HC-KAR

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 02ND DAY OF JUNE, 2026

BEFORE

THE HON'BLE MR. JUSTICE V SRISHANANDA

REGULAR SECOND APPEAL No.2330 OF 2017 (PAR)

BETWEEN:

SRI S UMESH
AGED ABOUT 62 YEARS
S/O LATE SUBBARAYAPPA,
R/AT JYOTHINAGARA,
SIRA TOWN,
TUMKUR TALUK AND DISTRICT.

...APPELLANT

(BY SRI AMBRISH.B.N AND SRI SANTOSH S. NAGARALE, ADVOCATES)

AND:

1. SMT. YELLAMMA
W/O LATE TIMMANNA,
AGED ABOUT 63 YEARS

2. KUMARASIDDANNA
S/O LATE TIMMANNA,
AGED ABOUT 38 YEARS

3. BHARASARABABU
S/O LATE TIMMANNA
AGED ABOUT 38 YEARS

4. RAJASHEKAR
S/O LATE SUBBARAYAPPA,
AGED ABOUT 54 YEARS

5. PUTTASIDDAMMA
D/O LATE SUBBARAYAPPA,

AGED ABOUT 56 YEARS

6. S.ASHWATHAIAH
S/O LATE SUBBARAYAPPA,
AGED ABOUT 57 YEARS

VITTALAPPA
DEAD BY LRS
RESPONDENT NOS.8 TO 10

7. SIDDARAJU
S/O VITTALAPPA
AGED ABOUT 45 YEARS

8. PANDURANGA
S/O VITTALAPPA,
AGED ABOUT 38 YEARS

9. SHASHIDARA
AGED ABOUT 41 YEARS
W/O D.RANGANATHA

10. S.K.SAVITHA
AGED ABOUT 41 YEARS
W/O D.RANGANATHA

11. S K ANITHA
W/O MANJUNATHAIAH
AGED ABOUT 38 YEARS

12. S K NAGAVEENA
W/O B JAGANNATHA,
AGED ABOUT 37 YEARS

13. NAGENDRAPPA
S/O LATE HANUMANTHAPPA
AGED ABOUT 69 YEARS

14. N S BYALAN(DEAD)
S/O LATE HANUMANTAPPA

AGED ABOUT 69 YEARS
SINCE DECEASED AND
REP. BY HIS LEGAL HEIRS

14(a) JAYALAKSHMI
W/O N.SUBRAMANYA BYALAN
AGED MAJOR

14(b) YASHWANTH S
S/O N SUBRAMANYA BALYAN
AGED MAJOR

BOTH ARE R/AT #474, 10TH 'B' CROSS
NEAR AYYAPPA TEMPLE
JAKKUR LAYOUT
VTC : BANGALORE NORTH
PO: JAKKUR
BENGALURU – 560 064

15. N R BYALAN
S/O NAGENDRAPPA,
AGED ABOUT 37 YEARS

RESPONDENTS 4, 5, 6 AND 10 ARE
R/O KALIDASANAGARA
SIRA TOWN.

RESPONDENTS 7 AND 8 ARE
R/O HUNASEHALLI
GAUDAGERE HOBLI
SIRA TALUK

RESPONDENT NO.9 IS WORKING AT :
CO-OPERATIVE BANK
SIRA TOWN

RESPONDENTS NO.11 AND 12 ARE
R/O K.R.EXTENSION
SIRA TOWN

RESPONDENTS 13, 14 AND 15 ARE
R/O NO.474, RENUKAMBA NILAYA
10TH CROSS, JAKKUR LAYOUT
JAKKUR, YELAHANKA
BENGALURU – 64.

...RESPONDENTS

(BY SRI NISHANTH.A.V, ADVOCATE FOR R1 TO R3;
SRI D.S.KESHAVA, ADVOCATE FOR R4, 45, R7 TO R9, R11 AND R12;

R6, R13, R14(a), 14(b), 15 ARE SERVED;
VIDE ORDER DATED 19.01.2023 NOTICE TO R10 HELD SUFFICIENT)

THIS RSA IS FILED UNDER SECTION 100 R/W ORDER XLII OF CODE OF CIVIL PROCEDURE, AGAINST THE JUDGMENT AND DECREE DATED 21.08.2017 PASSED IN RA NO.76/2013 ON THE FILE OF THE I ADDL. DISTRICT AND SESSIONS JUDGE, TUMKUR, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DATED 25.4.2013 PASSED IN O.S NO.10/2010 ON THE FILE OF THE SENIOR CIVIL JUDGE AND JMFC, SIRA.

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR. JUSTICE V SRISHANANDA

ORAL JUDGMENT

Heard Sri B.N.Ambrish, advocate for Sri Santosh S. Nagarale, learned counsel for the appellant and Sri A.V.Nishanth, learned counsel for respondent Nos.1 to 3.

2. Present Regular Second Appeal came to be admitted on the following substantial questions of law by the Order dated 05.09.2024.

> i. *Whether the First Appellate Court was justified in reversing the judgment and decree of the Trial Court and decreeing the counter claim of the defendant Nos.1, 2 and 3 in respect of item Nos.2, 3 and 9?*
>
> ii. *Whether the First Appellate Court was justified in holding that the item Nos.2, 3 and 9 are the self acquired properties of defendant Nos.1, 2 and 3?*
>
> iii. *Whether the judgment and decree of the First Appellate Court suffers from perversity and illegality, warranting any interference by this Court?*

3. Parties are referred to as plaintiff and defendants for the sake of convenience as per their original ranking in the Trial Court.

4. Appellant is the plaintiff, who filed the suit in O.S.No.10/2010 on the file of the Senior Civil Judge and JMFC, Sira, for the relief of partition and separation possession in respect of the following immovable properties hereinafter referred to as the 'suit properties'.

i. *"Land bearing Sy.No.38/1a measuring 3-00 acres, assessment at Rs.1-38 situated at Kallukote village, Kasaba Hobli, Sira Taluk, which consists 80 coconut, 4 tamarind, 40 bevu, 10 honge trees along with one I.P. set and Chettu well, bounded on East: Halla, West: alienated land in the same Sy.No.38/1, North: sites belongs to others, South: land of S.K.Siddanna.*

ii. *Land bearing Sy.No.30/1c measuring 5-00 acres, assessment at Rs.2-30 situated at Kallukote village, Kasaba Hobli, Sira Taluk, which consists 140 coconut, one tamarind, 10 bevu, 20 honge and 750 aracnut trees having two I.P. set bounded on East: land Sy.No.28/1c, West: Halla, North: land of Rahimkhan Sab, South: Srirama Layout.*

iii. *Land bearing Sy.No.28/1c measuring 4-00 acres, assessment at Rs.2-24 situated at Kallukote, Kasaba Hobli, Sira Taluk, consisting 150 coconut, 8 bevu, 3 honge and one* *tamarind trees along with one I.P. set and pump room, bounded on East: Maszid, West: land Sy.No.30/1c, North: land of Rahimkhan, South: land of Gadigiriyanna.*

iv. *Land bearing Sy.No.5/1 measuring 3-00 acres, assessment at Rs.2-07 situated at Kallukote, Kasaba Hobli, Sira Taluk, bounded on East: Amarapura road, West: land of Narayansingh, North: Kallukote village, South: Rice Mill of Kumaranna.*

v. *Land bearing Sy.No.42/1 measuring 4-00 acres, assessment at Rs.2-44 situated at Kallukote village, Kasaba Hobli, Sira Taluk, bounded on East: Amarapura road, West: sites belongs to others, North: Presidency School, South: land of R.Subbarayapp.*

vi. *Site property bearing assessment No.384/373/354, measuring 32 x 75.7 feet, situated at Kalidasanagara, Sira Town, bounded on East: road, West: House of Devirao, North: Galli, South: road.*

vii. *House property bearing assessment No.478/465/438, measuring 16 x 63 situated at Kalidasanagara, North: Gangammanahalla, South: road.*

viii. *Dilapidated house now becomes site bearing assessment No.625/596/561, measuring 23.6 x*

27.2 feet, situated at Kalidasanagara, Sira Town, bounded on East:house of Puttasiddanna, West:Road, North:Galli, South: Revanasiddeswara temple.

ix. *Site bearing assessment No.1084/1020/5751/5, measuring 15+2x/2 20+18 situated at Near N.H.4 Sira town, bounded on East: Road, West: N.H.4 Road, North: Hanuman Petrol Bunk, South: PWD Quarters compound.*

x. *House property bearing assessment No.528/511/482, measuring 46.9 x 20 feet, situated at Kalidasanagara, Sira Town, bounded on East: road, West: item No.7, North: Item No.12, South: Gangammanahalla.*

xi. *House property bearing assessment No.480/465/2/482/2, measuring East: road, West: Item No.7, North:item No.10, South:road.*

xii. *House property bearing assessment No.479/465/1/438/1, measuring 24 x 23, situated at Kalidasanagara, Sira town, bounded on East: house of Ashwathappa, West:road, North: Gangammanahalla, South: house of Shivaramanna.*

xiii. *Alienated land in Sy.No.38/1, measuring 3 acres 21 guntas, situated at Kallukote village,* *Kasaba Hobli, Sira Taluk, bounded on East: land Sy.No.38/1, West:Amarapura road, North: sites of others, South: land of S.K.Siddanna."*

5. In a cryptic manner, plaint has been drafted by contending that suit item Nos.2 and 3 are joint family properties and the same were purchased by the father of the plaintiff i.e., Sri D.Subbarayappa in the name of Sri S.Thimmanna, being his elder son. Said sale deed took place on 01.03.1976 and said properties were purchased from one Sri S.J.Nuruahkhan.

6. Insofar as item No.9 is concerned, there is no pleading at all in the plaint.

7. Likewise, there is no pleading with regard to item Nos.1 to 3 and item No.6 of the suit property. In paragraph 6 of the plaint, it has been contended that Item Nos.7, 8 and 10 were constructed by the father of the plaintiff and later on, they were renewed (*sic* renovated) out of the joint labour of the joint family members.

8. Pertinently, the cause of action at paragraph No.9 of the plaint reads as under:

> *"9. Cause of action for this suit arose about 3 months back when the defendants have refused to effect partition and subsequently at Sira town and Kallukote village, Kasaba Hobli, Sira Taluk, within the jurisdiction of this Hon'ble Court."*

9. Nowhere in the plaint, it has been mentioned that Item Nos.2 and 3 were purchased by utilizing the joint family funds by Sri D.Subbarayappa being the Kartha of the joint family in the name of Thimmanna.

10. Prayer in the plaint reads as under:

> *"WHEREFORE, the plaintiff prays for judgment and decree against the defendants-*
>
> *a) For partition and separate possession of his 1/3rd share in all the suit schedule properties by metes and bounds;*
>
> *b) For award of court costs and such other relief's as the Hon'ble court deems fit to grant under the circumstances of the case, in the ends of justice."*

11. Pursuant to the suit summons issued, defendants entered appearance and there is an emphatic denial of the plaint averments in the written statement filed by defendant Nos.1 to 3 who are the wife and children of Thimmanna.

12. There is a specific denial as to the averments made with regard to Item Nos.2 and 3 of the suit property and there is a counter claim that Item Nos.2, 3 and 9 are to be held as self acquired properties of Thimmanna.

13. Defendant Nos.4 and 5 filed separate written statement admitting the relationship and they sailed with the plaintiff with regard to the averments made in paragraphs 3 to 7 of the plaint. The discrepancy found in paragraph 8 was pointed out in their written statement.

14. Based on the rival contentions of the parties, learned Trial Judge raised the following issues and additional issues.

<u>*Issues*</u>

i) Whether the plaintiff proves that, the suit properties are joint family properties of both plaintiff and defendants?

ii) Whether the plaintiff made out a case that he is having share of 1/3rd in the suit schedule properties along with defendants?

iii) What Order or decree?

<u>Addl. Issues</u>

i) Whether the defendant Nos.1 to 3 proves that, the suit is bad for partial partition and not maintainable?

ii) Whether the defendant No.1 to 3 proves that, they are owners and in possession of the suit schedule properties item No.2, 3 and 9?

iii) Whether the defendant no.1 to 3 are entitled for the relief of declaration of title and permanent injunction as prayed for in the written statement in respect of the suit schedule item No.2, 3 and 9?

iv) Whether the defendant No.1 to 3 are entitle for share in suit schedule item No.1, 4 to 8 and 10?"

15. In order to prove his case, plaintiff got examined himself as PW-1. Two witnesses on his behalf viz., Parashuramaiah and S.M.Ramalingappa were examined as P.Ws 2 and 3.

16. Plaintiff placed on record 39 documents which were exhibited and marked as Exhibits P-1 to P-39 comprising of RTCs, assessment of list of buildings and land taxation, Genealogy tree, copy of MR, Information with respect to ration card holder, application with respect to ration card, indemnity bond, accounts book, sale deed, sale certificate, relinquishment deed, acknowledgment given by the Sira police, MCR receipt,

application given to BESCOM and its acknowledgement, KEB Bill, letter from BESCOM, Electricity bills paid receipts, certificate given by the School with respect to Birth Certificate, loan completion letter, letter from Balagunda Estate, letter from Kubour estate, letter from Gargandur estate, Notices given by Sira Municipalities, book maintained by brother of P.W.1, ten photos, ten negatives, invitation with respect to home ceremony, two electricity bills and 58 tax paid receipts.

17. As against the material evidence placed on record by the plaintiff, wife of Thimmanna by name Yallamma who is defendant No.1 got examined herself as DW-1. Two witnesses by name Pandurangaiah and S.Rajshekar were examined as D.Ws.2 and 3.

18. On behalf of defendants, in all 86 documents were placed on record, portion of which was confronted to P.W.1 in his further cross-examination and admitted by him. The documents were exhibited and marked as Exs.D.1 to D.86 comprising of sale deeds, relinquishment deed, promissory letter, order passed in RRT No.24/10-11, death certificates, encumbrance certificates, MR No.23/80-81, MR No.14/81-82,

MR No.4/11-12, Tax Register extracts, RTCs, Hissa Tippani, Akarbandh, Tax paid receipts, bank pass book, patta books, admission letter, house licence, licence recipt, photos and CD.

19. Learned Trial Judge after hearing the parties, by the judgment dated 25.04.2013, decreed the suit of the plaintiff in respect of all the suit items and dismissed the counter claim of defendant Nos.1 to 3 with regard to item Nos.2, 3 and 9.

20. Operative portion of the Trial Court judgment reads as under:

> *"The suit of the plaintiffs is hereby decreed with cost.*
>
> *The plaintiff and other defendants are entitled 1/8th share each in all the suit schedule properties.*
>
> *The counter claim of the defendant No.1 to 3 with respect to item no.2, 3 and 9 is hereby dismissed.*
>
> *Draw accordingly preliminary decree."*

21. Being aggrieved by the same, defendant Nos.1 to 3 filed an appeal in R.A No.76/2013 on the file of the I Additional District and Sessions Judge, Tumakuru.

22. The appeal was restricted to rejection of counter claim and decreeing of the suit in respect of item Nos.2, 3 and 9. As such, decreeing of the suit in respect of other items of the property remained intact.

23. Learned Judge in the First Appellate Court, after securing the records, heard the arguments of the parties in detail and allowed the appeal filed by defendant Nos.1 to 3.

24. Decree of the Trial Court was modified by the learned Judge in the First Appellate Court dismissing the suit of the plaintiff in respect of Item Nos.2, 3 and 9 and counter claim was allowed, *inter alia*, holding in paragraph Nos.38 to 48 as under:

> *"38. As could be seen from the material placed on record, the plaintiff has asserted that the suit item No.2, 3 and 9 properties are the joint family properties. Therefore initial burden lies on the plaintiff to plead and prove this assertion in accordance with law. The plaintiff at para-2 of the plaint has pleaded that all the suit properties are the joint family properties of himself, late Thimmaiah and defendant No.4 and 5. At para-3 of the plaint the plaintiff has further pleaded that the suit item No.2 and 3 properties are the joint family properties and same was purchased by his*

father in the name of late Thimmaiah as he was the eldest son. Except the pleading to the extent above, the plaintiff has no where pleaded that during the lifetime of his father the family had sufficient nucleus at its disposal. As a matter of fact the plaintiff has not pleaded the source of earnings of the family during the lifetime of his father. As stated supra, it is an admitted fact that except suit item No.2, 3 and 9 properties the other properties are the joint family properties. Interestingly the plaintiff has not pleaded the income from the admitted joint family properties so as to establish that out of the said income the suit properties were purchased by his father in the name of late Thimmaiah. At this juncture if the evidence of P.W.1 is perused, in his evidence he has spoken that the joint family was running blankets business and was supplying the same to the various customers and late Thimmaiah being the elder son was managing the entire business on behalf of the joint family. Interestingly there is no pleading to that effect in the plaint. It is the settled precedent law that the evidence has to be adduced on the basis of pleadings and any amount of evidence that is adduced de-horse the pleadings cannot be looked into. Therefore the evidence of P.W.1 about the joint family business as well as the management of business by late Thimmaiah is not backed by proper pleadings and hence the said evidence cannot be accepted.

39. This apart, it is further pertinent to note that the suit item No.2, 3 and 9 properties were acquired under Ex.P19 and P20. The perusal of Ex.P19 reveals that late Thimmaiah is shown to have purchased suit item No.2 and 3 properties from one S.K. Noorulla Khan on 1/3/1976 for valuable consideration. The recitals of this Ex.P19 no where discloses that these suit item No.2 and 3 properties were got purchased by the late father of the plaintiff in the name of his elder son late Thimmaiah. Similarly the suit item No.9 property was acquired under Ex.P20 which is the sale certificate issued by Administrative Officer, Town Municipality, Sira, which reveals that late Thimmaiah purchased the suit item No.9 property under Ex.P20. There are no recitals in Ex.P19 and P20 to show that these properties were acquired for and on behalf of the joint family. No-doubt the plaintiff himself has produced the original Ex.P19 and P20, but that itself is not sufficient to hold that these properties are the joint family properties.

40. This apart, it is further pertinent to note that P.W.1 in his evidence has gone to the extent of admitting that during the lifetime of his father, the joint family had more expenditure than income. This clear admission of P.W.1 goes to establish that the joint family had no nucleus at its disposal. In view of this clear admission, heavy burden lies on the plaintiff to establish as to how the joint family acquired the suit item No.2, 3 and 9 properties. If the plaintiff succeeds *in discharging his burden of proving this fact, the onus will shift on the defendants 1 to 3 to rebut the evidence of P.W.1. But the admission brought on record from the mouth of P.W.1 clinchingly establishes that the joint family had no earnings, as such the family expenditure was more than the income. That being so, the plaintiff has to convince this Court as to how the consideration amount was paid by his late father when the family expenses were on the higher side. But, surprisingly the plaintiff has not placed any evidence to establish that the joint family had sufficient nucleus at its disposal and that the said nucleus was utilized for the acquisition of suit item No.2, 3 and 9 properties.*

41. This apart it is further pertinent to note that late Thimmaiah was admittedly the eldest son of late Subbarayappa. According to the plaintiff, late Thimmaiah being the eldest son was managing the joint family affairs. Interestingly even on this aspect there is no pleading on behalf of the plaintiff. The entire plaint is silent about the management of the joint family by late Thimmaiah even during the lifetime of late Subbarayappa. At this juncture if the evidence of P.W.1 is perused, he has spoken that his late father was suffering from ailments, as such late Thimmaiah was managing the joint family properties. Even to establish this fact the plaintiff has not produced any cogent and convincing evidence before the learned trial Court. At this juncture if the evidence of D.W.3 is perused, he has stated that late Thimmaiah was *managing the affairs of joint family during the lifetime of his father. But at this juncture, if the written statement filed by defendant No.4 is perused, he has simply supported the case of the plaintiff by admitting all the plaint allegations and he has also no where pleaded that late Thimmaiah was managing the affairs of the joint family. Therefore the evidence of D.W.3 on this aspect is also not backed by corresponding pleadings. As such, his evidence also does not inspire the confidence of this Court.*

42. This apart it is further pertinent to note that the plaintiff in his evidence has got marked the documents at Ex.P30 to P32 which are the supply orders placed by different persons towards the supply of blankets and Ex.P31 is addressed to M/s. B. Subbarayappa and sons for the supply of blankets. Ex.P30 and 32 are addressed to Thimmaiah with address as M/s. B.Subbarayappa and Sons. The plaintiff in order to establish that the joint family was carrying on the business of supply of blankets perhaps has got marked these Ex.P30 to Ex.P32. But, at the cost of repetition it is necessary to mention that there is no corresponding pleading in the plaint about the joint family business of supply of blankets. Ex.P30 to 32 are relating to the year 1986. But interestingly the plaintiff has not placed any evidence to show about the possession of joint family nucleus as on the date of acquisition of suit item No.2, 3 and 9 properties under Ex.P19 and P20. Therefore Ex.P30 to 32 are almost 10 years later to the *acquisition of suit item No.2 and 3 properties under Ex.P19. Therefore these documents also does not inspire the confidence of this Court. At this juncture it is necessary to mention that the plaintiff has only referred to suit item No.2 and 3 properties at para-3 of the plaint and surprisingly the plaintiff has not referred to suit item No.9 property in the body of the plaint.*

43. This apart it is further pertinent to note that Subbarayappa died on 22/6/1988. The khata and revenue documents were admittedly mutated in the name of late Thimmaiah in respect of suit item No.2 and 3 properties on the basis of Ex.P19. The various revenue documents produced by both the sides establishes this fact and at this juncture if the evidence of P.W.1 is perused, he has also admitted that the mutation of suit item No.2, 3 and 9 properties was standing in the name of late Thimmaiah. Interestingly soon after the death of late Subbarayappa in the year 1988, the plaintiff and his other siblings did not bother to get the khata transferred in their name. This apart it is further pertinent to note that Thimmaiah died on 30/10/1994 and the admitted revenue documents establishes that the name of Thimmaiah and subsequently of his legal heirs were continued in the revenue records till the suit was filed on 28/10/2010. Therefore even after the death of late Thimmaiah, no steps were taken for change of mutation in the name of the legal heirs of late Subbarayappa. The plaintiff has not explained in his plaint about this. Therefore this *fact also goes against the case of the plaintiff. As stated supra, the initial burden of proving that the suit item No.2, 3 and 9 properties are the joint family properties is on the plaintiff. But the plaintiff has failed to plead and prove this fact in accordance with law. Therefore in view of the law laid down in the above authorities the onus never shifts on defendants 1 to 3 to establish that the suit item No.2, 3 and 9 properties are the self-acquired properties of late Thimmaiah. But however, the defendants 1 to 3 have set up counter claim asserting their absolute right and title over the suit item No.2, 3 and 9 properties.*

44. The defendant No.1 to 3 in order to establish that suit item No.2, 3 and 9 properties were the absolute properties of late Thimmaiah have led the evidence of D.W.1 and this D.W.1 in her evidence has throughout maintained that her husband purchased suit item No.2, 3 and 9 properties out of his own earnings and was in possession and enjoyment till his death. As stated supra, the original title deeds at the Ex.P19 and P20 pertaining to suit item No.2, 3 and 9 properties stands in the name of late Thimmaiah. The defendants 1 to 3 have also got marked the certified copies of the said documents and these documents supports the defense taken by the defendants 1 to 3 about the absolute right of late Thimmaiah over these properties. D.W.1 had also got marked the various RTC extracts at Ex.D25 to 74 which are pertaining to suit item No.2 and 3 properties and these documents admittedly stands in *the name of late Thimmaiah. There is no cross-examination directed to D.W.1 disputing the contents of the entries made in the revenue records in the name of late Thimmaiah. On the contrary, P.W.1 himself admits that all the revenue records pertaining to suit item No.2 and 3 properties were in the name of late Thimmaiah. Therefore the entries made under these RTC extracts has got presumptive value and a presumption has to be drawn that late Thimmaiah was also in possession and enjoyment of the suit item No.2 and 3 properties till his death. At this juncture it is necessary to mention that D.W.1 in her evidence has spoken that late Thimmaiah borrowed loan and dug bore-well in the suit item No.2 and 3 properties and so also obtained electricity connection in his name. This fact is admitted by P.W.1 in his cross-examination. Therefore all these facts clinchingly establishes that late Thimmaiah purchased the suit item No.2 and 3 properties in his own right and enjoyed the same till his death in the year 1994. Defendants 1 to 3 being the legal heirs of late Thimmaiah thereafter continued to enjoy the suit item No.2 and 3 properties and the name of defendant No.1 was also mutated in the RTC extracts in the capacity of the wife of late Thimmaiah which are never challenged by the plaintiff and his other brothers and sisters. The entire evidence placed on record also establishes that late Thimmaiah never throw the suit item No.2 and 3 properties in to the common hotchpotch and all the legal heirs of late Subbarayappa never enjoyed these properties as joint* *family properties. Therefore there is no blending of suit item No.2, 3 and 9 properties with the joint family properties. A such the question of treating these properties as joint family properties does not arise.*

45. The learned trial Court has erroneously come to the conclusion that all the joint family members were engaged in sheep wool business and the acquisition of suit item No.2, 3 and 9 properties in the name of late Thimmaiah by the joint family. It is surprising to note that D.W.1 is admittedly the wife of late Thimmaiah. But the learned trial Court has refused to accept the evidence of D.W.1 mainly on the ground that the suit item No.2 and 3 properties were purchased before her marriage with late Thimmaiah. No-doubt D.W.1 got married late Thimmaiah subsequent to the acquisition of properties under Ex.P19, but that itself is not sufficient to disbelieve the entire defense set up by the defendants 1 to 3. As stated supra, the defendants 1 to 3 have not only denied these properties as joint family properties, but have also set up counter claim over these properties. The learned trial Court has ignored this fact while appreciating the entire material placed on record. The rights of the parties cannot be decided merely on the basis of their oral testimonies. When the document itself speaks that the suit item No.2 and 3 properties were purchased by late Thimmaiah and the said document is also produced before the Court, then the oral evidence loses its significance. Therefore just because D.W.1 got married *subsequent to the acquisition of properties under Ex.P19, the learned trial Court ought not to have disbelieved her evidence.*

46. It is further pertinent to note that the learned trial Court at para-43 of the impugned Judgment has also observed that when all the members of the family were jointly residing, then the self-earnings also becomes the joint family property. The observations so made by the learned trial Court is foreign to the concept of the Hindu Joint family. As held in the above authorities, every Hindu Family is presumed to be joint. But there is no presumption under law that every property held by the family is a joint family property. Therefore, just because all the members of the family were residing jointly, no such presumption can be drawn that even the earnings of every individual becomes the joint family property. Therefore the findings so recorded by the learned trial Court is contrary to the settled law as laid down in the above authorities. Interestingly the learned trial Court has not at all appreciated the defense of defendant No.1 to 3 in the right prospective. Therefore the entire material placed on record falsifies the case put forth by the plaintiff as well as the defense set up by the defendants 4 and 5 to the effect that the suit item No.2, 3 and 9 properties as joint family properties. When once the plaintiff fails to establish that these suit item No.2, 3 and 9 properties as joint family properties, therefore, it has to be held that these properties were the self acquired properties of *late Thimmaiah and consequent to his death the defendants 1 to 3 being his legal heirs have become the absolute owners in possession and enjoyment of the said properties and their absolute title over the suit item No.2, 3 and 9 properties has to be upheld.*

47. At this juncture it is necessary to mention that the defendants 1 to 3 in their written statement have set up counter claim by seeking the relief of declaration of their title over the suit item No.2, 3 and 9 properties. On perusal of the order sheet of the learned trial Court, it was noticed that the learned trial Court did not give opportunity to the plaintiff to file his written statement as per Order 8 Rule 6 (3A) of C.P.C. But however, even issues were framed on the basis of counter claim and entire trial was conducted by the learned trial Court. It appears even the parties and their counsels did not brought this fact to the knowledge of the learned trial Court. But however during the course of arguments, the learned counsels appearing for both the sides fairly submitted that though the plaintiff has not filed any written statement as against the counter claim, but the parties understood their case and have led their evidence and nothing remains to be done except filing the written statement of the plaintiff and they consented for disposal of the appeal.

48. This apart is further pertinent to note that the plaintiff has pleaded the measurement of suit item No.2 property as 5 Acres of land. On perusal of Ex.P19, it was noticed that late Thimmaiah purchased 3

> *Acres 20 Guntas. But however during the course of arguments it was submitted that the 3 Acres 20 Guntas of land was sold along with the abutting rocky area and after survey the total extent was found to be 5 Acres. Even they also drew the attention of the Court to the relevant documents wherein the total extent is shown as 5 Acres. Even otherwise the boundaries are also similar in nature. As a matter of fact there is no dispute between the parties about the extent of suit item No.2 property as pleaded by the plaintiff. Therefore, with these observations I am of the opinion that the plaintiff has utterly failed to discharge his burden of proving that the suit item No.2, 3 and 9 properties as joint family properties and on contrary the defendants 1 to 3 are able to establish their right, title, possession over these properties and hence I record my findings on point No.1 and 2 in the negative."*

25. Being aggrieved by the same, plaintiff has filed the present Regular Second Appeal.

26. Sri Ambrish B.N., advocate for Sri Santosh S.Nagarale, learned counsel for the appellant/plaintiff reiterating the grounds urged in the appeal memorandum would contend that the First Appellate Court while reversing the judgment of the Trial Court with regard to Item Nos.2, 3 and 9 of the suit

property has given too much importance to the want of pleadings and not appreciated the material evidence on record in proper manner and thus sought for allowing the appeal.

27. He would further emphasize that item Nos.2, 3 and 9 were purchased by the father of the plaintiff viz., D.Subbarayappa and Thimmanna by utilizing the joint family funds. Item Nos.2 and 3 were purchased in the name of Thimmanna, who is the elder son, out of respect towards him, who is the husband of the first defendant and father of defendant Nos.2 and 3.

28. Therefore, First Appellate Court was not justified in dismissing the suit and allowing the counter claim of defendant Nos.1 to 3.

29. He also contends that no material evidence is placed on record to establish that the Thimmanna had independent income inasmuch as Yallamma/defendant No.1 in her cross-examination has specifically admitted that she does not know what was the profit derived from the business i.e., sale of ಕಂಬಳಿ (blankets) by Thimmanna.

30. He would further contend that when the material evidence placed on record by defendant Nos.1 to 3 are not sufficient to hold that Thimmanna had independent income, being the member of the joint family, and the business of sale of ಕಂಬಳಿ (blankets) was a joint family business, the Trial Court was justified in holding that Item Nos.2, 3 and 9 are also joint family properties.

31. Thus, the reversal of the finding to that extent by the First Appellate Court is thus suffering from perversity and sought for allowing the appeal.

32. *Per contra*, Sri Nishanth A.V., learned counsel for the respondents supports the judgment of the First Appellate Court.

33. He would contend that, not only for want of pleadings the First Appellate Court reversed the finding of the Trial Court in the respect of Item Nos.2, 3 and 9 of the suit property, but also there is no better evidence placed on record by the plaintiff to hold that those three items are also joint family properties.

34. He would further contend that there is a categorical admission in the cross-examination of PW-1 that expenditure was more than income in the joint family. Therefore, theory of joint family nucleus which is sought to be portrayed though not pleaded and proved by the PW-1, cannot be countenanced in law and thus sought for dismissal of the appeal.

35. Having heard the arguments of both sides, this Court perused the material on record meticulously.

36. On such perusal of the material on record, it is crystal clear that plaintiff/PW-1 has propounded that the Item Nos.2 and 3 are purchased out of joint family income for the first time in the examination-in-chief. In paragraph 3 of the plaint, there is no mention that there was utilisation of surplus joint family funds for purchase of Item Nos.2 and 3 of the suit property by D.Subbarayappa in the name of S.Thimmanna.

37. Further, there is no pleading and not a syllable spoken in the examination-in-chief of P.W.1 with regard to Item No.9 of the suit property.

38. How and when Item No.9 of the suit property is acquired and what is the source of income for purchase of Item No.9 of the suit property is not even spelt out by PW-1.

39. Likewise, the plaint is silent with regard to other items of the suit properties.

40. Since there is no dispute with regard to other items of the properties, this Court does not venture into the want of pleadings in respect of those items of the suit properties.

41. Insofar as Item Nos.2 and 3 is concerned, admittedly sale deed is in the name of Thimmanna. According to defendant Nos.1 to 3, Thimmanna was having an independent business of sale of ಕಂಬಳಿ (blankets) at Madikeri. Another brother, namely, S.Aswathaiah who is the 6th defendant was also involved in the sale of ಕಂಬಳಿ (blankets) at Somwarpet and Sakaleshapura.

42. DW-1 was subjected to searching cross-examination in this regard by the plaintiff. But she has withstood such searching cross-examination and apparently denied that the business of ಕಂಬಳಿ (blankets) was the joint family business.

43. Moreover, PW-1 has categorically admitted that the expenditure of the joint family was more than the income during the life time of Subbarayappa.

44. In order to establish that a particular item of the suit property is purchased out of the joint family income, it is incumbent on such propounder to establish the fact that there was surplus joint family income which was utilised for purchase of the said property.

45. But, there is no pleading at all in that regard and in the light of the admission elicited in the cross-examination of PW-1 that the expenditure was more than the income of the joint family, the doctrine of joint family nucleus and spillover cannot be applied to the case on hand to hold that Item Nos.2 and 3 are purchased by utilizing the surplus funds of the joint family income.

46. Crowning all these aspects of the matter, PW-1 categorically admits that the contents mentioned in Exhibits P-19 and 20/sale deeds are true and correct. In Exhibits P-19 and 20, there is a clear recital that the Thimmanna has

purchased the property from the respective vendors by utilising his own income.

47. When these aspects of the matter are taken into consideration in a cumulative manner, it is crystal clear that, as rightly contented on behalf of the respondents/defendants, the finding recorded by the First Appellate Court in reversing the decree of the Trial Court, decreeing the suit in respect of Item Nos.2 and 3 and 9 is not only for the want of pleadings but also for want of necessary material evidence on record.

48. Further, the Trial Court misdirected itself in not noticing that there is no pleading and proof with regard to Item No.9 of the suit property. No averments are made in respect of Item No.9 of the suit property in the plaint or in the entire examination-in-chief of PW-1.

49. To plug the loop holes in the evidence of PW-1, a feeble attempt is no doubt made by examining PWs-2 and 3.

50. PW-2 claims that he is the resident of Kalidasanagara in Sira town. But he does not know what are all the properties that were owned by Subbarayappa.

51. In his cross-examination, he specifically admits that the suit is filed only with regard to Item Nos.2 and 3 of the suit property comprising of about 09 acres. He would not even mention about Item No.9 of the suit property. So his oral testimony did not improve the case of plaintiff in proving that item Nos.2, 3 and 9 of suit properties are joint family properties.

52. Insofar as PW-3 is concerned, he has gone to the extent of answering in the cross-examination that when Subbrayappa died, Thimmanna was a bachelor. He went to the extent of deposing that Thimmanna managed the suit properties for a period of 30 years. Whereas, PW-1 has specifically answered that Subbarayappa was not well during his last days and therefore, it was Thimmanna who was managing the properties for about 6 to 7 years.

53. Thus, there are varied versions on behalf of the plaintiff with regard to Item Nos.2 and 3 of the suit property and no material evidence is placed on record insofar as Item No.9 of the suit property.

54. No doubt, there is a presumption that whenever the members of the joint family possesses the property, even though in the individual names, they are to be considered as joint family properties, unless acquisitions are after the severance of the joint family status.

55. But it is a rebuttable factual presumption. In order to raise such a presumption, it was for the plaintiff to discharge the initial burden by placing necessary and cogent evidence on record that acquisition of item Nos.2 and 3 of the suit property was from the joint family income, as is held by the Hon'ble Apex Court in the case of ***Shrinivas Krishnarao Kango vs. Narayan Devji Kango and others*** reported in ***(1954)1 SCC 544*** which is reiterated in the case of ***Dorairaj vs. Doraisamy (dead) through LRs and others*** passed in ***Civil Appeal Nos.2129-2130/2012 dated 05.02.2026***.

56. As pointed out supra, there is no pleading in this regard, much less proof.

57. Under such circumstances, when the initial burden itself is not discharged by the plaintiff, question of defendant placing the rebuttal evidence would not arise.

58. Thus, even though few admissions are elicited in the cross-examination of D.W.1, same would not be sufficient enough to hold that item Nos.2, 3 and 9 are also joint family properties.

59. The error committed by the learned Trial Judge was thus rightly corrected by the learned Judge in the First Appellate Court as discussed supra.

60. When there is no pleading or proof with regard to the purchase of Item Nos.2 and 3 by utilising the joint family funds, learned Trial Judge has thus committed an error in decreeing the suit in respect of Item Nos. 2 and 3.

61. Insofar as Item No.9 is concerned, there was no material at all either in the form of pleadings or in the form of evidence to hold that Item No.9 is also a joint family property.

62. Before this Court, Sri Ambrish, learned counsel strenuously contended that the First Appellate Court lost its sight in respect of Exhibits P-29/loan completion letter and Ex.P-30/letter from Balagunda Estate.

63. These two documents are the documents which have come into existence after the death of Thimmanna in clearing the alleged loan on Item Nos.2 and 3.

64. The same cannot be countenanced in law in view of the fact that author of Exhibits P-29 and 30 are not examined nor the contents of Exhibits P-29 and 30 would make it clear that it is the plaintiff who cleared the dues.

65. Moreover no attempt was made by the plaintiff to challenge the revenue entries which stood in the name of Thimmanna till his death, if the property is a joint family property.

66. Further, there is a specific admission by PW-1 that he has also purchased two items of the property in Survey Nos.116/2 and 116/3 of Hunasehalli.

67. If PW-1 has managed the property only for a period of one year after the death of Thimmanna, how could he purchase the two items which were not even included in the suit, is a question that remains unanswered.

68. Since there is no claim by the defendants in respect of those items of the property, this Court would not further venture to discuss about the same.

69. From the above discussion, this Court is of the considered opinion that the appellant/plaintiff has not made out any case whatsoever to annul the findings recorded by the First Appellate Court in setting aside the decree of the Trial Court in respect of Item Nos.2, 3 and 9 of the suit property.

70. Accordingly, the substantial questions of law (i) and (ii) are answered in the affirmative and (iii) in the negative, against the appellant.

71. Consequently, the following:

ORDER

Appeal is meritless and hereby ***dismissed***.

Sd/-
(V SRISHANANDA)
JUDGE

kcm
List No.: 2 Sl No.: 81