

(2005) 06 KAR CK 0053

In the Karnataka High Court

Case No : Regular Second Appeal No. 210 of 2003

Hanumath Bheemappa Sanadi and Others

APPELLANT

Vs

Rudrappa Thammanna Sanadi and Others

RESPONDENT

Date of Decision : 20-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 2005 Kar 393 : (2005) ILR (Kar) 3430 : (2005) 3 KCCR 2100

Hon'ble Judges : V.G. Sabhahit, J

Bench : Single Bench

Advocate : K. Raghavendra Rao, for the Appellant; G.B. Shastry, for the Respondent

Final Decision : Allowed

Judgement

V.G. Sabhahit, J.—This appeal by the plaintiffs is directed against the judgment and decree passed by the Court of Civil Judge (Senior Division) Gokak, in RA. 30/1998 dated 5.12.2002 reversing the judgment and decree passed in O.S.No. 692/89 by the Court of Additional Civil Judge (Junior Division) Raibag and consequently dismissing the suit of the plaintiffs in O.S.No. 692/89.

2. The essential facts of the case leading upto this appeal with reference to the rank of the parties before the Trial Court are as follows:

The plaintiffs filed the suit seeking for a decree for equitable partition awarding 2/3rd share or legitimate share of the plaintiffs with separate possession in the suit schedule properties by metes and bounds and for mesne profits and costs.

3. It is averred in the plaint that Hanamant Sanadi was the original propositus. He had three sons by name Tammani, Yamanappa and Bhimappa and two daughters Kallawwa and Kashavva. Kallawwa and Kashawa have died. The plaintiff No. 6 is the wife. Plaintiffs 1 to 4 are the children of Bhimappa. Plaintiff No. 5 is the son of Yamanappa. Plaintiff No. 6 is the wife of late Yamanappa. Plaintiff Nos. 7 and 8 are daughters of Yamanappa and defendants 1, 2, 3 are the

sons of Tammani. Defendant No. 4 is the wife of late Tammani. Tangewa is the wife of defendant No. 2 and defendants 6 and 7 are the sons of defendant No. 1. It is averred in the plaint that original propositus was serving as sanadi for the village Alakanur and he was granted the schedule property for his services by the Government and he was in actual possession and enjoyment of the same till his death. It is averred that names of defendants 1 and 2 and plaintiffs 1, 2 and 5 were brought for the purpose of joint arrangement and defendant No. 2 again got entered his wife's name in the record of rights and defendant No. 1 got entered his sons name and in the record of rights in respect of some of the agricultural lands and the said entries are without notice to the plaintiffs. It is further averred that the entries have been made for the sake of family arrangement and there was no equitable partition and separate possession by metes and bounds by the parties till the date of filing of the suit. Plaintiffs 1 to 4 have got 1/3rd share as they are the LRs., of Bhimappa and plaintiffs 5 to 8 are entitled to 1/3rd share as the LRs., of Yamanappa and defendants being the LRs., of Tammani are entitled to 1/3rd share. It is averred that since differences are arising between the plaintiffs and the defendants and among the woman folk in the joint family, it was impossible for the members to continue as members or the joint family and plaintiffs have demanded for legitimate share by effecting equitable partition and separate possession and wherefore the suit.

4. The suit was resisted by the defendants. Defendant No. 1 filed the written statement averring that genealogy given in the plaint is not correct. It is false to say that plaintiffs and defendants are close relatives. It is true that suit properties are the sanadi inam lands and it is false to say that suit properties are ancestral properties of plaintiffs and defendants as alleged. It is averred that Hanamant was serving as sanadi for the village of Alakanur and lands were granted for sanadi services and lands have been granted in his name and he was in peaceful possession and enjoyment of the suit properties and it is false to say that after the death of Hanamant they were in peaceful possession and enjoyment of the suit land. Yamanappa and Bhimappa never served as sanadi as averred in the plaint, Tammani was alone the sanadi of the village. Tammani was the absolute owner in possession of the suit properties and after the death of Tammani defendants have succeeded to the suit properties. It is further averred that plaintiffs 1, 2 and 5 and defendants 1 and 2 have separated long back in the year 1981 and under the said partition RS. Nos. 212/4A and 213/4A have been allotted to the plaintiffs family and accordingly their names have already been entered in the record of rights and since from the date of partition effected in the year 1981 plaintiffs and defendants are enjoying the properties allotted to their share which is absolutely false to say that defendants 1 and 2 and plaintiffs have got their names entered as alleged by the plaintiffs in para-4 of the plaint and after partition there was again partition between the family of the defendants and their names have been entered. Plaintiffs are not challenging the mutation entries effected in the year 1981 before the competent authorities and after partition in the family that defendants have invested nearly about Rs. 10 lakhs

for the improvement of the lands on the advise of elderly persons of the village, plaintiffs, 1, 2 and 5 have been allotted Rs.Nos. 212/4A and 213/4A which are fertile and irrigated by GLBC canal and well water and after the improvement made by the defendants investing considerable amount in the suit properties the plaintiffs with avaricious motive instituted the suit on the instigation of the ill wishers.

5. The Trial Court framed appropriate issues. On behalf of the plaintiffs, first plaintiff was examined as PW. 1 and plaintiffs also examined PWs. 2 and 3 and got marked Exs. P1 to P30. On behalf of the defendants, defendant No. 1 was examined as DW. 1 and he also examined DW. 2 and got marked Exs. D1 to D108. The Trial Court after considering the contention of the Learned Counsel appearing for the parties and the material on record held that the defendants have failed to prove that the schedule property absolutely belong to Tammani and that they have also failed to prove partition in the year 1981 as averred in the written statement and in the absence of partition, the material on record would only shows that there was an arrangement under which the members of the family were cultivating the land separately for their livelihood and there was no partition by metes and bounds and accordingly held that plaintiffs being the legal representatives of Yamanappa and Bhimappa together are entitled to 2/3rd share in the schedule properties with mesne profits and accordingly decreed the suit of the plaintiff by judgment dated 23-9-1998. Being aggrieved by the said judgment and decree the defendants have preferred RA. 30/98 on the file of Civil Judge (Senior Division) Gokak and the First Appellate Court by its judgment dated 5-12-2002 held that the defendants have failed to prove that Tammani was the absolute owner of the schedule property. However, the First Appellate Court held that the finding of the Trial Court that defendants have failed to prove partition in the year 1981 is erroneous and the material on record and the wardi given as per Ex. D58 to D60 and the entries in the record of rights would clearly show that parties have separated the properties with the intention to severance the status of joint family and the partition in the year 1981 as alleged by the defendants in the written statement has been proved and wherefore the plaintiffs are not entitled to any share in the schedule properties as they have already been allotted 15 acres of land comprised in Sy.Nos. 212/4A and 213/4A and accordingly, set aside the judgment and decree passed by the Trial Court and dismissed the suit of the plaintiffs. Being aggrieved by the said judgment and decree of the First Appellate Court, the plaintiffs have preferred this second appeal u/s 100 CPC., which was admitted on 4-8-2004 for consideration of the following substantial questions of law:

1) Whether the First Appellate Court is right in law in not applying the legal presumption relating to the jointness of the Hindu Family, while coming to the conclusion that there is a prior partition in the family?

2) Whether the respondents have failed to discharge the legal burden that is cast upon them to prove the factum of prior partition; and if so, whether the First

Appellate Court is right in law in reversing the judgment and decree of the Trial Court and dismissing the suit of the appellants for partition and separate possession in the given circumstances?

6. I have heard the Learned Counsel appearing for the parties on the above said substantial questions of law. The Learned Counsel appearing for the plaintiffs-appellants submitted that the Courts below have concurrently held that defendants have failed to prove that schedule property was the absolute property of Tammani and that plaintiffs have no right or interest over the schedule property and the Trial Court had rightly held that there was no partition by metes and bounds and there was no severance of status of the joint family and there was only an arrangement under which parties were cultivating the land separately for their livelihood and the partition alleged in the written statement is not proved. The Learned Counsel submitted that the defendants are relying upon Ex. D58 to D60 and entries made on the basis of the said mutation entry and the same would not confer any title and there is no material to show that there was partition by metes and bounds. The Learned Counsel submitted that mere fact that parties have been in separate possession and enjoyment of separate property would not prove partition. He has relied upon the decision of this Court in *Fakirappa Bailappa Kambar v. Kristappa Bailappa Kambar* ILR 1985 KAR 3063. Wherein the Division Bench of this Court has held as follows:

"It is open to the members of the coparcenary to arrange amicably separate possession and enjoyment of the family properties without effecting partition or disruption of the joint family, but at the same time whether co-owners in exclusive possession of different portions of joint family property held the same in the partition or under an arrangement as to the possession, depends upon the intention to the parties which has to be gathered from the facts and circumstances of each case. Where direct evidence of intention is available, there is no difficulty in determining the question. In cases where such direct evidence of intention is wanting, the fact that the members have been living separately and enjoying the properties, separately may be taken into consideration in arriving at the conclusions but that is not conclusive... where exclusive possession of land by co-owners is not in conformity with the shares of respective parties, generally, the indication is that it is not a partition, but it may be an arrangement not intended to be permanent. Therefore, the fact that the parties were in possession of different properties and different properties have been entered in their individual names in the record or rights, is not by itself sufficient to hold that there was such a partition Nothing turns out from the long duration. It depends upon the affinity and nature of relationship of the parties. A provisional arrangement which for some reason continued for a long time without objections does not take away its provisional character and make it permanent. There must be some other evidence indicating that the parties have been living separately under a permanent arrangement or partition".

7. The Learned Counsel appearing for the appellant has also relied upon the

decision of the Hon"ble Supreme Court in Bharat Singh and Another Vs. Bhagirathi, wherein Hon"ble Supreme Court has observed as follows:

"There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the Joint Hindu Family to prove it. The mere fact that after the death of the father mutation entry was made in favour of three brothers and indicated the share of each to be one-third, by itself could be no evidence of the severance of the joint family which, after the death of the father consisted of the three brothers who were minors".

8. He has also relied upon the decision of this Court in Nagaraja Shetty Vs. Krishna, wherein the principles laid down in the above cited decisions have been reiterated.

9. On the other hand, the Learned Counsel appearing for the respondents-defendants vehemently argued that the partition of the year 1981 has been proved by the defendants. The parties have been cultivating the land exclusively with the specific survey numbers, necessary mutation entries have been made by giving joint war dies and entries in the record of rights have not been challenged by the plaintiffs and the parties are acted upon the partition of the year 1981 as there was partition among plaintiffs 1 and 2 as also among the defendants and the Learned Counsel further submitted that, even a family arrangement would constitute partition. If the parties have acted upon the family arrangement and the material on record give raise to the inference of severance of status of the family. The Learned Counsel has relied upon the decision of the Privy Council AIR 1945 128 (Privy Council) wherein it is observed as follows:

"a) Hindu Law-joint family presumption: The State of every Hindu family is presumed to be joint in food, worship and estate; but the strength of the presumption necessarily varies in each case. The presumption of union is stronger in the case of brothers than in the case of cousins and the father you go from the founder of the family, the presumption becomes weaker and weaker. The evidence in the case has to be reviewed in the light of this presumption.

b) Revenue records-Mutation Value of evidence. An order made in mutation proceedings is, no doubt, not a judicial determination of the title of the parties, but it has evidentiary value.

10. He has further relied upon the decision of the Supreme Court in Kale and Others Vs. Deputy Director of Consolidation and Others, wherein the Hon"ble Supreme Court has laid down as follows :

"The family arrangement may be even oral in which case no registration is necessary. The registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for

information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and is therefore, not compulsorily registrable.

The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same.

Even if bona fide disputes, present or possible which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement".

11. The Learned Counsel has also relied upon the decision of the Hon"ble Supreme Court in Digambar Adhar Patil Vs. Devram Girdhar Patil (died) and another, wherein Hon"ble Supreme Court has held that under Hindu law, it is not necessary that the partition should be effected by a registered partition deed. Even a family arrangement is enough to effectuate the partition between coparceners and to confer right to a separate share and enjoyment thereof. The Learned Counsel also relied upon the decision of the Allahabad High Court in Ram Gopal and Others Vs. Smt. Maya Devi and Others, wherein it is observed as follows:

"It is obvious that when branches have been separated over long periods, it is not always possible to have a direct evidence of the actual date of partition that will be an impossibility in many cases. However, the course of dealing with the property is itself material to show that there has been separation or not. When there is a controversy as to whether there has been separation or not in a family, the fact that sale deeds in the past were executed by members of a family with recitals which would only be consistent with separateness and not jointness, then such documents are undoubtedly admissible to prove separateness".

12. The Learned Counsel has also relied upon the decision of the Supreme Court in Lakshmi Ammal and Others Vs. Chakravahthi and Others, , wherein Hon"ble Supreme Court has observed as follows:

"Family arrangement": Document mentioned as deed of partition-Deed reciting that over the claim of share of the property amongst the parties to the said deed, disputes were raised by the members of the family and in respect of such disputes, a decision was given by the Panchayat and the parties were put in possession of the properties in question-No finding that any fraud had been practised in getting the deed executed in 1969-Challenge to the deed on ground of undue influence being exercised on plaintiff respondent's father for obtaining the deed not sustainable because plaintiff's father had not challenged the deed

within the period of limitation even though he had died in 1974-For the purpose of family arrangement, a bona fide claim by some of the members of the family who may not be lawful owners of the property must exist so that in order to settle the dispute, family arrangement is made".

13. I have considered the contention of the Learned Counsel appearing for the parties with reference to the material on record in the light of the principles laid down by the Hon"ble Supreme Court and this High Court and the High Court of Allahabad in the above cited decisions. I have been taken through the pleading, oral and documentary evidence on record and the judgment passed by the Trial Court and the First Appellate Court and I answer the substantial questions of law as follows:

No. 1 : In the negative.

No. 2: In the affirmative as per the final order for the following:

REASONS

14. Substantial Questions of Law 1 and 2 : These two questions are clubbed together since they are inter connected and to avoid repetition. It is clear from the pleading and the material on record that though the defendants have contended that there is no relationship between the defendants and plaintiffs as averred in the plaint, the evidence of the parties and the material on record would clearly show that indisputably the schedule property belonged to Hanamant who was the Sanadi and schedule lands have been allotted to him and he had three sons and two daughters. The daughters died without leaving behind any heirs and the Hanumant died living behind Yamanappa, Bhimanna and Tammani. It is also not in dispute that plaintiffs 1 to 4 are the sons of Bhimappa and plaintiffs 5 to 8 are the legal representatives of Yamanappa and other defendants are the legal representatives of Tammani. The plaintiffs claim through the branch of Yamanappa and Bhimappa and defendants claim through the branch of Tammani. Though it was contended in the written statement that Tammani was the absolute owner of the schedule properties and on the advise of the elders, 15 acres of land was given to the plaintiff comprised in Sy.Nos. 212/4A, 212/4B, 213/4A and 213/4B, the said contention is not at all substantiated and the material on record clearly shows that Tammani was not the absolute owner of the schedule properties. It is now well settled that the regrant of land in favour of any of the member of the joint family would enure to the benefit of the family as laid down by the Hon"ble Supreme Court followed by the decision of this Court including the decision in Fakirappa Bailappa Kambar"s case that the regrant in favour of any member enures to the benefit of all the members of the family and in view of the further contentions taken by the defendants, it is clear that the concurrent findings arrived at by the Courts below that Tammani is the absolute owner of the property is not proved by the defendants is unassailable. However, so far as the issue pertaining to the prior partition in the year 1981 as alleged by the defendants in the written statement,

it is clear that the Trial Court held that the said partition by metes and bounds has not been proved though the material on record proved only separate possession and enjoyment of the property for their livelihood under a family arrangement. The First Appellate Court has held that the prior partition had been proved in view of the joint wardi given as per Exs. D58 to D60 and the entries in the revenue records made pursuant to the mutation entry made and pursuant to the general wardi given in Exs. D58 to D60 and separate possession and enjoyment of the land exclusively by the members of the three branches of the family. It is well settled that partition can be effected between the members of the joint family either under a partition deed or by referring the matter to the panchayatdars and partitioning the properties at the instance of the panchayatdars and there can also be oral partition and in the present case it is the case of the defendants that there was partition in the year 1981. The material on record clearly shows that even prior to 31.8.1981 the parties have been enjoying the property separately as it is clear from the statement made by the first defendant himself as per Ex.P26 which shows that he was in separate enjoyment of some portion of the schedule properties for his livelihood and Yamanappa and Bhimappa were also in possession of some portions of the land. It is the case of the defendants in the present case that there was a panchayat and in the said panchayat 15 acres of land which belonged to the family were allotted to the share of Yamanappa and Bhimappa comprised in Sy.Nos. 212/4A, 212/4B, 213/4A and 213/4B and 36 acres were allotted to the share of Tammani. There is no averment in the written statement as to who were the panchayatdars and as to whether panchayat took place and whether there was any palu patti or joint wardi prepared at the time of alleged panchayat and partition in the year 1981. DW.2 has been examined as a panchayatdar and his evidence is not helpful to the plaintiff to prove partition and separate possession in the year 1981 as it is clear from the evidence that the facts elicited in the cross examination would clearly show that lands were not measured and he has not been able to substantiate the contention of the defendant as to the description of the property allotted to the share of Tammani, Yamanappa and Bhimappa and his evidence is not helpful to the defendants to prove panchayat and partition and it is clear from the averments made in the written statement that name of DW.2 is not mentioned in the written statement as the person who was present at panchayat and according to DWs. 1 and 2 that the panchayat took place in the premises of the Village Accountant. So far as the documentary evidence produced in the case is concerned, it is clear that the First Appellate Court has proceeded to reverse the judgment and decree passed by the Trial Court on the basis of the joint wardi given as per Exs. D58 to 60. The Trial Court held that the said entries are not worthy of acceptance having regard to the discrepancy in the date on which the entries were made and according to the material on record, the mutation entry has been made even before the wardi was given. However, the perusal of Exs. D58 to 60 would show that they are not helpful to the defendants to prove the alleged partition by metes and bounds in the year 1981 as none of these documents is signed by all the brothers or their representatives.

Ex.D58 has not been signed by Yamanappa and it is only a wardi given to the effect that the name of son of Bhimappa should be entered has become old and it pertains to Sy.Nos. 212/4 A and 213/4 A only. Ex. D59 is signed by plaintiff No. 5 and defendant No. 2 and it is not signed by others and it is a wardi given to the effect to enter the name of plaintiff No. 5 in respect of Sy.No. 212/4B and 213/4B. The said document does not also bear the signature of Yamanappa and Exs.D60 and 61 are the mutation entry dated 30-8-1991 on the basis of the wardi given as per Ex.D58 to D59 and wherefore, it is clear that the contents of Exs. D5 8 and D59 which are joint war dies are not helpful to the defendants to prove partition and separate possession of the schedule properties in favour of Yamanappa, Bhimappa and Tammani and all the subsequent entries are based upon the mutation entries Exs.D60 and D61. It is well settled that mere fact that parties have been in separate possession and enjoyment of the properties belonging to the family would not by itself lead to the inference of partition by metes and bounds as there is strong presumption in favour of jointness of the family and in the present case it is not the case of the defendants that there was a family arrangement which was treated as a partition. The specific case of the defendants is that, there was a partition of the properties in the year 1981 and said partition could be proved only by discharging the burden of producing oral and documentary evidence in that behalf of the oral and documentary evidence adduced in the present case referred to above comprising of the evidence of DW. 2 and the joint wardi on the basis of which mutation entries were made is not helpful to the defendants to prove partition by metes and bounds in the year 1981 as the joint wardi does not state the manner in which the property was partitioned between Yamanappa, Bhimappa and Tammani and it is also clear that the two branches of Yamanappa and Bhimappa, 2/3 rd share was given and allotted 15 acres of land in the name of Yamanappa and Bhimappa and remaining 36 acres of land were entered in the name of Tammani and when once it is held that the wardi Exs. D58 and D59 and the mutation entry Exs. D60 and 61 would not prove the prior partition. The entries in the record of rights on the basis of the said mutation entry and also the entry to show that parties have resided separately in separate houses and they have also made arrangements among themselves for enjoyment of the land separately would not by itself lead to the inference of partition by metes and bounds and the Lower Appellate Court was not justified in holding that there was no averment regarding family arrangement as it is clearly averred in the plaint that the plaintiffs have been allotted lands for the purpose of their livelihood and there was no partition by metes and bounds. It is also clear from the perusal of the judgment passed by the First Appellate Court that the judgment of the First Appellate Court is passed mainly upon the entries made in the revenue records and the joint wardi and the First Appellate Court has appreciated the said oral and documentary evidence is perverse as evidence of DW. 2 is not at all helpful to the defendants to prove prior partition and joint wardi Exs. D58 and 59 are mutation entries made thereto is not helpful to the defendants and wherefore the entries made in the record of rights would not prove the partition by metes and bounds and accordingly, I hold that the

First Appellate Court was not justified in holding that the defendants have discharged the burden of proving prior partition in the year 1981 and wherefore was not justified in setting aside the judgment and decree passed by the Trial Court which had been passed after appreciating the oral and documentary evidence on record in the proper perspective having regard to the above said material on record and accordingly, I answer the substantial questions of law and pass the following order:

The appeal is allowed. The judgment and decree passed by the Court of Civil Judge (Senior Division) Gokak, in RA.30/98, dated 5-12-2002 dismissing the suit of the plaintiff is set aside and the judgment and decree passed by the Trial Court the Court of Additional Civil Judge (Junior Division) Raibag in O.S. 692/89 dated 23-9-1998 is restored. However, there shall be no order as to costs in this appeal.