SUPREME COURT OF INDIA

V.K.Surendra

Vs.

V.K.Thimmaiah

C.A.No.1499 of 2004

(G.S. Singhvi and Sudhansu Jyoti Mukhopadhaya JJ.)

10.04.2013

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

1. This appeal has been preferred by defendant No.3 against the judgment dated 20th January, 2003 passed by the High Court of Karnataka in R.F.A. No.319 of 1998. By the impugned judgment and decree the High Court allowed the appeal, set aside the judgment and decree of trial court and decreed the suit declaring that defendant Nos.1,2,3 and 4 are entitled to 11/50th share each and the plaintiff, defendant Nos.5,6,7,8 and 9 are entitled to 1/50th share each in the suit schedule properties.

2. The facts of the case are as follows:

> The plaintiff-respondent No.4 filed a suit for partition and separate possession of 1/10th share in the suit schedule properties by metes and bounds and also sought for an enquiry under Order 20 Rule 12 C.P.C. to ascertain the mesne profits. She is the second daughter of late Shri Kunnaiah whereas defendant Nos.1,2,3 and 4, including the appellant herein are the sons and defendant Nos.5,6,7 and 8 are the daughters of late Shri Kunnaiah. Defendant No.9 is the son of the first daughter of late Shri Kunnaiah.

3. Plaintiff claimed that the suit schedule properties are self-acquired properties of late Shri Kunnaiah and, therefore, she is entitled for 1/10th share in the suit schedule properties.

Defendant Nos.1, 2 and 4 filed a joint written statement claiming 1/5th share in the suit schedule properties, as according to them the suit schedule properties are the ancestral joint family properties. The appellant-defendant No.3 filed a separate written statement claiming the right over total 32 acres 55 cents of lands. According to defendant No.3, the suit schedule properties are the self-acquired properties of their father, late Shri Kunnaiah who bequeathed the same in his favour under a Will dated 14th June, 1991. As per the Will he is entitled for a total extent of 32 acres 55 cents of lands in respect of which the plaintiff and other defendants have no right whatsoever. The rest of the defendants did not choose to file written statement.

4. The trial court framed the following issues:

"1. Whether the suit schedule properties are the self-acquired properties of late Shri Kunnaiah as contended by plaintiff or they are joint family properties as contended by defendants 1, 2 and 4 ?

2. Whether the plaintiff is entitled to1/10th share as contended by her or she is entitled to 1/50th share as contended by defendants 1, 2 and 4 ?

3. Whether the plaintiff is entitled to the relief prayed for ?

4. Whether defendants 1, 2 and 4 are entitled to the reliefs prayed for in the counter claim ?

5. What decree or order ?"

On issue No.1 the trial court has held that the suit schedule properties are the self-acquired properties of late Shri Kunnaiah. On issue No.2 it was held that the Will set up by defendant No.3 has been proved and, therefore, the plaintiff was not entitled for a share in the suit schedule properties. Issue Nos.3 and 4 were accordingly answered in negative.

Two additional issues were also framed by the trial court which are as follows:

"1. Whether 3rd defendant proves that late Shri Kunnaiah executed a Will dated 14.6.1991 under which the properties mentioned in para 9 of his written statement have been bequeathed in his favour ?

2. Whether the event of the court holding that the properties were not the self acquisitions of late Shri Kunnaiah the properties in the possession of 3rd defendant could be allotted to him, as prayed for by him in para 2 of the additional written statement filed on 26.05.1997 ?"

The trial court answered additional issue No.1 in the affirmative and held that consequently additional issue No.2 was not necessary to be decided.

5. In appeal, the High Court considered the following three questions:

"i) Whether the suit schedule properties are the joint family properties of late Shri Kunnaiah and if so what share is to be allotted to each of the parties in the suit ?

ii) Whether the defendant No.3 proves the execution of the Will dated 14.06.1991 said to have been executed by late Shri Kunnaiah ?

iii) In the event if the Will dated 14.06.1991 is proved to be valid in law what is the effect of the said Will on the suit schedule properties in the event if the said properties are held to be joint family properties ?"

Taking into consideration the evidence on record and the stand taken by the plaintiff and the defendants, the High Court held that there was no evidence on record to prove that the suit schedule properties are self- acquired properties of late Shri Kunnaiah and it further held that the suit schedule properties are joint family properties of late Shri Kunnaiah and his children.

6. So far as the Will (Ex.D-17) relied on by defendant No.3 the High Court held that late Shri Kunnaiah who is the father of defendant Nos. 1 to 4 had no right whatsoever to bequeath the suit schedule properties under a Will or partition without the consent of all the co-parceners. Therefore, Ex.D-17 is not binding on the other co-parcerners. In determining the shares to be allotted to each of the parties in the proceedings, the High Court held that the sons, defendant Nos.1,2,3 and 4, and late Shri Kunnaiah are entitled for 1/5th share of the suit schedule properties. In so far as 1/5th share of late Shri Kunnaiah¸ sons and daughters

were entitled for 1/50th share. Regarding defendant No.9 who is the son of the first daughter, the High Court held that since he is the only heir to succeed to the estate of first daughter, he is also entitled for 1/50th share. The appeal was allowed with the aforesaid observation and suit was decreed by the High Court declaring that defendant Nos.1,2,3 and 4 are entitled to 11/50th share each and the plaintiff, defendant Nos.5,6,7,8 and 9 are entitled to 1/50th share each.

7. According to the appellant-defendant No.3, when late Shri Kunnaiah was a minor, his mother purchased certain properties including suit schedule properties by a sale deed dated 7th May, 1918-Ex.D-1, in the joint name of herself (Ningamma mother) and son, Kunnaiah. Later on Kunnaiah sold certain landed properties on 16th July, 1942, properties situated at Kaikere village on 19th March, 1953 and some other properties on 4th November, 1963. These sale deeds were not challenged by the plaintiff or the defendants. Since, the children of Kunnaiah were major, their names were got entered in the Revenue records by him in the year 1975 with a view to give those properties to the children. To sell some of the properties, Kunnaiah got consent of his children as their names were appearing in the Revenue records which were sold on 23rd July, 1976. Further, according to the appellant, Kunnaiah, wanted partition of the properties and effected division by executing a Will on 20th January, 1984 distributing the properties to all the children. The respondents were aware of such arrangement. However, the said Will was cancelled by late Shri Kunnaiah on 7th January, 1991 with the knowledge of all the children as Pranesh(defendant No.9), grandson through daughter Tayamma was not given property. Subsequently, a fresh Will was executed by late Shri Kunnaiah on 14th June, 1991(Ex.D-17) whereby the suit schedule properties were settled in favour of his children, Thimmaiah, B.K. Ramachandra, Ganesh, all the daughters and Pranesh son of a predeceased daughter. On 9th July, 1993, Kunnaiah died leaving behind him his 9 children, i.e., 4 sons and 5 daughters. Under the Will-Ex.D-17 dated 14th June, 1991, Kunnaih gave away all the properties owned by him and the children of Kunnaiah came to the possession of their respective portions given to each of them under the Will.

8. Learned counsel for the appellant submitted that in absence of any plea taken by the plaintiff or most of the defendants that the suit schedule properties were ancestral, the High Court was not justified to hold that the said properties are the joint family properties. Even assuming the said properties as joint family properties, it was open to the father to divide the properties under the Will -Ex.D-17. The respondents were aware of the execution of the Will (Ex.D-17) and also the earlier Will which was cancelled but they kept quiet for a long time which will

amount to giving their consent to the father to partition the properties, as the same is permissible under the Hindu Law.

9. In order to consider whether the suit schedule properties are joint family properties or self-acquired properties of late Shri Kunnaiah, it is necessary to notice the documentary as well as the oral evidence produced by the parties.

10. By the sale deed dated 7th May, 1918 (Ex.D-1), the lands in Sy.No.211 measuring 5 acres 28 cents; Sy.No.208 measuring 19 acres 83 cents; Sy.No.209 measuring 4 acres 89 cents; Sy.No.209/A measuring 27 cents; Sy.No.210 measuring 9 acres 28 cents and Sy.No.205/2 measuring 5 acres 33 cents of Attur Village, Virajapet Taluk, South Kodagu District were purchased in the name of Kunnaiah(minor) along with her mother late Smt. Ningamma. Kunnaiah was then admittedly a minor and was the only son of late Shri Thimmaiah. There is no evidence on record to show that Kunnaiah who was minor as on the date of purchase of the said lands, possessed of any immovable property or properties yielding any income so as to purchase the lands under Ex.D-1. The appellant-defendant No.3 has also failed to adduce any evidence to show that late Smt. Ningamma, mother of Kunnaiah had any income from movable or immovable properties so as to purchase the above said properties.

11. In his evidence, DW.1 deposed that their grandfather Thimmaiah owned 1000 batti boomi and 24 acres, i.e, about 54 acres of land including a house in Hoskote. Their grandmother Ningamma was only a house wife and she did not own any property in her name; out of the income derived from the lands situated at Hoskote the suit schedule lands were purchased in the name of his father late Kunnaiah. Aforesaid statement made by DW.1 in the examination-in-chief was not questioned by any of the parties during the cross-examination.

> DW.1, in his statement further stated that out of the income of lands aforesaid, the lands in Attur were purchased in the year 1918. After the death of Thimmaiah, Smt. Ningamma mother of Kunnaiah was managing the affairs of the family as there was no other male member living with her except Kunnaiah who was minor.

12. It is true that late Kunnaiah had sold some properties at Hoskote under the registered sale deed dated 16th July, 1942 by Ex.D-7. The reason for sale of the said lands under Ex.D-7 was mentioned, that is to discharge the loan borrowed by him for the purpose of purchasing the lands at Kaikere village and to improve the

lands. It is not the case of the appellant that Kunnaiah had owned land in his own name in Hoskote. The properties at Hoskote were belonging to his grand father Thimmaiah. In this background the High Court has rightly held that the properties purchased by Kunnaiah at Kaikere village out of the money received by him from the sale of the ancestral lands under Ex.D-7, are the ancestral properties. Lands at Attur village measuring 1 acre 6 guntas in Sy.No.208/3; 4 acres 77 cents in Sy.No.210 were sold by late Kunnaiah under Ex.D-3. The recital in Ex.D-3 discloses that the above lands are the ancestral properties of late Kunnaiah. For that reason before selling the said land under Ex.D-3, consent of all the sons of Kunnaiah was taken. The consent certificate was produced and is marked as Ex.D-4. Through the aforesaid evidence the High Court rightly came to the conclusion that the recitals in Ex.D-3 and consent certificate Ex.D-4 are binding on the persons who were parties in the said documents and, therefore, when Kunnaiah himself admitted in Ex.D-3 that the lands sold under Ex.D-3, which were the lands purchased under Ex.D-1, are the ancestral properties, the High Court rightly held that it was not open for defendant No.3 to say that the said lands are self-acquired properties of late Kunnaiah.

13. Similarly, the land measuring 5 acres 33 cents of Sy.No.205/2 was sold by Kunnaiah to a person under Ex.D-11 on 19th March, 1953. Kunnaiah had also sold the lands measuring 3 acres in Sy.No.208/2 and 4 acres in Sy.No.208/1 of Attur village to Orange Growers Cooperative Society under sale deed dated 4th November, 1963 Ex.D-6. In these sale deeds though the properties are described as self-acquired properties, it is apparent that both the lands were purchased under Ex.D-1. The High Court has noticed that Kunnaiah has also himself described the lands in Attur village as ancestral properties purchased under Ex.D-1. Therefore, the sale deed dated 23rd July, 1976, Ex.D-3 and the sale deed dated 4th November, 1963, Ex.D-6 cannot be said to be self-acquired properties of Kunnaiah merely because they have been described as self-acquired properties in those evidence.

14. We have noticed that though the appellant examined himself as DW.4 he failed to produce either documentary or oral evidence to show the lands at items Nos.2,3 and 5, situated at Village Kaikere are the self-acquired properties of Kunnaiah. In absence of any division in the family of Kunnaiah and his sons, we hold that the family of Kunnaiah continued to be the joint family. If a co-parcener of a joint family claims that properties are his self-acquired properties, the burden is on him to prove that the same are the self-acquired properties. In that background the High Court has rightly held that Kunnaiah had no right to change the character of the

joint family properties by transferring the same either under a Will or a gift to any party without the consent of the other co-parceners.

15. In his deposition DW.1 stated that in the year 1976 when Kunnaiah was alive, the names of all his sons were entered in the Jamabandhi in column No.6. He further stated that since their names were in the Jamabandhi their consent was asked for the purpose of advancement of loan. DW.2, Krishna, a resident of Hoskote deposed in his evidence that the suit schedule properties are the ancestral properties of Kunnaiah. DW.3, Raja, resident of Bilagunda in his evidence has deposed that his father and Kunnaiah's father belong to the same family. He has further stated that the father of Kunnaiah possessed of about 30 acres of wet land and 24 acres of garden land in Hoskote. He further stated that Kunnaiah had purchased the lands in Kaikere village after the sale of the lands at Hoskote to the grandfather of DW.2. He has further stated that when the lands were purchased under Ex.D-1, Kunnaiah was a minor and his grandmother purchased those properties as a guardian of minor Kunnaiah. DW.4 stated that he, his father and brothers are all the members of the joint family. He also admitted that the consent letter given by him along with his brothers under Ex.D-4 was for the purpose of sale of lands under Ex.D-3. He further admitted that the lands sold under Ex.D-5 are the lands purchased under Ex. D-1 and these are the joint family properties. In his evidence, defendant No.3 (DW.4) deposed that his father had sold about 25 acres of land and if the above said lands were not sold he and his brothers were entitled for a share in the said properties.

16. From the aforesaid statement, it is clear that even defendant No.3 (DW.4) admits that the lands sold under Ex.D-5 are the joint family properties and if lands were not sold he and his brothers would have been entitled for a share.

17. In the light of discussions as made above, we hold that those suit schedule properties are joint family properties of Kunnaiah along with 4 sons and the co-parceners have equal shares in the properties. Accordingly, 4 sons and Kunnaiah are entitled to 1/5th share of the total properties. So far as 1/5th share of Kunnaiah is concerned, apart from 4 sons, i.e., defendant Nos. 1, 2, 3 and 4, the daughters of Kunnaiah are entitled to 1/50th share each whereas the sons, i.e., defendant Nos.1, 2, 3 and 4 are entitled to 11/50th share each, inclusive of their respective shares. Defendant No.9 who is the son of the first daughter having succeeded the estate of his mother, a co-parcener is also entitled to 1/50th share. In this background no interference with the impugned judgment is called for. In absence of any merit the appeal is dismissed. The parties shall bear their respective costs.