

CASE NO.:
Appeal (civil) 1388 of 1990

PETITIONER:
KONDIRAM BIKHU KIRDAT

RESPONDENT:
KRISHNA BIKHU KIRDAT

DATE OF JUDGMENT: 04/10/1994

BENCH:
K. RAMASWAMY & S.C. AGRAWAL & N. VENKATACHALA

JUDGMENT:
JUDGMENT

1994 SUPPL. (4) SCR 213

The following Order of the Court was delivered :

Unsuccessful defendant No.1, Kondiba, is the appellant before us. The original plaintiff, Krishna, the appellant's real brother laid Suit No. 135 of 1976 in the trial court, namely, Civil Judge, Senior Division, Satara for partition of the properties by metes and bounds in equal share and for separate possession thereof. The trial court decreed the suit only in respect of two items, the land bearing Survey Nos. 131/3 and 218/7-6 while declaring that items 1, 3 and 6 have already been partitioned between the defendant and Krishna, the original plaintiff. On appeal, at the instance of Krishna the appellate court, on evaluation of evidence recorded the finding in paragraphs 12 and 13 of the judgment (pages 82-85 of the paper book) thus :

"12. Thus, the evidence on record and the strong presumption in favour of joint family leads me to hold that the joint family comprised of deceased plaintiff Krishna and defendant Kondi existed till upto 10.11.1964 and all the suit houses, suit open plot purchased during the period from 29.11.1945 till upto 22.4.1960 were joint family properties having 1/2 share to deceased plaintiff Krishna and the defendant. The perusal of 7 X 12 extract of the Suit lands at serial Nos. 1 to 8 clearly discloses that many of them have facility of canal water and well water and capable to provide cash crops like rice, chilly kardai, Dhana and ground-nuts. Moreover, even the tenanted lands at serial Nos. 9 to 12 described in para 1B were also in the possession and cultivation of plaintiff and defendant till upto 1963. The said yield surely enabled theft after severance of the joint family to purchase the erstwhile family tenanted lands on 27.1.1967 under the sale deed Exh, 131. So far the suit lands at serial Nos, 7, 8 are concerned. The deceased plaintiffs after severance of joint family effected on 10.11.1964 has filed the instant suit on 26.4.1976 namely within 12 years for his 1/2 share for all those suit properties in general and more and more particularly the suit lands bearing revision survey No. 221/4B and 152/5 which have been purchased for Rs. 2,500 by the defendant as a tenant in common brother Krishna on 27.1.1967, In such state of affairs, the plaintiffs are surely entitled to 1/2 share even out of the lands described at serial Nos. 5, 7, 8 in para 1B of the plaint of course subject to payment of Rs. 1,250 as contribution towards their price paid by the defendant.

13. The suit houses and plot are part and parcel of erstwhile big building (wada) belonged to Patluba Kirdat and the map in respect of said Wada available from the Reg. Civil Suit No. 930 of 1940 instituted by defendants instant paternal brother or Laxman Kirdat against the defendant's, his father Bhiku and two uncles in at Exh. 66. It clearly disclosed that the deceased Bhiku owned C.T.S. Nos. 144 and 147 shown in that map. The C.T.S.

No. 144 is bounded by C.T.S. No. 141 and 142 to West and by C. T.S. No. 143 to South while the C.T.S. No. 147 is bounded by CT.S. No. 146 to North. The said Laxman Kirdat under the decree obtained the passage to his CT.S. No. 142 through C.T.S. No. 144 arid to his C.T.S; No. 146 through CT.S. No. 147 and the said passage caused loss of 2 khans one khan from each C.T.S. No. 144 and 147. There is also no quarrel that despite title to C.T.S. No. 147, the deceased plaintiff neither sold his share therein under the sale-deed Exh. 97 nor even included it in the suit for his share therein. But the sale deeds on record clearly discloses that C.T.S. No. 141, 142 and 143 are purchased during the period from 29.11.1945 to 11.2.1956 when the joint family comprised of plaintiff and defendant existed. Moreover, the C.T.S. No. 310-D described at serial No. 4 in Para 1A of the plaint has been also purchased on 22.4.1960 from lady Savitribai when the joint family existed with full force of monitory nucleus of all the suit lands in possession of the said family till 1960. It is also on record that in the year 1964 itself the plaintiff No. 1 was suggested, found to be victim of leprosy land this circumstance also caused the deceased plaintiff to sell his interest out of C.T.S. No. 144 and to construct his own house in the C.T.S. No. 373. The map Exh. 47/1 clearly shows that the C.T.S. Nos. 141, 142 are bound by public lane to west and in case of partition, the plaintiffs can avail their own separate entrance from West side providing the defendant to have the accesses through main door of entire Wada to East side getting C.T.S; No. 143 to his share during equitable partition. Thus, it is obvious that the suit proper-ties were acquired prior to severance of joint family effected on 10.11.1964 and they were owned by deceased plaintiff and defendant as tenants in common and the deceased plaintiff within 12 years has exercise his right to 1/2 share in each of the suit property in the capacity as tenant in common against the defendant. All these clinching circumstances contained me to set aside the decree of the lower court allowing the appeal and I pass the following order."

Consequently it directed partition of suit properties described at serial Nos, 1 to 4 in para 1A of the plaint and at serial Nos. 1 to 8 in para 1B of the plaint subject to Krishna or thereafter his legal representative depositing a sum of Rs. 1, 250 towards their contribution of the price of consideration of Rs. 2,500 made by the defendant for purchasing lands mentioned at serial Nos. 5, 7 and 8 in para 1B of the plaint under sale-deed Exh. 131. Accordingly directed the partition by metes and bounds by appointing Court Commissioner etc. Thus this appeal by special leave.

It is contended by Mr. Vishwanatha Iyer, learned Senior counsel for the appellant that having entered into military service and after his discharge, the appellant continued to contribute for the acquisition of the properties in his own name and, therefore, items except items at serial Nos. 1, 3 and 6, which were already partitioned, remained to be his self acquired properties. Therefore, there is no joint family nucleus for acquisition of these properties and accordingly the trial court was right in declining partition of the items except those mentioned in the preliminary decree granted by the trial court. We find no force in the contention. It is seen that Kondiba and Krishna were in military service. While they were in service, their father was enjoying the properties and acquired other proper-ties individually and collectively of the appellant and Krishna and that properties remained to be joint. Admittedly, both the appellant and Krishna were discharged in 1948 from the military service. Since Krishna had suffered disability of hearing, he remained in the family and the finding of the appellate court is that he continued to cultivate not only the properties acquired by them but also tenanted properties. Thereafter Krishna continued to remain in joint possession alongwith the appellant of all the properties till he sold the properties to the appellant by registered sale deed on November 10. 1964. Thus it can be seen that till the date of severance in status there is no individual enjoyment of the properties or assertion of their rights in respect of any specified item of the property. It is seen that during the life time of the father, both the brothers remained joint and after the demise of the father, by which date both the brothers were discharged from military service, Krishna

continued to maintain properties not acquired only by them but also tenanted land. Therefore, it is clear that they had joint family nucleus and continued to acquire the respective properties; So they must be deemed to be joint family properties as found by the appellate court. After the severance in status, admittedly, the appellant had purchased items 5, 7, and 8 of para 1B of the plaint in his own individual names. Therefore, though the appellate court had clubbed those properties also into the joint family properties, it was not right in treating those properties to be joint family properties. Accordingly only items 5, 7 and 8 mentioned in paragraph 1B of the plaint shall be declared to be self-acquired properties of the appellant. All other properties are joint family properties and liable to be partitioned in equal moiety between the appellant and the Krishna and the legal representatives of Krishna would take half share in the properties. The decree of the appellate court is modified accordingly to that extent. Since items 5, 7 and 8 para 1-B of the plaint are declared to be self-acquired properties of the appellant, the question of respondents' contribution of Rs. 1250 does not arise. The decree of the appellate court is accordingly modified. In other respect it is confirmed. The appeal is partly allowed. No costs.