

(1992) 12 KAR CK 0005
In the Karnataka High Court
Case No : W.A. No. 1247 of 1991

Bangaramma

APPELLANT

Vs

Nanjamma

RESPONDENT

Date of Decision : 11-12-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54
Constitution of India, 1950 — Article 226, 227
Karnataka Prevention of Fragmentation and Consolidation of Holdings (Amendment) Act, 1991 — Section 2 (1)

Citation : (1993) ILR (Kar) 230 : (1993) 1 KarLJ 116

Hon'ble Judges : K.A. Swami, Acting C.J.; N.D.V. Bhat, J

Bench : Division Bench

Advocate : Mirle L. Krishnamurthy, for the Appellant; M.P. Eswarappa, for ACC Associates for R-2(1) to (4), B.T. Indusekhar, for R-2(5) to R-2(9), K. Abhinav Anand, for R-3 and R-4 and N.K. Gupta, Government Advocate for R-5 and R-6, for the Respondent

Final Decision : Allowed

Judgement

K.A. Swami, Ag. C.J.

1. This Writ Appeal is preferred against the order dated 14.3.1991 passed by the learned Single Judge in W.P.No. 21709/1990.
2. The learned Single Judge has rejected the petition, therefore, the petitioners in the Writ Petition have come up in the Appeal. During the pendency of the Appeal respondent No.2 expired therefore, his legal representatives have been brought on record and they have also been served with the notice.
3. In the Writ Petition, the petitioners/appellants sought for quashing the order dated 18.2.1989 passed by the Special Deputy Commissioner (Revenue), Bangalore District in Case No.O.S. /Ex.No. 3/88-89. They have also sought for quashing the order dated 16.8.1990 passed by the Karnataka Appellate Tribunal in Appeal No. 193/1989. Both the orders have been produced as Annexures A

and B in the Writ Petition.

4. The matter arises under the following circumstances:

There was Original Suit No. 71 of 19S2 filed in the Court of the Civil Judge, Bangalore (Rural) District, Bangalore which came to be decided by the First Additional Civil Judge for partition and separate possession of the share of the plaintiffs. The Trial Court decreed the suit in the following terms:

"It is ordered and decreed that declaring that the sale deed Ex.D1 dated, 6.2.1957 executed by 2nd defendant in favour of defendants 3 and 4 of Items 4 and 5 of suit "A" schedule is not binding on the shares of plaintiff and the 1st defendant and it is further ordered and decreed that plaintiffs are together entitled to 5/12th share and the 1st defendant to 1/6th share in suit items 2 to 11 of "A" schedule except No. 300/1-B and No. 300/1-C in Item No. 11 and they are also entitled to their respective shares in movable properties, or movable properties or its value as mentioned in the list prepared by the Commissioner in the inventory and it is also further ordered and decreed that plaintiffs and defendant No. 1 do recover their respective shares by partition by metes and bounds. The partition of the lands assessed to payment of revenue to Government shall be made by the Deputy Commissioner or his Gazetted subordinate deputed by him in this behalf as required u/s 54 CPC and the partition of other properties shall be divided by the Commissioner appointed by the Court in this behalf."

Aggrieved by the decree of the Trial Court, defendant No.2 went up in Appeal. The plaintiffs also preferred a cross objection because the Trial Court had refused a decree for accounting of the profits. In the appeal, the learned District Judge modified the decree of the Trial Court and held that Items 2 and 3 of "A" schedule were not the joint family properties and Items 4 and 5 did not belong to the joint family therefore, the plaintiffs were not entitled to any share in those items; that only half portion in Items 6, 7 and 8 of the "A" schedule were available for partition and the remaining half belonged to defendant No.2. Aggrieved by the aforesaid decree of the Appellate Court, the plaintiffs preferred Regular Second Appeal No. 1023 of 1971. This Court by the Judgment and decree dated 23.8.1974 set aside the finding recorded by the Lower Appellate Court on Items 4 and 5 and held that the alienation of the suit items 4 and 5 of the "A" schedule properties was not binding upon the shares of the plaintiffs and the first defendant. The finding recorded by the District Court regarding Items 2 and 3 was confirmed and it was held that those properties were not proved to be the joint family properties. Similarly, the finding recorded by the District Judge in the appeal regarding items 6 to 8 was also confirmed and it was held that the plaintiffs and defendants 1 and 2 were entitled to the respective shares in the half portion of Items 6 to 8 and remaining half portion exclusively belonged to defendant No. 2. The matter did not stop at that stage. There was a Civil Petition 46/1978 filed for review of the Judgment and decree passed in the Second Appeal. The Review Petition was confined to the quantum of shares. In the

Review Petition this Court only modified the quantum of shares and held that the plaintiffs branch would be entitled to 3/7th share and the first defendant would be entitled to 1/7th share whereas the second defendant would be entitled to 3/7th share. In the Civil Petition the other findings recorded in the Second Appeal were not disputed. In the Second Appeal it was also ordered that defendant No.2 would be liable to give accounts of the profits from the date of suit till the date of delivery of possession. Thus, as a result of the findings recorded by this Court in the Second Appeal as well as in the Civil Petition, suit items that are available for partition between the plaintiffs and defendants 1 and 2 would be only Items, 4, 5, 10A, 10B and half share in Items 6 to 8 and the House bearing Katha No. 165, List Nos. 231, 231/1 and 231/2. Out of these properties, it is not in dispute before us that the house properties and the house sites have been partitioned as per the preliminary decree. Now the dispute is only with regard to the agricultural lands comprised in Item Nos. 4, 5 and half portion in Items 6 to 8. The Deputy Commissioner has applied the provisions of the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966 and has held that as the partition results in creation of fragments it would not be possible to effect partition. Therefore, he has held that the share that is allottable to the plaintiffs and defendant No. 1 should be quantified in the value. Accordingly, he has valued that share to Rs. 22,510.63. Aggrieved by the decision of the Special Deputy Commissioner, the plaintiffs went up in appeal before the Karnataka Appellate Tribunal and the same was dismissed. The learned Single Judge has also dismissed the Writ Petition.

5. In the light of the contentions urged, the following Points arise for Consideration:

1. Whether the provisions of the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966 are applicable to the proceeding in question?

2. In view of the fact that plaintiffs have received a sum of Rs. 22,510.63, whether it would disable them from invoking the jurisdiction of this Court under Article 226 and 227 of the Constitution?

6. Point No. 1: It is settled position of law that a suit for partition would be pending till the last item of the suit property is divided and put in possession of the parties according to the command of the preliminary decree. In the instant case, the agricultural lands have not been divided and the parties have not been put in possession of the same. It is also settled position of law, as held by this Court that the Karnataka Prevention of Fragmentation and Consolidation Act would be applicable and would become relevant only at the time when the actual division of the agricultural lands take place (see : Basappa Lachamappa Mongyal Vs. Hanumantha Rao Roaoji Rao, The relevant portion of the Judgment reads thus:

"The suit must be deemed to be pending till the actual partition by metes and bounds takes place and the possession is delivered pursuant to the partition. The

Act becomes relevant only at the time of actual division, of the land pursuant to a preliminary decree for partition and separate possession. Even in the case of partition without intervention of the Court also, the Act as it stands on the date of actual division is applicable. So also in the case of transfer inter vivos the Act as it stands on the date of executing the deed of transfer becomes applicable. Therefore, the amendment effected to the Act by Karnataka Act No. 15 of 1979, which came into force on 3.4.1979, became applicable to the proceeding. By the Karnataka Act 15 of 1979, the extent of the fragment has been reduced. This reduction is in favour of the subject".

In Halappa Bin Rangappa Vs. State of Karnataka, HAKEEM, J following the Decision in Mongyal's case has laid down that the suit for partition would be a suit for acquiring exclusive right in the immovable property and therefore such a proceeding is not governed by the repealed Act. The relevant portion of the Judgment is as follows:

"The repealing provision in the instant case reflects the principle found in Section 6 of the General Clauses Act. It appears to be well settled that the distinction between what is, and what is not a right preserved by the provisions of Section 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right. A distinction is drawn between a legal proceeding for enforcing a right acquired or accrued and a legal proceeding for acquisition of a right. The former is saved whereas the latter is not. In that view of the matter, what is sought to be achieved by the petitioners herein is to pursue the proceedings in the expectation of a right which ought to have accrued to them but for the repealing of the Act. In B.L. Mongyal v. H.R. Roaoji Rao, this Court has held that the provisions become relevant only at the time of actual division of the land pursuant to a preliminary decree for partition and separate possession. Even in the case of partition without intervention of the Court, the Act, as it stands on the date of actual division, is applicable. In that view of the matter, I do not find any error in the view taken by the Appellate Tribunal."

We are in full agreement with the aforesaid two Decisions and the propositions laid down therein. The Act came to be repealed on 5th February 1991 by Karnataka Act 4/1991. Consequently, during the pendency of the suit (we say pendency of the suit because as already pointed out above, the suit should be deemed to be pending until the last item of the suit property is divided and possession is delivered) the Act came to be repealed. The proceeding in question does not fall under Clause (d) of Section 2(1) of the Act No. 4/1991 because it is a proceeding for acquiring the exclusive right in the property. It is not a proceeding wherein it can be said that already a right was acquired or privilege was confirmed or obligation of the liability was incurred. Therefore, the authorities below are required to proceed on the basis that the Act is not applicable to the proceeding in question because it has been repealed before the

proceeding reached the finality. If that be so, then the very basis of the order of the Deputy Commissioner becomes unsustainable because he has applied the Act and denied the share in the Items 6 to 8 because the division in them would result in fragmentation. In lieu of that a sum of Rs. 22,510.63 has been determined to be paid being equivalent to 4/7th share in those items. As the Act cannot be applied because it is repealed, those properties are also to be divided as per the commands of the preliminary decree.

7. Here itself we will consider the contention of Sri Eswarappa, learned Senior Counsel appearing for respondents 2(a) to 2(d) [2(1) to 2(4)] that the appellants having received a sum of Rs. 22,510.63 as awarded by the Deputy Commissioner in lieu of their share in Items 6 to 8 therefore, are not entitled to challenge the said order. It is also further contended that the proceeding must be deemed to have come to an end before the Act came to be repealed.

8. In support of the first contention, the learned Senior counsel placed reliance on a Decision in Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, That was a case in which by way of compromise the petitioners in the Writ Petitions assured the R.T.A. that they would withdraw the Writ Petitions pending in the High Court and on such assurances and subject to the actual withdrawal of the Writ Petitions in terms of the assurance, the R.T.A. considered the matter in the said meeting and after hearing the parties, made an order giving effect to the compromise. Thereafter, the order of the R.T.A. was challenged. Therefore, the Supreme Court held that under those circumstances it would disentitle the party to invoke the jurisdiction of Article 226 of the Constitution. It was also further held that the Writ of Certiorari would not be granted in a case where there was such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances which would cause prejudice to the adverse party. Thus, it is clear that, that was a case in which the party agreed to withdraw the Writ Petition and the compromise was given effect to. On that assurance that proceeding was concluded by the R.T.A. on the basis of the compromise arrived at by the parties. When a party compromises the dispute before a Court or an authority, he loses his right to challenge the same unless it be on the ground that the very compromise itself is vitiated by fraud, coercion or undue influence or being opposed to law. Therefore, it is clear that when a party is not entitled to challenge the order definitely he will be disentitled to invoke the jurisdiction of the High Court under Article 226 of the Constitution which is discretionary. Thus, there cannot be any dispute about the proposition laid down in the aforesaid Decision of the Supreme Court. But. the question is whether that Decision is applicable to, the case on hand This is a case in which there is no compromise. The Deputy Commissioner in exercise of his jurisdiction has quantified the amount payable in lieu of the share in the land. Therefore, the fact that the amount was received by the party will not take away the right to challenge the same. In addition to this, Annexure-A filed along with I.A.No. II also shows that the amount was received under a mistaken notion and was tried

to be redeposited which was not allowed. In addition to this, the order determining the amount and also receiving of it did not result in division of all the properties. Items 4 and 5 of the agricultural lands had remained to be divided. Therefore, the proceeding did not come to an end before the Act 4/1991 came into force. Thus, there was no actual division on the date the Act No. 4/1991 came into force. Therefore, we are of the view that the provisions of the Act cannot be applied to the proceeding in question because it came to be repealed before the actual division of the properties took place. Point No. 1 is answered accordingly.

9. Point No.2:- While dealing with Point No. 1, we have already pointed out that this is not a case in which there was a compromise between the parties regarding the determination of the amount as to the value of the share nor accepting of that amount. That being so, we do not see any ground which disentitles the plaintiffs to invoke the jurisdiction of this Court under Articles 226 or 227 of the Constitution. On the contrary, this is a case in which the parties have been litigating for over three decades. The plaintiffs have been awarded the share and at the end of the litigation if they are to be told that they are not entitled to immovable properties but would only be entitled to the value of it, though, in law they are entitled to it, it would be nothing but travesty of Justice. In a case like this, exercise of jurisdiction under Articles 226 and 227 of the Constitution becomes necessary to do Justice, and to prevent failure or miscarriage of Justice. Hence, Point No. 2 is answered in the negative.

10. For the reasons stated above, the Writ Appeal is allowed. The Order dated 14.3.1991 passed in Writ Petition No. 21709 of 1990 by the learned single Judge is set aside. The Writ Petition is allowed. The order of the Deputy Commissioner and the Karnataka Appellate Tribunal are quashed. The matter is remitted to the Special Deputy Commissioner, Bangalore Urban District, Bangalore, with a direction that he shall now effect division in suit Items 4, 5 and halt portion of Items 6 to 8 in accordance with the commands of the decree and in accordance with law and in the light of the observation made in the order.

11. As the matter is pending for a long-time, we direct that the parties should appear before the Spl. Deputy Commissioner, Bangalore Urban District, Bangalore, on the 11th of January, 1993.

12. The Deputy Commissioner shall complete the proceedings within a period of three months from 11th of January, 1993. The plaintiffs shall redeposit the amount of Rs. 22,510-63 on the 11th of January 1993.

13. In the facts and circumstances of the case, there will be no order as to costs.