

Devidas And Others vs Shrishailappa And Others on 21 February, 1961

Equivalent citations: 1961 AIR 1277, 1961 SCR (3) 896, AIR 1961 SUPREME COURT 1277, 1962 (1) SCJ 557, 1961 3 SCR 896, 64 BOM LR 82

Author: J.C. Shah

Bench: J.C. Shah, S.K. Das, M. Hidayatullah

PETITIONER:
DEVIDAS AND OTHERS

Vs.

RESPONDENT:
SHRISHAILAPPA AND OTHERS.

DATE OF JUDGMENT:
21/02/1961

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
DAS, S.K.
HIDAYATULLAH, M.

CITATION:
1961 AIR 1277 1961 SCR (3) 896

ACT:
Mortgage-Non-joinder of Parties-Proper, but not -necessary,
added beyond limitation-Suit instituted on behalf of joint
family-Plaintiff not described as manager in the plaint-
Maintainability of suit-Indian Limitation Act, 1908 (9 of
1908), s. 22.

HEADNOTE:
The manager of an undivided Hindu family consisting of
himself, his brother and their step-mother, instituted a
suit for recovery of the amount due under a mortgage
belonging to the family. The step-mother who was interested
in the mortgagee right was not made a party to the suit.
Though the manager (the first plaintiff) did not describe
himself as the manager in the plaint, the allegations in the

plaint showed that the suit was filed on behalf of the joint family. No objection as to non-joinder was raised in the trial court, but when the appeal was pending in the High Court the step-mother was added as a party on her application. The contesting defendants pleaded that as all persons having an interest in the mortgage security were not joined as parties within the period of limitation prescribed for a suit to enforce the mortgage, and the first plaintiff did not, in any case, purport to institute the suit in his capacity as the manager, the suit must fail.

Held: (1) that the failure to join a person who is a proper but not a necessary party does not affect the maintainability of the suit nor does it invite the application of S. 22 Of the Indian Limitation Act, 1908 ;

(2) that the question whether a suit as instituted by the manager of an undivided Hindu family in his personal capacity or as representing the family depends upon the circumstances of each case and that the failure of the plaintiff to describe himself as the manager in the plaint is not decisive of the question.

(1) [1955] 28 I.T.R. 189.

(2) [1955] 27 I.T.R. 176.

897

In the resent case, the step-mother was not a necessary party, and the facts showed that the suit was instituted by the first plaintiff in his capacity as manager. Accordingly, the suit was maintainable.

Guruvayya Gowda and Others v. Dattatraya Anant and Others (1904) I.L.R. 28 Bom. 11, referred to.

JUDGMENT:

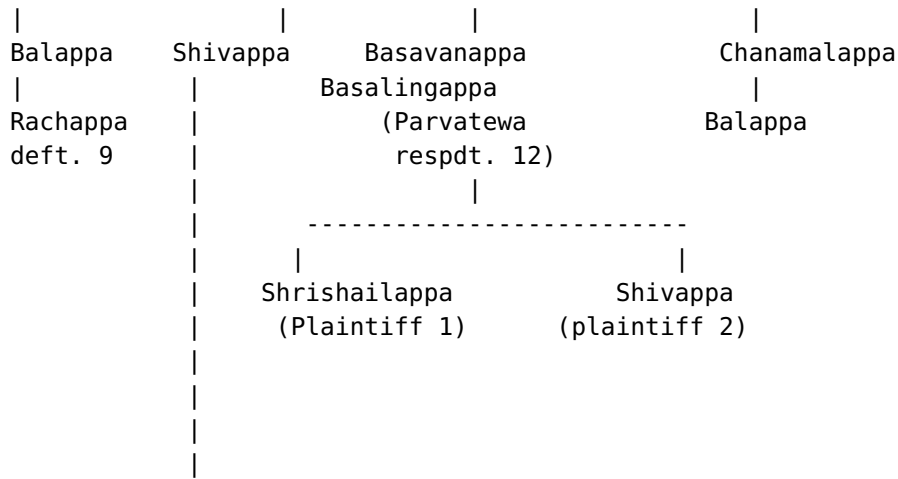
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 112 of 1957. Appeal by special leave from the judgment and decree dated January 28, 1954, of the Bombay High Court in First Appeal No. 69 of 1950.

Purshottam Trikamdas and Naunit Lal for the appellants. C. K. Daphtary, Solicitor-General of India, S. N. Andley, J. B. Dadachanji and P. L. Vohra for respondents Nos. 1 and 2.

B R. L. Iyengar for respondents Nos. 6 to 9.

1961. February 21. The Judgment of the Court was delivered by SHAH, J.-The genealogy which sets out the relationship between some of the principal parties in this litigation is as follows:

Mallappa |



-----|-----|-----|-----| malappa Chanabasappa Balappa Basavanappa Shrishailappa (deft. 5) (deft.6) (adopted by (deft. 7) (deft. 8) Chanamalappa Mallappa had four sons Balappa, Shivappa, Basavanappa and Chanamalappa. These four sons, formed a joint Hindu family. Chanamalappa separated himself from the joint family sometime in the year 1909 and his other three brothers continued to remain joint. Shivappa was the Manager of the joint family after the death of Mallappa. Shivappa died in 1928. and Rachappa became the Manager of, the family. The joint family possessed lands in seventeen, villages and many houses in Khanapur. The family had also an extensive money- lending business. One Bashettappa Neeli-hereinafter referred to as Bashettappawas married to the sister of Rachappa. On July 29, 1929, Bashettappa executed a deed of simple mortgage in favour of Rachappa in respect of certain parcels of lands and houses belonging to him to secure repayment of Rs. 1,73,000/-, Rs. 76,700/- out of which were received in cash and the balance represented amounts which Rachappa agreed to pay to Bashettappa's creditors. To one Gurappa, Bashettappa owed Rs. 8,000/- as an unsecured debt and Rachappa agreed to pay that debt. In Insolvency Application No. 22 of 1929 of the file of the First Class Subordinate Judge, Dharwar, Bashettappa was adjudicated an insolvent and receivers were appointed by the Insolvency Court to administer his estate. The receivers applied for a declaration that the mortgage deed, in favour of Rachappa was in fraud of creditors and was 'accordingly void. The Assistant Judge, Dharwar, in Appeal No. 25 of 1934 from the order of the Insolvency Court held that Rachappa was entitled out of the mortgage amount to recover Rs. 45,700/- as a secured debt and Rs. 31,000/- as unsecured debt. Gurappacreditor of Bashettappa-in the meanwhile filed Suit No. 84 of 1932 against Rachappa and other members of his family in the court of the First Class Subordinate -Judge, Dharwar, for a decree for Rs. 8,000/-claiming that Rachappa had, acting on behalf of the joint family of which he was the manager, undertaken under the deed of mortgage to pay that amount and. that he-Gurappa-had accepted that undertaking.; A decree exparte was passed in that suit against Rachappa on February 28,1933, and the claim against the other members of the family was either withdrawn' or rejected. On July 23, 1939, the three branches of the joint family by mutual agreement severed the joint status and properties movables and immovables belonging to the family were divided.

Pursuant to this division, lands and houses which fell to the shares of the three branches were mutated in the Revenue and Municipal records in the names of the managers of the respective branches. Movables were also divided. The mortgage amount recoverable from Bashettappa and a claim against one Desai were' it is the case of the plaintiff in the suit out of which this appeal Arises, kept joint. Gurappa after making certain infructuous attempts to execute the decree filed dharkhast No. 176 of 1940 to recover Rs. 11,061-6-9 and prayed for an order of attachment and sale of the rights of Rachappa under the mortgage bond dated July 29,1929. One Ganpatrao N. Madiman-hereinafter referred to as Madiman- offered the highest bid at the court auction and the mortgage bond was sold to him for Rs. 20,000/- An application filed by Rachppa for setting aside the sale pleading that the sale was vitiated by material irregularities and fraud in publishing and conducting the sale was rejected.

The mortgage bond was delivered by the executing court to Madiman and orders were issued against Bashettappa and the receivers of his estate prohibiting them from making payments of the dues under the mortgage or any interest thereon, to any person or personal except the purchaser Madiman. In Miscellaneous Application No. 57 of 1944, Madiman applied, to the Insolvency Court to be recognised as an unsecured creditor for Rs. 31,000/., and the application was granted on the footing that the entire interest under the mortgage bond was purchased by him. Receivers appointed by the Insolvency Court thereafter put up for sale. the equity of redemption in the mortgaged properties and the same was purchased for Rs. 15,500/. by Madiman. The sale deed in this behalf was executed by the receivers in favour of Madiman on January 28, 1947. Madiman accordingly became the owner of the equity of redemption and claimed to be entitled to the entire mortgagee right as a purchaser of the right, title and interest of Rachappa.

Basalingappa who was the natural brother of Rachappa and was adopted by his-uncle Basavanappa died in 1946 leaving him surviving his widow Parvatewa, and two sons Shrishailappa and Shivappa. The sons of Basalingappa who will hereinafter be referred to as the plaintiffs filed Suit No. 253 of 1947 for a decree for Rs. 1,23,400/- by enforcing the mortgage deed executed by Bashettappa claiming that Madiman had at the court auction acquired in the mortgagee right only the right, title and interest of Rachappa which was a third and the plaintiffs and defendants 5 to 8 sons of Shivappa continued to remain owners of the remaining two-third share. The plaintiffs prayed for a decree that the amount due under the mortgage be awarded to them and in default of payment the amount be realised by sale of the mortgaged property. To this suit were impleaded Bashettappa as defendant No. 1, receivers of his estate as defendants Nos. 2 and 3, Madiman as defendant No. 4, sons of Shivappa as defendants Nos. 5 to 8 and Rachappa and his son as defendants Nos. 9 and 10. Madiman died after the institution of this suit and his sons were impleaded as defendants Nos. 4A to 4C and his widow as defendant 4D. Madiman's sons were the principal contesting defendants and the main contentions raised by them were: (1)

that the mortgagee right was the separate property of Rachappa and it did not belong at any time to the joint family, of Rachappa defendants 5 to 8 and the plaintiffs, (2) that in any event, at the partition between the three branches the mortgagee right had failed to the share of Rachappa and that it was not kept undivided as alleged by the plaintiffs, and (3) that in Execution Petition No. 176 of 1940, the entire interest of the joint family was sold and it was purchased by Madiman and consequently, the plaintiffs could not enforce the mortgage.

The trial court negated the contentions raised by the sons of Madiman and held that only a third share in the mortgagee right was purchased at the court auction by Madiman. The court accordingly passed a decree against defendants Nos., 4A to 4D for payment of Rs. 60,933-5-4 and proportionate costs 'with future interest at 6% per annum 'on Rs. 30,466,10-8 from the date of the suit to the plaintiffs and defendants 5 to 8 within six months and in default of payment for sale of the mortgaged property. Against that decree, defendants 4A to 4C-hereinafter referred to as the appellants-appealed to the High Court at Bombay. The High Court held that the mortgagee right belonged to the joint family, that the agreement to pay Rs. 8,000/- to Gurappa was not binding upon that family and therefore in execution of the decree passed in favour of Gurappa only the right, title and interest of Rachappa was purchased by Madiman. The High Court further held that there was in 1939 severance of joint family status between the members of the family of Rachappa, plaintiffs and others, but as in the state of the record in the view of the court a finding on the question whether the mortgage debt was kept undivided could not be recorded, they remanded the case for recording a finding on the following issue:

" Whether it is proved that the mortgage debt of 29th July, 1929, fell to the share of defendant No. 9 at the family partition of July, 1939, " and directed the trial court to allow both the parties to lead evidence upon this issue and to certify its findings thereon. The trial court recorded a negative finding on that issue. It held that the mortgage claim was kept undivided at the partition. The High Court confirmed this finding and dismissed the appeal filed by the appellants, subject to a slight modification as to the rate of interest awarded by the trial court. With special leave under Art. 136 of the Constitution, this appeal is preferred.

No serious argument was advanced before us on the plea that the amount due under the mortgage from Bashettappa was not the property of the joint family. At the material time when the mortgage deed was executed by Bashettappa, Rachappa was the manager of the joint family. In Suit No. 84 of 1932 filed by Gurappa it was alleged that Rachappa was the manager of the joint family consisting of himself and the branches of Shivappa and Basavanappa and that the mortgage transaction was for the benefit of the joint family and that Raohappa had entered into that transaction for and on behalf of the joint family and in that suit Rachappa alone was declared liable to pay Rs. 8,000/-. Partition of the year 1930 is supported by evidence which has remained unchallenged. Intimation was given to the village and Municipal authorities pursuant to the partition for mutating the names of the different branches to whom the shares were allotted. The evidence of Rachappa and Mallappa that the

partition took place also has remained uncontradicted.

The question which calls for consideration is whether at the partition, the mortgagee right under the deed executed by Bashettappa was kept undivided. Mallappa defendant No. 5 in his evidence when he was examined after remand stated that "

an equal division was made of the lands according to the income and that Rachappa was not given a smaller share in the lands. " He also stated that the houses were divided in equal shares and the outstandings in the money-lending business except two bonds-the mortgage bond executed by Bashettappa and one Desai were kept undivided. He denied the suggestion that the mortgage debt due from Bashettappa was allotted exclusively to Rachappa. Rachappa in his evidence also stated that the mortgage bond was kept undivided between the three branches and that it was not true that it was allotted to his shares at the partition. Devidas-defendant No. 4 A-had evidently no personal knowledge about this partition or the terms thereof His statement that Rachappa had told him at the time when Madiman offered his bid at the court auction that the mortgage bond was allotted exclusively to Rachappa's share could not in the circumstances of the case be true and was rightly "believed by the trial court and the High Court. On an analysis of the various entries on the record of rights relating to the lands held by the three branches, the trial Judge hold that the plaintiff's' father had received at the partition. lands admeasuring 203 acres 18 gunthas assessed at Rs. 233-10, defendants 5 to 8 had received 127