

(2006) 12 KAR CK 0004

In the Karnataka High Court

Case No : Regular First Appeal No. 349 of 1996

K. Ramaiah and Others

APPELLANT

Vs

S. Anjaneya and Others

RESPONDENT

Date of Decision : 19-12-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 8, 96
Evidence Act, 1872 — Section 91

Citation : (2007) 3 KCCR 1824

Hon'ble Judges : R. Gururajan, J;C.R. Kumaraswamy, J

Bench : Division Bench

Advocate : T.N. Raghupathy, for the Appellant; G.S. Visveswara, K. Chandranath Ariga, for Respondents 5 to 7 and H.S. Chandrashekar, for Respondents 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Kumaraswamy, J.—This is a regular first appeal filed u/s 96 of CPC against the judgment and Decree dated 7-3-1996 passed in O.S. No. 111/93 on the file of the Small Causes and Addl. Civil Judge, Mysore, partly decreeing the suit for partition. Parties are referred to as per their ranking in the Trial Court.

2. The case of the Plaintiff in the Trial Court is as follows:

One Anjanappa was the common ancestor of the Plaintiffs and Defendants 1 to 11. The said Anjanappa died leaving behind his sons namely A. Sanjeevaiah and A. Kenchaiah. The said A. Sanjeevaiah and A. Kenchaiah were the members of the joint Hindu Family. A. Sanjeevaiah died in the year 1950 and A. Kenchaiah died in the year 1963. Since the elder brother namely A. Sanjeevaiah was not well acquainted with worldly affairs, his younger brother A. Kenchaiah was the manager of the joint family looking after the joint family properties and managing the same on behalf of the members of the joint family. Plaintiffs 1 to 4 are the children of late A. Sanjeevaiah and Defendants 1 to 6 are the children of late A. Kenchaiah. Defendant No. 7 is the wife of late Kenchaiah and Defendants

8 to 11 are the legal representatives of deceased daughter of A. Kenchaiah, namely Lalithamma. There was no division of the joint family properties between the two brothers A. Sanjeevaiah and A. Kenchaiah and both the brothers died undivided.

3. The schedule mentioned i.e., immovable properties belongs to the joint family consisting of two brothers. The katha of the schedule properties stood in the name of late A. Kenchaiah, who was managing the joint family properties. After the death of A. Kenchaiah, the Plaintiffs and Defendants 1 to 11 continued as members of the Hindu joint family and are in joint possession of all the immovable properties mentioned in the schedule. After the death of late A. Kenchaiah, Plaintiffs 1 to 3 and Defendants 1 to 4 jointly mortgaged some of the schedule properties for the purpose of joint family consisting of Plaintiffs and Defendants 1 to 11, as per the registered mortgage bond dated 12-1-1972 in favour of one Nagaraja Setty and in the said deed of mortgage Defendants have admitted that the Plaintiffs and the Defendants are the members of joint Hindu Family. Both the Plaintiffs and Defendants have jointly discharged the said debt on 7-12-1988. On 16-10-1984, Defendants 1 to 4 and Plaintiffs 1 and 3 have executed a power of Attorney appointing Plaintiff No. 2 as their power of attorney holder and empowered him to collect the rent from the tenants in respect of some of the items of the plaint schedule property. In the said power of attorney, Defendants 1 to 4 have clearly admitted that the Plaintiffs are the joint family members along with them. The second Plaintiff and 2nd Defendant have filed a suit in O.S. No. 352/81 on the file of Civil Judge, Mysore against the other Plaintiffs and Defendants for partition and separate possession of their share in the schedule properties. The said suit was dismissed on the ground of default under Order 9, Rule 8 of CPC Plaintiff states that the said dismissal of the above suit is not a bar to the Plaintiffs for filing this suit for partition. Plaintiffs together are entitled for half share in all the items of the plaint schedule properties and Defendants 1 to 11 together are entitled for half share in the said properties. Defendants have taken a hostile attitude against the Plaintiffs and Defendants 1 to 4 have changed the katha of some of the schedule properties behind the back of the Plaintiffs and have issued notices to the Plaintiffs demanding rent from them. Hence, this suit is filed for declaration, partition and possession of Plaintiffs' share in the plaint schedule properties and for mesne profits.

4. Defendants 1, 3, 4 and 6 have filed their written statement in the Trial Court. In the written statement, relationship between Defendants' father and Anjanappa is admitted. Kenchaiah is the father of these Defendants and Sanjeevaiah being he elder brother of Kenchaiah is the father of Plaintiffs 1 to 4. Defendants 1 to 6 are the children of Kenchaiah and Defendant No. 7 being the mother of Defendant No. 1 to 6 and grand mother of Defendants 9 to 11. Defendants 2, 5 and 7 have colluded with the Plaintiff. A. Kenchaiah was not at all managing the joint family. The children of A. Sanjeevaiah were living independently and managing their affairs independently after the demise of their father Sanjeevaiah. The father of the Defendants A. Kenchaiah who first married

one Chikkamma D/o. Dasappa, who was a wealthiest man in those days hailing from Tiptur and he had coconut gardens and bangle shops. The marriage of Kenchaiah took place in 1930 and 1st Defendant was born out of the said wedlock. At the time of marriage, her father had given jewels, silver articles and cash and the said Dasappa supported Kenchaiah to establish his business in powerloom having the factory at D. No. 1406, B.N. Street, Mandi Mohalla, Mysore. The said Chikkamma died in the year 1944. During her lifetime Kenchaiah purchased item No. 5 of the schedule property from the CITB, which is site Nos. 28 and 29 of the Industrial Suburb, Mandi Mohalla, Mysore measuring 22133/13 Sq. Yds. Apart from that Kenchaiah was doing powerloom and made pattas and strings. Later five power loom factories were shifted to item No. 5 of the plaint schedule in a shed constructed by Kenchaiah. As such, item No. 5 of the schedule property is the self-acquired property of A. Kenchaiah. He died in the year 1963. Subsequently, Defendant No. 2 took the management of the said factory.

5. S. Viswanath and K. Anantharamaiah filed a suit in O.S. No. 352/81 on the file of Prl. I Munsiff, Mysore and could not prosecute it and it was dismissed for default. Now, the said S. Viswanath has made his other brothers as Plaintiffs in this suit and they are hand in glove with Defendants 2, 5 and 7. In fact Defendants 2, 5 and 7 are having full knowledge that item No. 5 of the schedule properties is absolute and self acquired property of Kenchaiah. The other properties mentioned in the schedule are the ancestral properties of Defendants 1 to 11 and the Plaintiffs. These Defendants deny about the averments in respect of deed of mortgage and the execution of power of attorney. S. Viswanath is the second Plaintiff, illegally squatting on the above said properties of Defendants' father and grand-father. The father of the Plaintiff has no avocation and he was not at all doing anything. Simply he was collecting rents of other properties except item No. 5 of the schedule property and he was leading luxury life having three wives. Suit is bad for non-joinder of necessary parties as the Plaintiffs have not made other tenants of item No. 5 of the schedule property as parties. Defendants 2, 5 and 7 are parties to the other suit also. Later, the Defendants 1, 3 and 4 have changed the khatha of item No. 5 of the schedule property in their respective names. The second Defendant has given his consent and he has accepted for such change. The 2nd Defendant is collecting rent of item No. 5 property since 1980 till today posing himself as the owner, though neither his father nor the Plaintiffs have any right over the same. They have intentionally included item No. 5 of the property as the joint family property to avoid these Defendants from getting their legitimate share in the property.

6. The Trial Court based on the pleadings of the parties has framed 8 issues and it has answered issues No. 1 to 4 and 6 in the affirmative and issues No. 5 and 7 in the negative. Second Plaintiff has examined himself as PW-1 and in addition to this two other witnesses are examined as P Ws. 2 and 3 and got marked Exs. P1 and P17. On behalf of the Defendants, 1st Defendant was examined himself as DW-1 and Exs.D1 to D10 are marked. The findings of the Trial Court are that late

Kenchaiah was managing the family affairs of the joint family by collecting rent. The Trial Court also held that all the suit properties are ancestral properties of the Plaintiffs and Defendants. The Trial Court further held that the Plaintiffs are the members of the joint family. Plaintiffs prove that the suit item No. 5 is the joint family property acquired by the joint family funds. Defendants 12 and 13 are the tenants made as parties to the suit.

7. We have carefully perused the records and heard the learned Counsel for the Appellants as well as the learned Counsel for the Respondents.

8. Learned Counsel for the Appellant mainly relies on the documentary evidence i.e., Ex.D1, Exs.D2 and also Ex.D3, sales tax receipts and Ex.D10, Katha extracts and submits that item No. 5 in the plaint is the self-acquired property and the Trial Court has erred in giving a finding that item No. 5 of the suit schedule property is not the self acquired property. The Trial Court has erred in not considering the oral evidence of PW1. Learned Counsel for the Appellant further submits that the oral evidence in respect of admission made by PW-1 in respect of item No. 5 of the suit schedule property has not been properly appreciated.

9. Learned Counsel for the Respondent mainly relies on Ex.P1, mortgage deed dated 12-1-1972 of suit item No. 5, Ex.P2, discharge Deed dated 17-2-1988 and Ex.P4, letter of Panchayathdars. Both the Plaintiffs and Defendants have jointly signed Ex.P4 i.e., the letter of Panchayathdars. Ex.P5 is the power of attorney jointly executed by both the Plaintiff and Defendant appointing the 2nd Plaintiff as a power of attorney holder to collect the rents in respect of item No. 5 of the plaint. Learned Counsel for the Respondent further submitted that the documentary evidence prevails over the oral evidence. No documentary evidence is produced by the Defendants to show that they got the fund and fees other than the joint family either by way of gift deed or any other documents. The sale deed in respect of item No. 5 of the schedule is not been produced to show that it was a self-acquired property. Defendants 2, 5 and 7 also contend that partition of the property also has to be effected. In view of the above referred points, the following issue arises for our consideration:

1) Whether the impugned judgment is to be interfered by this Court or not?

10. The main contention raised by the Appellants is that item No. 5 of the plaint schedule is a self acquired property. So the burden lies on the Defendant to establish this issue. In order to discharge this, DW-1 has stated that his grand-father who was a merchant, helped his father. According to him, his grand father paid the money to his father. But he has not given any document to prove that the money has been given to his father. He has not produced any document to show that his grand father was an inamdar. DW-1 has not stated how much money was paid to his father by his grand father and nobody has been examined in this regard to know whether his grand father had given money to his father or not. Another contention is that his father was selling clothes. On perusal of Exs.P1 and P5 would clearly shows that suit item No. 5 is a joint family property

belonging to Plaintiffs and Defendants. Therefore, the Defendants are estopped from denying the statement made in the above documents u/s 91 of the Evidence Act. It is admitted by the Defendants that the power of attorney executed is revoked. With regard to the relationship between the Plaintiffs and Defendants, there is no dispute. It is also undisputed fact that suit property is continued in the joint family without dividing the same. The only contention in this appeal appears to be in respect of item No. 5, as the self acquired property of the Defendants. We have carefully perused Exs.P1, P4 and P5 that mortgage letter and power of attorney wherein Defendants have admitted that the Plaintiffs are the joint family members. The assertion that father-in-law of Kenchaiah has contributed money for purchase of item No. 5 has not been proved by any material evidence except oral testimony of DW-1.

11. The Lower Court has weighed the evidence in proper perspective. The learned Counsel for the Appellant failed to show any misapplication of law to the facts of the case. Even though, the learned Counsel for the Appellants submitted that the oral testimony of PW1 has not been considered by the Trial Court but there is documentary evidence to show that the property in question i.e., item No. 5 was a joint family property. Such being the case, the impugned judgment and decree do not call for interference by this Court.

12. In view of what has been stated above, we pass the following:

ORDER

Appeal is dismissed. No order as to costs.