appellant filed RFA No. 189 of 1990 and prayed for setting aside the decree passed in O.S. No. 4528/1980 insofar as the trial Court upheld the claim of partition made by respondent No.1 qua Item No.5 of Schedule `B' properties. Respondent No. 2 also filed RFA No. 476 of 1991 and challenged the dismissal of the suit for declaration filed by her.

18. Learned counsel for the appellant argued that the impugned judgment is liable to be set aside because the learned Single Judge of the High Court committed grave error by granting substantive relief to respondent No.1 despite the fact that

she had not filed appeal or cross-objections to question the findings recorded by the trial Court on various issues. She further argued that the learned Single Judge committed an error by passing a decree in favour of respondent No.2 on the basis of Settlement Deed dated 18.7.1977 ignoring that she had failed to prove that the suit property was self- acquired property of the father and that in O.S. No. 4528 of 1980 the trial Court had ruled that Item No.5 of `B' Schedule properties was joint family property.

19. Learned counsel for the respondents supported the impugned judgment and argued that the High Court did not commit any error by granting relief to respondent Nos. 1 and 2. She submitted that even though respondent No.1 had neither filed an appeal against the judgment and decree passed by the trial court in O.S. No. 4528 of 1980 nor she filed cross-objections in RFA No. 189 of 1990, the learned Single Judge had rightly invoked the principle underlying Order 41 Rule 33 CPC for the purpose of doing full justice to the parties. She also defended the decree passed in favour of respondent No.2 and argued that the learned Single Judge did not commit any error by relying upon the recital in the settlement deed for the purpose of recording a finding that Item No.5 of Schedule `B' properties was self- acquired property of the deceased.

20. Before adverting to the arguments of the learned counsel for the parties and the reasons recorded by the learned Single Judge, we consider it proper to take cognizance of some of the additional documents filed by the counsel for the respondents which include copy of the plaint in O.S. No. 286 of 1979 (renumbered as O.S. No.4528 of 1980), written statement filed in that suit, the issues framed by the trial Court, depositions of respondent No.1 and the appellant, copy of Settlement Deed dated 18.7.1977, orders passed by the Karnataka High Court in Writ Petition Nos. 11401 of 1981, 20067 of 1991 and 20068 of 1991 and order passed by the Land Tribunal. These documents show that respondent Nos. 1 to 3 had filed Writ Petition No. 11401 of 1981 for quashing order dated 9.6.1981 passed by the Land Tribunal whereby occupancy rights were granted to N. Bhadraiah in respect of land comprised in survey Nos. 79/2, 108/2 and 205. By an order dated 28.5.1985, the Division Bench of the High Court allowed the writ petition, quashed the order of the Land Tribunal and remitted the matter for fresh disposal of the application filed by N. Bhadraiah after giving opportunity to the parties. After remand, the Land Tribunal passed order dated 29.10.1988 and again accepted Bhadraiah's claim for occupancy rights. The second order of the Land Tribunal was challenged by respondent Nos. 1 to 3 in Writ Petition Nos. 20067 and 20068 of 1991, which were allowed by the Division Bench of the High Court on 20.1.1994 and the matter was again remitted to the Land Tribunal for fresh

consideration. Of course, learned counsel for the parties did not inform the Court whether the application filed by N. Bhadraiah for grant of occupancy rights has been finally disposed of.

21. The learned Single Judge first considered the issue raised in RFA No.476 of 1991, i.e., whether Settlement Deed dated 18.7.1977 executed by Shri D. Yellappa was valid. He referred to a portion of the settlement deed in which the executant has mentioned that the house property is a self- acquired property purchased by him on 01.02.1950 and proceeded to observe:

In the light of the above recital in Ex. P.1 the settlement deed which is extracted above it is too late for the son to come and contend that it is not the self acquired property of their father. The recital coupled with the evidence available on record and the further fact that Susheela the plaintiff has been enjoying the property exclusively would go to show that the plea that the property in question is ancestral property, set up by the son, is not acceptable or believable. This aspect of the case has not been considered by the trial Court and as rightly found by the trial court in the other suit and I have also no hesitation to hold that, the suit property is self acquired property of their father and consequently, the settlement deed executed by her father in valid and binding on the parties.

22. While recording the aforesaid finding, the learned Single Judge did not even refer to the detailed reasons recorded by the trial Court for holding that respondent No.2 has failed to prove that the suit property was self-acquired property of the executant because Sale Deed dated 01.02.1950 was not produced by her. The learned Single Judge also omitted to consider the statement of respondent No. 2 that the suit property was purchased by her father in the name of the mother and she had transferred the same in the name of the father, which enabled him to execute Will dated 28.3.1977 and Settlement Deed dated 18.7.1977. Not only this, the learned Single Judge failed to take note of the fact that the recital contained in the settlement deed was contrary to the evidence of the parties which, as mentioned above, was to the effect that the property had been purchased by the father in the name of the mother and the latter had transferred it to the father after some time and that in the judgment of O.S. No. 4528 of 1980 it was categorically held that Item No. 5 of Schedule `B' properties was joint family property and respondent No.1 was entitled to a share in it. We are surprised that the learned Single Judge ignored the patently contradictory findings recorded by the trial Court in the two suits on the issue of nature of Item No. 5 of Schedule `B' properties and decreed the suit filed by respondent No. 2 by assuming that she had succeeded in proving that her father Shri D. Yellappa was competent to execute the settlement deed. In

the process, the learned Single Judge completely overlooked the detailed reasons recorded by the trial Court in O.S. No. 4528 of 1980 after considering the mortgage deed Ex. P13 executed by Shri D. Yellappa and Erappa in favour of the Salem Bank Ltd. for the purpose of taking loan. Therefore, it is not possible to sustain the finding and conclusion recorded by the learned Single Judge in RFA No.476 of 1991.

23. We shall now deal with the appellant's challenge to the decree passed in favour of respondent No.1. It is not in dispute that respondent No.1 had not challenged the findings recorded by the trial Court on various issues framed by it. She also did not file cross-objections in the appeal preferred by the appellant. Though, it is possible to take the view that even in the absence of an appeal having been preferred by respondent No.1, the learned Single Judge could have exercised power under Order 41 Rule 33 CPC, as interpreted by this Court in Nirmala Bala Ghose v. Balai Chand Ghose (1965) 3 SCR 550, Giani Ram and others v. Ramjilal and others (1969) 3 SCR 944 and Banarsi and others v. Ram Phal (2003) 9 SCC 606, after having carefully examined the entire record, we are convinced that the impugned judgment cannot be sustained by relying upon Order 41 Rule 33. In the impugned judgment, the learned Single Judge has included Item No. 3 of Schedule `B' properties in the pool of joint family property despite the fact that the same had been purchased by D. Yellappa by registered sale deed in 1961 in the name of the appellant. The learned Single Judge overturned the finding on this issue by adverting to some portions of the averments contained in para 2 of the written statement filed by the appellant, while ignoring the remaining averments contained in that paragraph as also paragraph Nos. 4 and 6. The learned Single Judge also failed to take note of the fact that the claim made by N. Bhadraiah for grant of occupancy rights in respect of agricultural land was pending before the Land Tribunal. It is not possible for us to approve the approach adopted by the learned Single Judge in dealing with the claim of respondent No. 1 for partition of the suit properties despite the fact that she had failed to prove the case set up in the plaint. A substantial portion of the judgment of the trial Court as well as the learned Single Judge is based on pure conjectures. The learned Single Judge appears to have been unduly influenced by the fact that N. Bhadraiah was the father-in-law of the appellant and both seem to have conspired to deprive the three daughters of the deceased of their shares in the suit properties.

24. We may have remanded the matter to the High Court for fresh disposal of the appeals filed by the appellant and respondent No. 2 but keeping in view the fact that the findings recorded in the two suits regarding Item No. 5 of Schedule `B' properties specified in the plaint of O.S. No. 4528 of 1980 are contradictory and

substantial portion of the judgment of O.S. No. 4528 of 1980 is based on surmises and conjectures, we feel that ends of justice would be met by setting aside the impugned judgment and remitting the matter to the trial Court for fresh disposal of the suits filed by respondent Nos. 1 and 2.

25. In the result, the appeals are allowed. The impugned judgment is set aside. The judgments of the trial Court in O.S. Nos. 4528 of 1980 and 2062 of 1981 are also set aside and the matter is remitted to the trial Court for fresh disposal of the suits. With a view to avoid the possibility of conflicting findings regarding Item No.5 of Schedule `B' properties specified in the plaint of O.S. No.4528 of 1980, we direct the trial Court to club the two suits and dispose of the same by one judgment. The parties shall be free to file applications for additional evidence and bring on record the orders passed by the Land Tribunal and the High Court in relation to Item Nos. 1 to 4 of Schedule `B' appended to the plaint of O.S. No.4528 of 1980.