IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 31ST DAY OF MAY, 2017

PRESENT

THE HON'BLE MR.JUSTICE B.S.PATIL

AND

THE HON'BLE MR.JUSTICE K.SOMASHEKAR

Prakash Bharmu Chandagade (wrongly stated as Prakash Bharmu Gidagulle in pleadings) –v/s Suvarna Sikandar Kanhi and others

R.F.A. No.4179/2012

C/W R.F.A No.4177/2012 (PAR & SEP POS)

IN RFA NO.4179/2012

JUDGMENT

Regular First Appeal No.4177/2012 is filed challenging the judgment and decree passed in O.S.No.88/2009 on 23rd July 2012 by the learned Senior Civil Judge Chikodi, thereby decreeing the suit filed by plaintiff-respondent No.1 herein against her father Satappa Dhulappa Chandagade and six others. The learned trial Judge has while decreeing the suit filed by plaintiff awarding 1/8th share in favour of plaintiff in the suit schedule properties has found that, father of 7th defendant by name Bharmu Gidagulle had gone in adoption to 'Gidagale' family and therefore he was not entitled for any share in the family properties and as a result, 7th defendant could not be held entitled to any share. The trial Judge has, therefore, proceeded to divide the share and allot 1/8th share in favour of plaintiff by excluding the entitlement of Bharmu Gidagulle.

2. It is in this background, the other appeal in RFA No.4179/2012 has been filed by 7th defendant Prakash. As both the appeals arise out of the common judgment, we have heard them together and both the appeals are disposed of by this common judgment.

3. Briefly stated, facts involved are that:

One Dhulappa was the propositus. He died in the year 1960, leaving behind four sons by name (1) Devappa, (2) Satappa(defendant No.1), (3) Raghu, (4) Bharmu and a widow by name Kallava (also described as Ratnabai). Dhulappa was a tenant in respect of agricultural lands, which are the suit schedule properties. After his death in the year 1960, his eldest son Devappa's name was entered in the revenue records. Devappa also died in the year 1965 unmarried. After his death, names of other two sons of Dhulappa, by name Satappa and Raghu were entered in the revenue records as tenants. Name of Bharmu, the other son of Dhulappa was not entered in the revenue records. Raghu died in the year 1992. He has left behind his wife-defendant No.4 and two children by name Annasaheb and Bahubali defendants 5 and 6. Bharmu has also died and he has left behind 7th defendant-Prakash his son.

4. Plaintiff Suvarna is the daughter of Satappa-defendant No.1. Sunita and Sarojini-defendants No.2 and 3 are other two daughters of Satappa. The suit was filed by the daughter against her father and other family

members seeking partition of the agricultural lands on the ground that, as Dhulappa was none other than the grandfather of the plaintiff and was the tenant of the lands in question upon his death the lands were inherited by his sons including defendant No.1(father of the plaintiff), plaintiff and her two other sisters-defendants No.2 and 3. Hence, they were entitled to a share in the portion to which Satappa was entitled.

5. It was the contention of the plaintiff that, suit properties being ancestral joint family tenanted properties inherited by plaintiff along with her father, her sisters and defendant No.4-wife of Raghu, they were all entitled for 1/8th share each in the suit properties.

6. Insofar as Bharmu the 4th son of Dhulappa was concerned, plaintiff contended that, he was given in adoption to 'Gidagale' family of Sadalga, therefore 7th defendant, who represented the branch of Bharmu was not entitled for any share in the tenanted lands

7. Defendant No.1-Satappa filed a separate written statement denying the plaint averments, contending inter-alia that, after the death of Dhulappa, himself and his three brothers cultivated the land as tenants in their personal capacity and at the time of death of Dhulappa, plaintiff had not been born. He continued to be in joint possession and enjoyment of the property along with his brothers: that, after the commencement of Karnataka Land Reforms Act, 1961, he filed an application in Form No.7 claiming occupancy rights for himself and for his brothers and also mother Kallavva: the Land Tribunal considering the said application granted occupancy rights making it clear that each one had 1/4th share. He further contended that at the time of filing Form No.7 his elder brother Devu had already died and it was he who was looking after the management and cultivation of the tenanted lands and plaintiff had no connection whatsoever with the suit properties as they were the self acquired properties of himself and his brothers.

8. Thus, defendant No.1 denied the right of the plaintiff in respect of tenanted lands to seek partition. The first defendant emphatically denied the assertion made by the plaintiff that, his brother Bharmu had been given in adoption at any time.

9. Defendants 2 and 3 sisters of the plaintiff have not supported the case of plaintiff but have stated in their written statement that, if the Court were come to the conclusion that plaintiff was entitled for a share in the properties, they may also be granted their legitimate share. Defendants 4, 5 and 6 have filed common written statement denying the plaint averments and requesting the Court for dismissal of the suit.

10. Similarly defendant No.7 has denied the plaint averments and has specifically contended that, his father was not given in adoption to 'Gidagale' family. He has also sought for dismissal of the suit.

11. Based on the pleadings, the trial Court has framed as many as eight issues including two additional issues. They are as under:

1. *Whether plaintiff proves that the suit properties are joint family properties?*

2. *Whether defendants prove that the suit properties are self-acquired properties of defendant No.1?*

3. *Whether suit is bad for mis-joinder of parties and non-joinder of necessary parties?*

4. *Whether the suit is not valued properly and Court fee paid is insufficient?*

5. *Whether plaintiff is entitled for legitimate share in the suit properties by way of partition and separate possession?*

6. *What order or decree?*

Additional Issues

1. *Whether defendant No.4 to 6 proves that the late Bharmu was not given in adoption?*

2. *Whether suit is not maintainable during the life time of defendant No.1?*

12. Plaintiff, in support of his case, has examined herself as PW.1 and produced and marked Ex.P.1 to P.15. Defendant No.1-Satappa examined himself as DW.1 and produced and marked Ex.D.1 to 31. No other witness was examined.

13. The trial Court on appreciation of oral and documentary evidence has come to the conclusion that, plaintiff successfully proved that suit properties were joint family properties, hence, she was entitled for her legitimate share in the same. The trial Court further found that defendants failed to establish that the suit properties were self acquired properties of defendant No.1.

14. Insofar as additional issue No.1 is concerned, the trial Court has held that defendants 4 to 6 failed to prove that, late Bharmu was not given in adoption. It is necessary to note at this stage itself that the additional issue in the negative terms was framed in the following manner.

"1. Whether defendant No.4 to 6 prove that late Bharmu was not given in adoption?"

15. Aggrieved by the judgment and decree passed by the trial Court, defendant No.1-Satappa has filed RFA No.4177/2012. Shri Sangram S Kulkarni has appeared for the appellant in this case and has addressed his arguments.

16. RFA No.4179/2012 has been filed by 7th defendant-Prakash and Shri Vivek A Wajape appears for the appellant. Smt.K.S.Hemalekha has appeared for plaintiff-respondent No.1 and has addressed her elaborate arguments.

17. Shri Sangram S Kulkarni, learned counsel has contended that the trial Court was in serious error in proceeding on the basis that suit properties were ancestral properties in which plaintiff had a share. It is urged by him that plaintiff being the daughter of appellant-defendant No.1, she was neither a co-parcener, nor a person entitled to claim any share in the tenanted land over which defendant No.1 had absolute right along with his brothers and mother. Elaborating this submission he contends that even assuming that the tenancy rights had

been inherited by the first defendant/appellant along with his brothers and mother from Dhulappa (father of first defendant), that would not create any right in favour of plaintiff to claim any right in the tenanted lands.

18. Appellant's further contention is that after the commencement of the Karnataka Land Reforms Act, 1961, and as on the appointed day fixed under the 1974 Act (01.03.1974) the first defendant-Satappa along with his brothers and mother were actually cultivating the land as tenants, hence, they got absolute rights to seek grant of occupancy rights to themselves: therefore once the occupancy rights was registered in their names, the right enjoyed by them was absolute: the property to the extent of their share becomes their self acquired property and therefore plaintiff being the daughter of the first defendant, during his lifetime was not entitled to claim any share by filing a suit for partition against him.

19. Learned counsel appearing for the respondent, Smt.K.S.Hemalekha has countered these contentions urging that as the tenancy rights were heritable father of the plaintiff (appellant herein) had inherited the tenancy rights from his father and therefore those properties did

not become his self-acquired properties: the suit properties took the characteristic of ancestral properties, wherein plaintiff had right by birth and therefore she was entitled to seek partition in respect of her legitimate share. She has taken us through the provisions contained in Section 24 of the Karnataka Land Reforms Act, 1961, and definition of the term 'family' as contained in Section 2(12) of the same.

20. In the connected appeal, Shri. Vivek A. Wajape, learned counsel has urged that findings recorded by the trial Court on the negative issue framed as an additional issue No.1 as to 'whether defendant No. 4 to 6 failed to prove that late Bharma was not given in adoption' is baseless and perverse and is therefore, liable to be set aside.

21. In the light of the above contentions urged by the respective counsel and on careful consideration of the entire materials on record, the following points arise for our consideration:

i) Whether plaintiff-respondent No.1 herein is entitle to claim share in respect of the suit schedule properties, for which, occupancy rights were granted in

favour of her father defendant No.1 (Satappa Dhulappa Chandagade) by the Land Tribunal Chikodi?

ii) Whether the trial Court was right and justified in decreeing the suit, granting 1/8th share in the suit schedule properties in favour of the plaintiff?

iii) Whether the trial Court has committed any illegality in recording a finding that late Sri. Bharmu Chandagade, father of defendant No.7 was given in adoption and therefore, was not entitled for any share in the suit schedule properties?

22. Re. point (i) & (ii): As, these two points are inter-related, they are taken up together for discussion.

The essential facts pertaining to the tenancy rights granted by the Land Tribunal Chikodi, in respect of the lands in question are not in dispute. Late Sri. Dhulappa @ Dhulu S/o. Satappa Chandagade, the grand father of the plaintiff and father of defendant No.1 was the original tenant of the lands in question. He died in the year 1960, leaving behind his widow and four sons. After the commencement of the Karnataka Land Reforms Act, defendant No.1, Satappa Dhulappa Chandagade, the father of the Plaintiff filed application in Form No.7

seeking occupancy rights for himself and also on behalf of his surviving brothers and his mother. The Land Tribunal, Chikodi granted occupancy rights on 11.09.1981, in respect of the lands in question wherein it has been made clear that all the three brothers and the widow of deceased Dhulappa were entitle for 1/4th share in respect of the land granted. After the death of the original tenant, Dhulappa @ Dhulu, in the year 1960, it was defendant No.1 Satappa along with his three brothers and mother who have succeeded to the tenancy rights granted in favour of Dhulappa. Admittedly, plaintiff- respondent No.1 herein was not born at that time. Therefore, question of plaintiff claiming any right or share in the suit schedule properties by birth is ruled out. Even if she had been born during the year 1960, she could not have got any right in the said property by birth, inasmuch as, she was not a coparcener at that point of time, as the law then stood. On the cut-off date, in the year 1974, when rights were conferred in favour of the tenants to file application in Form No.7 seeking occupancy rights, the tenants, namely, defendant No.1 (Satappa Dhulappa Chandagade), his brothers along with his mother filed application before the Land Tribunal. While granting occupancy rights in their

favour, jointly, the Land Tribunal has made it clear that they were entitled for 1/4th share each in the granted land. The family members, that is to say, Satappa, his brothers and mother were the persons who had inherited the tenancy rights and they had been recognized as persons entitled for claiming occupancy rights by filing Form No.7. Plaintiff who is the daughter Satappa Dhulappa Chandagade-defendant No.1 herein could not have joined them in filing Form No.7, as she had not succeeded to the tenancy rights nor could she be recognized as a tenant cultivating the land during the lifetime of her father. It is not her case that she was independently cultivating the land in question as a tenant, as on the appointed date i.e. 01.03.1974, along with her father and therefore, she was not entitle for grant of occupancy rights along with her father. In such circumstances, the trial Court was in serious error in recording a finding that plaintiff was entitle for a share in the tenancy rights conferred in favour of her father.

23. During the life time of her father, the daughter-plaintiff cannot claim any right in respect of the suit properties, for which, occupancy rights were conferred in favour of her father. The occupancy rights so conferred in

favour of her father cannot be termed as ancestral property, over which, plaintiff can derive any right by birth so as to maintain a suit for partition. The trial Court has misdirected itself, while examining this important aspect. Therefore, we are of the view that point Nos (i) & (ii) are required to be answered against the plaintiff-respondent No.1 and in favour of the appellant- defendant No.1. Accordingly, we answer point Nos. (i) and
(ii) in the negative.

24. Re. Point No. (iii): On careful scrutiny of the averments made in the plaint, absolutely no details are furnished by the plaintiff with regard to the alleged adoption of late Bharmu-father of defendant No.7 by the family members of Gidagale. Neither the date of such adoption nor the details of the person who took the boy in adoption are forthcoming either in the pleadings or in the evidence of the plaintiff. No oral or documentary evidence to that effect was let-in by the plaintiff.

25. While framing additional issue No.1 trial Court wrongly fastened the burden of proof on the defendants, in the following manner 'whether defendant No.4 to 6 prove that late Bharmu was not given in adoption?'. When the

plaintiff has come up with a specific case that late Bharmu, one of the sons of original propositus Dhulappa had been given in adoption to the Gidagale family, and therefore, he was not entitled to claim any share in respect of the tenancy rights of the suit schedule properties, the trial Court ought to have placed the burden on the plaintiff to plead and prove the said aspect. On careful perusal of the records, plaintiff has neither pleaded the details regarding the adoption nor adduced any evidence in that regard. We are of the view that the Court below was in total error in placing the burden on the defendants to prove the negative issue framed as additional issue No.1. The finding recorded in this regard by the trial Court is solely on the basis of some discrepancy in the surname of late Bharmu. In paragraph-26 of its judgment, the trial Court proceeds to hold that if at all, Bharmu has not gone in adoption, defendant No.1 could have applied for grant of occupancy rights in respect of the suit lands along with Bharmu as well. Another reason assigned is that as admitted by DW.1, pursuant to the order passed by the Land Tribunal, name of defendant No.1 and his other brother late Raghu only came to be mutated in the record of rights, but name of Bharmu was not mutated

which disclosed that he had indeed gone in adoption to Gidagale family. One more circumstance which the Court below has taken into consideration is that defendant No.7 did not enter the witness box to explain why surname of his father was not Chandagade but was described as Gidagale and therefore, an adverse inference had to be drawn in that regard'.

26. In our view, the approach of the learned judge of the trial Court is wholly erroneous. Whatever be the circumstance under which such discrepancy in not mutating the name of Bharmu in the revenue records along with his two brothers and in not describing his surname as 'Chandagade' the same cannot be made a ground to draw an adverse inference that Bharmu had been given in adoption to 'Gidagale' family. Factum of adoption has to be proved by the person who sets of the said plea. The ceremony of giving and taking the boy in adoption has to be pleaded. No evidence is adduced to that effect. Hence, there was absolutely no justification for the Court below to draw such an adverse inference and record a finding to that effect. Hence, we are of the view that the said finding is untenable in law and in the facts and circumstances of the present case. Accordingly, we answer

point No. (iii) in favour of the appellant in RFA. No.4179/2012.

27. The contention of Smt. K.S. Hemalekha, learned counsel for the respondent that in view of the definition of 'family', as defined in Section-2(12) and in the light of the provisions of Section-24 of the Karnataka Land Reforms Act, 1961, rights of tenant are heritable and hence, plaintiff was entitled for half share by inheritance to the tenancy rights granted in favour of her father defendant No.1 is untenable in law. The definition 'family' found in Section-2(12) has no relevance for the purpose of reckoning the rights of the plaintiff in the present case. Insofar as Section-24 is concerned, it no doubt provides that where a tenant dies, the landlord shall be deemed to have continued the tenancy with the heirs of such tenant on the same terms and conditions on which such tenant was holding at the time of his death. This provision enables the father of the plaintiff to claim inheritance of tenancy rights. At any rate, father of the plaintiff had an independent right to claim occupancy rights in respect of the lands in question, as he was actually cultivating the land along with his brothers and mother as on the appointed date i.e., 01.03.1974. Therefore, even assuming that father of the

plaintiff had inherited tenancy rights from his father, the same will not entitle the plaintiff to claim that she had also inherited such rights along with her father. There is no question of applying the concept of coparcenery and the concept of ancestral property, in such case. In any event, as already stated supra, plaintiff was not a coparcener, when the occupancy rights were inherited, upon the death of the original tenant Dhulappa @ Dhulu. Therefore, above contention of the learned counsel does not in any manner strengthen the case of the plaintiff.

28. For the foregoing reasons, both these appeals deserve to be allowed. Accordingly, both the appeals are allowed. The impugned judgment and decree under challenge are set aside. The suit filed by the plaintiff is dismissed.

29. In the peculiar facts and circumstances of the case, both parties are directed to bear their respective costs.