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**(2015) 08 KAR CK 0193**

**In the Karnataka High Court**

**Case No : Regular Second Appeal No. 5641 of 2010**

Duvedta Juvanv Gomes

APPELLANT

Vs

Bastanv Juvanv Gomes and Others

RESPONDENT

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**Date of Decision : 03-08-2015**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, Order 41 Rule 27(1)(a)(aa), 100

**Citation : (2015) 08 KAR CK 0193**

**Hon'ble Judges : B. Veerappa, J**

**Bench : Single Bench**

**Advocate : J.S. Shetty, for the Appellant**

**Final Decision : Dismissed**

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## **Judgement**

B. Veerappa, J—The unsuccessful 1st defendant is before this Court challenging the concurrent finding of facts recorded by the courts below.

2. The respondent-1 who is plaintiff in the trial court filed suit in O.S. No. 63/1995 on the file of Civil Judge (Jr.Dn), Bhatkal, for partition and separate possession and for permanent injunction against the petitioner and other defendants in respect of suit schedule properties contending that the suit schedule properties were joint family properties of their father Juvanv and his brother Francis. They divided those properties orally and came in possession of their respective share. Eastern half portion of the suit property had fallen to the share of Francis while the Western half share fallen to the share of Juvanv and heirs of said Francis are defendants 15 to 20 have been made as formal parties to the suit since their names appear in the records of rights and to avoid any technicalities. The suit schedule property is the western half portion. The plaintiff claims his 1/10th share in those properties. There is an ancestral house in Sy. No. 97/6 belonging to Juvnav and its Gram Panchayat is No. 1207/1. There is yet another house in Sy. No. 88/4 belonging to their family. Parties to the suit are Indian Christians. The women folk of their family have not been able to reside

together in view of the relationship being strained and it was not possible to carry on their life jointly any longer. As such, the plaintiffs have sought for partition to extent of their share in the suit schedule properties from the defendant-1. But defendant No. 1 got enraged and refused the partition of properties with an intention to cause loss to the plaintiff Defendant No. 1 is attempting to demolish the suit schedule house referred to at Sl. No. 3 in the schedule to the plaint. He also threatened to demolish on 23.8.95 and therefore, the plaintiff was constrained to file suit for partition and separate possession and for permanent injunction, etc.

3. The defendant No. 1 filed written statement inter alia contending that the plaintiff and defendants 1 to 14 did not belong to the same family. The allegations that the schedule properties have been their joint family properties is also false. The plaintiffs claim for 1/8th share in the suit schedule properties is also denied and contended that the Juvnav had two wives and the said fact has been admitted and it is also admitted, subsequent to the amendment the lacuna that had crept in the plaintiffs pleadings has been rectified. Defendant-1 admits that defendants 15 to 20 being the LRs of deceased Francis and they had half interest in the suit schedule survey numbers. But such a share being separated by metes and bounds and being exclusive possession of those persons is denied. According to defendant-1 there had been no division whatsoever in the property belonging to Junvnav and Francis. The said properties have been in their joint possession and there has been no division between the shares so far and therefore, the suit filed by the plaintiff is not maintainable, and the suit schedule properties have not been separated by boundaries. The defendant-1 denies the Western half suit schedule survey numbers and the house property situated in Sy. No. 97/6, etc., as belonging to their family. He also denied existence of yet another house bearing Sy. No. 88/4. He claims that he himself has constructed his own house in Sy. No. 97/6 bearing House No. 1207/2 out of his own funds and that is his exclusive property, etc., and also filed additional written statement contending that the plaintiff is not entitled to 1/10th share in the schedule properties. Eastern and Western properties in the schedule survey numbers are not demarcated and their father and brothers had not partitioned the properties. Therefore he sought for dismissal of the suit.

4. Based on the pleadings the trial court framed the following issues:

1. Whether the plaintiff proves that the schedule properties have been the joint properties of himself and D. 1 to D. 14 and D. 21 and D. 22?
2. Whether the plaintiff further proves that he is entitled to 1/10th share in those schedule properties?
3. Whether the plaintiff further proves that he is in exclusive possession of the suit schedule No. 3 properties, as such he is entitled for the relief of permanent injunction from being evicted till the division in the schedule properties by metes and bounds?

4. Whether the defendant No. 1 proves that the plaintiffs suit suffers from non-joinder of necessary parties?

5. Whether the defendant No. 1 further proves that the court fee is insufficient?

6. What judgment & the decree?

5. In order to establish his case, the plaintiff examined himself as PW. 1 and examined one witness as defendant No. 15-Santa Francis Gomes as his witness as P.W. 2 and marked documents Ex. P. 1 to P. 6. The defendant No. 1 got examined himself as D.W. 1 but no documents were marked by defendant.

6. The trial court after considering the entire material on record, has come to the conclusion that the plaintiff has proved that the suit schedule properties are joint family properties of himself and defendants-1 to 14, 21 and 22. Plaintiff also proved that he is entitled to 1/16th share in the suit schedule properties and further held that the plaintiff is in exclusive possession of suit schedule 3 properties. As such he is entitled for permanent injunction. Accordingly, decreed the suit declaring that the plaintiff is entitled to 1/16th share in the Western half of suit schedule properties as well as the house therein.

7. Aggrieved by the said judgment and decree, the present appellant who is the defendant-1 has filed appeal in R.A. No. 205/2001. During the pendency of the appeal, the defendant No. 1/appellant has filed application I.A. No. III under Order XLI Rule 27 of Code of Civil Procedure praying for an order to permit to adduce additional evidence by way of production of documents. The appellate court while considering the said application has framed the following issues:

1. Whether the defendant No. 1 proves that the trial Court has committed error in including the House bearing No. 1207/2 in the suit properties while granting share to the plaintiff?

2. Whether the defendant No. 1 proves that the house bearing No. 1207/2 is his own property and same is not liable for partition?

3. Whether the defendant No. 1 has made out any ground to permit him to adduce additional evidence by way of production of documents as prayed for in I.A. No. III?

4. Whether the defendant No. 1 proves that the impugned judgment and decree of the trial court is not based on proper appreciation of the oral and documentary evidence on record and the principles of law applicable to the case on hand?

5. Whether the defendant No. 1 has made out any ground for interfering with the impugned judgment and decree of the trial court at the hands of this Court in this appeal?

6. What order and decree?

8. Considering the entire material on record, the lower appellate court held that the defendant failed to prove that the trial court has committed error in including

the house property No. 1207/2 in the suit properties while granting share to the plaintiffs and also held that the defendant has failed to prove that house bearing No. 1207/2 is his own property and the same is not liable for partition and also held that the defendant has not made out any ground to permit him to adduce additional evidence by way of production of documents as prayed for in I.A. No. 3 and also held that the 1st defendant failed to prove that the impugned judgment and decree of courts below is not based on proper appreciation of oral and documentary evidence on record. Accordingly, the appellate court dismissed the appeal confirming the judgment and decree of the trial court.

9. Again the said concurrent findings of the courts below the present appeal is filed.

10. I have heard the learned Counsel for the appellants.

11. Sri J.S. Shetty, learned Counsel for the appellant has contended that the courts below committed a serious error in decreeing the suit in its entirety even in respect of the house constructed by the appellant by spending his own money, even though the appellant is entitled for the improvement made and therefore, the impugned judgment and decree of the courts below are erroneous and cannot be sustained in law. He also contended that the courts below mainly decreed the suit only on the basis of the alleged admission made by the appellant even though there was no such admission by the appellant and both the courts below have not properly considered the oral and documentary evidence on record. Therefore, he sought to set aside the judgment and decree of the courts below.

12. I have given my thoughtful consideration to the arguments advanced by the learned Counsel for the appellant and perused the judgment and decree of the courts below.

13. The substantial questions of law for consideration in the present second appeal are:

1. Whether the courts below are justified in decreeing the suit for partition in respect of suit schedule property?

2. Whether the appellant has proved that he is exclusive owner of house bearing No. 97/6 presently bearing house property No. 1207/1?

14. The trial court considering the evidence of PWs. 1 and 2 and material documents Ex. P. 1 to 6 and considering the evidence of defendant-1 examined as D.W. 1 has come to the conclusion that, it is admitted fact that the plaintiffs' father Juvann had brother by name Francis. It is being admitted by defendant-1 and plaintiff that the suit schedule properties are two properties bearing Sy. No. 96/11 measuring 0.11 guntas and Sy. No. 88/4 measuring 1 acre 3 guntas, both situated at Mavalli village, Bhatkal Taluk. Those two persons being joint owners of suit properties is also admitted. Ex. P. 1 and Ex. P. 2 refers to the Record of Rights pertaining to the two suit schedule properties. The extent of those two

properties as well as names of all the parties to the suit appears in them. There is no need to go into the contents of those two documents. In Sy. No. 97/6 there is house property bearing No. 1207/1. The house assessment extract in that regard is marked as Ex. P. 3. It stands in the name of plaintiff Bastanv. Ex. P. 4 is the M.E. No. A. 4164 dated 8.2.1990. It also corresponds to the death of Juvanv - plaintiff's father and names of heirs being entered therein in respect of Sy. No. 97/6.

15. Ex. P. 5 is copy of the house assessment extract for the year 1981-92 pertaining to House Nos. 1207/1 and 1207/2. That House No. 1201/1 stands in the name of plaintiff Bastanv as already stated. House No. 1201/2 stands in the name of defendant-1. But another part in the same hissa No. 2 name of Mmgly Juvanv Gomes (defendant No. 2) is also found therein. Contents of this document would show the oral partition between plaintiff's father Juvanv and Francis. According to the plaintiff, the suit schedule properties were divided between their father Juvanv and his brother Francis. Eastern half of the suit schedule survey numbers had been fallen to the share of Francis, while the western half had been fallen to the share of plaintiff's father Juvanv. The said statement has been corroborated by the oral testimony of PW. 2 Santa Francis Gomes one of the LR to deceased Francis. PW. 2 on oath has stated that, his father Francis and plaintiff's father Juvanv had divided the suit schedule property. The trial court also recorded evidence of DW. 1 and recorded that there is absolutely no evidence to show that defendant-1 himself has constructed his own house out of his own funds and has been residing there and his claim that he has got repaired the said house is again without any basis. The trial court has held that they are all self-serving statements and his pleading to the effect that he had spent Rs. 50,000/- in constructing his own house or repairing it, is without any corroborative piece of evidence and defendant has no right to demolish the house situated on the suit schedule property so long as the properties are not divided by metes and bounds, and therefore the plaintiff is entitled to the relief of permanent injunction also and accordingly suit was decreed, declaring that the plaintiff is entitled to 1/16th share in the western half portion of suit schedule survey numbers as well as house properties therein and plaintiff is entitled to get those properties divided by metes and bounds to the extent of his half share and defendant-1 is restrained by way of permanent injunction not to demolish or damage any of the house properties situated in the western half portion of the suit schedule survey numbers till the division by metes and bounds is effected in the suit schedule properties.

16. The lower appellate court by re-appreciating the entire material on record has recorded a finding that defendant has been examined as DW. 1 but he has not chosen to produce any document to support his contention. The only contention of the defendant in this appeal is that the house No. 1207/2 is his own property and the same is constructed from his own funds. In the suit schedule, house property bearing No. 1207/2 is not mentioned. On the other hand, as per Ex. P. 3, the house situated in the suit properties is bearing No.

1207/1 and as per Ex/P. 5 there are two houses bearing House Nos. 1207/1 and 1207/2. Even though House No. 1207/2 is not mentioned in the suit schedule, there is clear mention in the plaint that there are two houses in the suit schedule properties. It is not the case of defendant-1 that the house property mentioned in the suit schedule as per Sl. No. 4 is not the house bearing No. 1207/2, there is absolutely no evidence forthcoming from defendant-1 to prove that there are two separate houses other than the house bearing No. 1207/2 in the suit properties. Defendant No. 1 has not disputed identity of the suit property either in the pleadings or in the evidence before the trial court. More over it is not the case of the defendant-1 that House No. 1207/2 is his own property and he constructed the same from his own fund. Both the courts below have held that there is absolutely no independent oral and documentary evidence forthcoming from defendant-1 to prove that house bearing No. 1207/2 is his own property constructed from his own funds. In his cross examination he has admitted as under:

17. Again in the categorical terms DW-1 has admitted that the plaintiff is having right in the old house. The relevant portion of the evidence of D.W. 1 reads as under:

The appellate court after considering the application under Order 41 Rule 27(1) (a)(aa) and (b) of Code of Civil Procedure, has recorded a finding that defendant-1 has failed to make out any ground to permit him to adduce additional evidence for production of documents as prayed for in I.A. 3 and accordingly held that I.A. 3 does not merit consideration in the facts and circumstances of the present case. The appellate court also recorded a finding that, the discussion of the trial court in the impugned judgment clearly goes to show that the trial Court has touched each and every aspect of oral and documentary evidence available on record and thereby has come to the conclusion that plaintiff is entitled to a share in the suit schedule properties and therefore, the plaintiff is entitled to relief of partition and separate possession of his share in the suit properties. The trial court has not committed any error in the decreeing the suit. More over the plaintiff has not challenged the quantum of share 1/16th instead of 1/10th granted by the trial court as per the impugned judgment. Defendant No. 1 has failed to show that the trial court has committed any error in decreeing the suit of the plaintiff Accordingly, the lower appellate court confirmed the judgment and decree of the trial court. Both the courts below concurrently held that all the suit schedule properties are joint family properties and plaintiff is entitled to share and the defendant failed to prove his exclusive possession as contended in the written statement. Such a finding of fact recorded by the courts below is based on the legal evidence on record.

18. Accordingly, point No. 1 is answered in the affirmative and point No. 2 is answered in the negative and the appellant has not made out any ground to interfere with the judgment and decree under the provisions of Section 100 of Code of Civil Procedure. No substantial question of law involved in the present

appeal.

Accordingly, regular second appeal is dismissed.