

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.442 of 2007

Manohar, S/o Dayaram Nai, aged about 48 years, R/o Village
Bhejamaidani, Tahsil Gurur, Distt. Durg (C.G.)

(Plaintiff)
---- Appellant

Versus

1. Dayaram, S/o Kejaw (Dead)

(Defendant No.1)

1A) Baharin Bai, D/o Dayaram, W/o Sukhdev Sen, aged about 43 years,
R/o Village Sat Behna (Birgudi), Tahsil Nagri, District Dhamtari (C.G.)

1B) Krishna Bai, D/o Dayaram, W/o Takesh Kumar Sen, aged about 40
years, Village Post Sihava, Tahsil Nagri, District Dhamtari (C.G.)

1C) Janki Bai (Died and deleted)

2. Sahida Begum, W/o Abdul Gaffar Sekh, aged about 38 years, R/o Village
Bhejamaidani, Tahsil Gurur, Distt. Durg (C.G.)

(Defendant No.2)
---- Respondents

For Appellant: Mr. B.P. Gupta, Advocate.

For LR's of Respondent No.1: -

None present, though served.

For Respondent No.2: Mr. Jitendra Nath Nande, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

21/01/2020

1. This second appeal preferred by the plaintiff was admitted for hearing
on the following substantial questions of law: -

"1. Whether the first appellate court was justified in rejecting the application under order 41 rule 27 of CPC by which the appellant intended to prove the suit property to be a joint property of the appellant as well as defendant No.1?

2. Whether the findings arrived at by the two Courts below in respect of the appellant not having any right over the suit property on the basis being exclusively owned by defendant No.1 was justified or not?

3. Whether the appellant/plaintiff would not be entitled for ½ share of suit property being son of defendant No.1?

4. Whether the appellant/plaintiff would have preemptive right over the suit property or not?"

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

2. The relationship of the plaintiff and defendant No.1 is that of son and father. The suit property was held by defendant No.1 Dayaram. The plaintiff filed suit for declaration of title and permanent injunction stating inter alia that the suit property is the joint family property of the plaintiff and his father – defendant No.1 and therefore his father – defendant No.1 has no right to alienate the suit property in favour of defendant No.2 on 25-7-1997 and defendant No.2 be restrained from interfering with the peaceful possession of the plaintiff over the suit property. Defendant No.1 filed written statement stating that the suit property is his self-acquired property which was purchased by him by registered sale deed dated 12-3-1965 (Ex.D-1) and therefore the suit be dismissed.
3. The trial Court upon appreciation of oral and documentary evidence on record, dismissed the suit holding that the plaintiff has failed to establish that the suit property is the joint family property and he has a right of pre-emption over the suit land and the suit land has already been sold by defendant No.1 to defendant No.2. In the appeal preferred by the plaintiff, the plaintiff also filed an application under Order 41 Rule 27 of the CPC and sought to produce two sale deeds dated 25-1-1957 and 4-3-1963 which was eventually rejected by the first appellate Court by the impugned judgment after hearing the appellant / plaintiff on merits against which this second appeal has been preferred in which substantial questions of law have been formulated and which have been set-out in the opening paragraph of this judgment.

4. Mr. B.P. Gupta, learned counsel appearing for the appellant herein / plaintiff, would submit that both the Courts below have erred in holding that the plaintiff has failed to prove that the suit property is the joint family property by recording a finding which is perverse to the record. He would further submit that the first appellate Court rejected the application under Order 41 Rule 27 of the CPC by not appreciating the fact that by those two sale deeds the plaintiff is intended to prove the suit property to be the joint family property of the plaintiff and defendant No.1. As such, the appeal deserves to be allowed by answering the substantial questions of law in favour of the plaintiff and against defendant No.1.
5. None present for LR of respondent No.1 herein / LR of defendant No.1, though served.
6. Mr. Jitendra Nath Nande, learned counsel appearing for respondent No.2 herein / defendant No.2, would support the impugned judgment & decree.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
8. The plaintiff simply brought a suit against his father – defendant No.1 that the suit property is the joint family property of the plaintiff and defendant No.1 and defendant No.1 has no right to alienate the suit property in favour of defendant No.2, as the suit property was purchased out of the income of the joint family property. A careful perusal of the plaint would show that the plaintiff in the plaint (para 5) has only pleaded the suit property to be the joint family property of himself and his father – defendant No.1 and it was purchased out of the income of the ancestral property. There is no pleading to this effect either before the trial Court or before the first appellate Court

introduced by way of amendment that the joint family, if any, consisting of the plaintiff and defendant No.1 had any nucleus to purchase the suit property.

9. The Supreme Court in the matter of **Srinivas Krishnarao Kango v. Narayan Devji Kango and others**¹ has held that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint. It was observed as under:-

"8. ... Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. ..."

10. In the matter of **Mudigowda Gowdappa Sankh and others v. Ramchandra Revgowda Sankh (dead) by his legal representatives and another**², the Supreme Court has held that there is no presumption that merely because the family is joint so the property is also joint. So the person alleging the property to be coparcenary property must prove it. But if it is shown that there was a nucleus of the joint family property then any acquisition by its aid by a member is joint property. It was observed as under:-

"6. ... This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. ..."

11. In **Mudigowda Gowdappa Sankh** (supra), the Supreme Court relied upon the ratio of Privy Council judgment in the matter of **Randhi**

1 AIR 1954 SC 379

2 AIR 1969 SC 1076

Appalaswami v. Randhi Suryanarayanamurti & Others³ and held as under:

"... Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. ..."

12. Likewise, in the matter of **D.S. Lakshmaiah and another v. L. Balasubramanyam and another**⁴ the Supreme Court relied upon its earlier decisions in this regard and held as under:-

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

13. The Supreme Court in the matter of **Rangammal v. Kuppuswami and another**⁵ has held that in a suit for partition only joint family property has to be included by holding as under:-

"45. It hardly needs to be highlighted that in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family

3 ILR 1948 Mad 440 (PC)

4 (2003) 10 SCC 310

5 (2011) 12 SCC 220

property did not belong to the plaintiff's joint family in regard to which decree for partition is sought.”

14. Reverting to the facts of the present case in the light of the legal position noticed herein-above, it is quite vivid that the suit property was purchased by defendant No.1 by registered sale deed dated 12-3-1965 (Ex.D-1) as such it was his self-acquired property which the trial Court has accepted and it was affirmed by the first appellate Court to be the self-acquired property of defendant No.1. The plaintiff neither pleaded nor brought any evidence, oral or documentary as well, to establish that the suit property was purchased from the income of the joint family property and the said family had nucleus to purchase that property, but at the appellate stage, the plaintiff sought to file those two documents – sale deeds dated 25-1-1957 and 4-3-1963, along with an application under Order 41 Rule 27 of the CPC to establish that out of the income of those properties, the suit property Ex.D-1 was purchased and that was rejected by the first appellate Court.
15. The application filed seeking to produce those sale deeds under Order 41 Rule 27 of the CPC would show that it is as vague as it can be, rather is absolutely a vague application, simply it has been said that during the inspection of the house of defendant No.1, it has been noticed that the said documents / sale deeds have been obtained by him which are very much necessary for the disposal of suit. No similar application under Order 6 Rule 17 of the CPC was sought to be filed stating that from the income of those two sale deeds, the suit property Ex.D-1 was purchased. Therefore, in that light, the first appellate Court dismissed the application under Order 41 Rule 27 of the CPC. As such, the first appellate Court was absolutely justified in rejecting the application for amendment, as none of the ingredients or the requirements of Order 41 Rule 27 of the CPC were pleaded in the said application for admitting additional evidence.

16.The plaintiff pleading and taking defence that the suit property to be the joint family property purchased from the income of joint family was required to plead and establish that the joint family of them had any nucleus and out of that money, the suit property Ex.D-1 was purchased by the joint family and therefore it is the joint family property. But the plaintiff has failed to plead and establish as well that the joint family had any nucleus and out of that nucleus, the suit property was purchased. As such, both the Courts below have rightly found established that the suit property was the self-acquired property of defendant No.1 and it was not the joint family property as pleaded by the plaintiff. The substantial questions of law are answered accordingly.

17.In view of the above, the judgments & decrees of both the Courts below are neither perverse nor contrary to the record and they are hereby affirmed. Consequently, the second appeal deserves to be and is accordingly dismissed. No order as to cost(s).

18. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge