

(2009) 05 KAR CK 0039

In the Karnataka High Court

Case No : Regular First Appeal No. 64 of 2003 and Regular First Appeal CROB.
No"s. 14 and 16 of 2003

Kanteppa and Others

APPELLANT

Vs

Smt. Vimalabai and Others

RESPONDENT

Date of Decision : 29-05-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54

Citation : (2011) 1 KCCR 421

Hon'ble Judges : Anand Byrareddy, J;A.N. Venugopala Gowda, J

Bench : Division Bench

Advocate : K.M. Ghate, in Regular First Appeal No. 64 of 2003, Shankar Rao Shetkar and M.H. Ganje, in Regular First Appeal CROB No. 14 of 2003 and S.S. Mamdapur, in Regular First Appeal CROB No. 16 of 2003, for the Appellant; Shankar Rao Shatker, for Respondent-2 (A-F), Ashok R. Kalyanshetty, for Respondent-1 in Regular First Appeal No. 64 of 2003, K.M. Ghate, for Respondent-2, Ashok R. Kalyan Shetty, for Respondent-1 in Regular First Appeal CROB No. 14 of 2003 and K.M. Ghate in Regular First Appeal CROB No. 16 of 2003, for the Respondent

Judgement

Anand Byrareddy, J.—Heard the Counsel for the parties at length.

2. The brief facts of the case are as follows:

The parties are referred to by their rank before the Trial Court, for the sake of convenience. The Plaintiff claims to be the widow of one Gurubasappa Son of Late Gundappa Hegge.

Gundappa Hegge was said to be the manager of a Hindu joint family consisting of himself and his four sons: 1) Kantappa 2) Gurubasappa 3) Ishwarappa 4) Mahadappa. After Gundappa Hegge's death, his above named sons are said to have continued as a joint family.

The genealogical tree of the family is shown as under in the plaint:

_____| | | | | | Kanteppa Gurubasappa Ishwarappa Mahadappa Laxmibai
Sharnamma Deft. 1 (Deceased) (Deft. 2) (Deft. 3) (Deft. 5) (Deceased) |
Vimalabai (Wife) (Plaintiff)

_____| | | | |
| Keshappa Mallappa Ramesh Rajkumar @ Raju Shankuntal (Deft. 6) (Deft. 7)
(Deft. 8) (Deft. 9) (Deft. 10) As seen above, Defendant No. 5 is the daughter of
Gundappa Hegge and Defendant Nos. 6 to 10 are the children of one other
deceased daughter of Gundappa Hegge.

3. It was the Plaintiff's case that the properties described in the suit Schedule A to E are joint family properties. It is her further case that her husband having died after suffering an illness, his brothers have, jointly and severally, misappropriated the joint family funds and have denied her claim for a share in respect of the joint family properties. It was in this background that a suit was filed for partition and separate possession of her 4/21st share in the suit properties.

4. The suit was contested by Defendant Nos. 1 to 4, who filed their joint written statement; Defendant No. 6 had filed a separate written statement. The legal representatives of Defendant No. 3, who came on record pursuant to the death of Defendant No. 3 during the course of the suit, filed a written statement substantially admitting the Plaintiff's claim, while disowning the written statement filed on behalf of Defendant No. 3 and raising a claim for 1/4th share in the suit properties as the legal representatives of Defendant No. 3.

5. It was the case of Defendant Nos. 1 to 4 that the Plaintiff was not the legally wedded wife of Gurubasappa and was only a concubine, or the kept mistress, of Gurubasappa. It was asserted by them that one Nagamma was the legally wedded wife, who was not divorced during the lifetime of Gurubasappa and was alive as on the date of the suit. It was their further case that Gurubasappa had no issues. It was contended that several properties described in the suit schedule did not belong to the family at all and some did not even exist. It was also contended that Gurubasappa had, by a registered Will dated 09.01.1986, bequeathed his undivided share in the joint family properties in their favour.

6. Defendant No. 6 also denied the status of the Plaintiff as the widow of Gurubasappa and also disputed the correctness of the suit schedule and staunchly denied any right in the Plaintiff to claim partition of the suit properties. The said Defendant also preferred a counter-claim seeking a declaration that the Plaintiff is not the legally wedded wife of Gurubasappa and hence was not a member of the family.

7. The legal representatives of Defendant No. 3, on the other hand, chose to file a written statement in their own right and supported the case of the Plaintiff. They also preferred a counter-claim seeking 1/4th share in the suit properties.

8. The Trial Court framed issues placing the burden on the Plaintiff to prove that,--

(a) the suit properties are joint family properties liable for partition and

(b) that she is entitled to 4/21st share and separate possession of the suit properties;

While placing the burden on the legal representatives of Defendant No. 3 to prove that.--

(a) they were entitled to one-fourth share and separate possession over the suit properties and

(b) that a Will, said to have been executed by deceased Defendant No. 3 bequeathing his undivided share in the properties in favour of Defendant No. 1 and 2, as being null and void;

While placing the burden on the legal representatives of Defendant No. 2 and Defendant No. 6 to prove that the Plaintiff was not the legally wedded wife of Gurubasappa.

9. The Trial Court decreed the suit in part, holding that the Plaintiff is entitled to 4/21st share in suit schedule A and B properties, while holding that it was not, however, established that suit Schedule C, D and E properties were joint family properties.

10. It was also held that the legal representatives of Defendant No. 3 were entitled to 1/4th share of Schedule A and B properties but were not entitled to claim suit schedule C, D and E properties as being joint family properties. The Will said to have been executed by Defendant No. 3 was held to be null and void.

11. The counter-claim of the legal representatives of Defendant No. 2 and 6, seeking a declaration that the Plaintiff was not the legally wedded wife of Gurubasappa was dismissed.

It is in the above background that the above appeal and cross-objections are filed.

12. The Counsel for the Appellant contends as follows:

a) That the Trial Court has committed an error in having re-cast issues framed, of its own notion. The Counsel contends that initially the Trial Court had framed certain issues on 13.06.1998. Thereafter, as the legal representatives of Defendant No. 3 had filed a written statement in their own right, additional issues were framed on 04.12.2001. It is contended that Defendant Nos. 1 and 2 had filed an interlocutory application (I.A. No. 65) before the Trial Court seeking the re-casting of issues and framing of certain additional issues as set out therein. The said application is said to have been rejected by the Trial Court by an order dated 08.08.2002. However, on 23.08.2002 the Trial Court had suo-motu proceeded to recast the issues on which the parties went to trial. The

Counsel contends that the Trial Court having failed to address the crux of the pleadings, the judgment now rendered on the incomplete issues, suffers from a serious lacuna of not having addressed the several contentions of the parties.

13. More particularly, it is contended that there was no issue framed as regards the Will executed by Gurubasappa, as well as the Will executed by Mahadappa. There was also no issue framed as regards the inclusion and non-inclusion of certain properties in the suit schedule. The failure to frame issues and the failure to consider material evidence placed on record on these aspects has resulted in an erroneous judgment being rendered.

14. It is contended that the cavalier approach of the Trial Court in addressing the material on record is evident from a summary finding that the evidence of PW-1, is an erroneous and cryptic observation in the face of elaborate cross-examination and the significant circumstance established, namely, that PW-1 was totally ignorant of many vital facts material to the case. This was especially so with regard to the inclusion of several properties in the suit schedule, which were not at all properties of the joint family.

15. The Counsel for the Appellants further contends that the status of the Plaintiff as wife of Gurubasappa was strongly denied.

a) the Appellants had specifically contended that the suit fails on account of non-joinder, as Nagamma, the legally wedded wife of Gurubasappa, was not a party. There was no issue framed on that aspect.

b) An application filed by the Appellants to implead Nagamma as one of the Defendants was rejected.

c) An application to summon the said Nagamma was also rejected

d) Exhibits D-10 and D-11, namely, a wedding photograph of Gurubasappa and Nagamma and the Will executed by Gurubasappa were not seriously disputed.

e) Insofar as the contention that Nagamma was not the wife of Gurubasappa but was the wife of one Baswanth Rao of Kaplapur was not at all established in accordance with the rules of evidence.

f) No document worth its name has been produced to establish that the Plaintiff was the legally wedded wife of Gurubasappa.

g) There is no evidence by any witnesses, on behalf of the Plaintiff, to vouch for her marriage ceremony with Gurubasappa.

h) There was nothing on record to establish that the material produced by the Plaintiff to demonstrate that Nagamma, wife of Baswanth Rao, was the same Nagamma, who was the wife of Gurubasappa.

i) The Plaintiff and the legal representatives of Defendant No. 3 have not established that they are entitled to any share from the material placed on record.

j) And even though there was no prayer in the suit to declare the Will executed by Gurubasappa and Mahadappa as null and void, the Trial Court has proceeded to declare the same as null and void, which is clearly without jurisdiction.

16. It is contended that while the Trial Court has held that the Plaintiff is entitled to 4/21st share in Schedule A and B property and at the same time, has held that the legal representatives of Defendant No. 3 are entitled to 1/4th share in the same properties, this is akin to holding that there could be two types of partition in respect of the same properties, which is not contemplated in law.

17. It is also contended that the judgment also suffers from the infirmity of a direction being issued to the concerned Deputy Commissioner to execute a preliminary decree even without there being a final decree, u/s 54 of the Code of Civil Procedure.

It is hence prayed that the appeal be allowed and the judgment impugned be set aside.

18. On the other hand, the Counsel for the Plaintiff seeks to support the judgment of the Trial Court and would take this Court through the material on record to substantiate the Plaintiff's case.

In the cross-objections, RFA Crob. No. 14/2003, the objectors are the legal representatives of Defendant No. 3, namely, his widow, and five daughters. Their grievance is with respect to suit schedule "C to "E" properties, wherein they have been denied any right therein. The Counsel for the cross-objectors above named contends that the Trial Court, having passed a decree with respect to schedule "B" property, Item No. 1 (Sangam Theatre) has failed to note that the corresponding Item Nos. 1 to 3 of Schedule "C being an integral part of item No. 1 of Schedule "B". It is contended that the Trial Court has summarily rejected the counterclaim in respect of Schedule "C to "E" properties in the face of ample evidence available on record.

19. RFA Cross Objection No 16/2003 is preferred by the Plaintiff questioning the dismissal of the suit in respect of Schedule C, D and E properties.

It is contended that -

a) The Trial Court having decreed the suit as prayed for in respect of Schedule "A" and "B" properties, the Court below ought to have decree the suit in respect of the other properties as well. Apart from a cryptic observation that no material is available to hold that the Schedule "C to "E" properties are joint family properties. The Trial Court has glossed over the circumstances that there was adequate material available on record to demonstrate that the items of property described in Suit Schedule "C to "E" were machinery and material forming integral part of suit Schedule "A" and "B" properties apart from business assets, movables and domestic animals of which a physical audit was the only formality necessary to demonstrate that the same are available as joint family property to which the Plaintiff was entitled.

b) The existence of a flour mill along with its fittings and accessories has not been denied by the contesting Defendants. The Trial Court was hence not justified in denying the said item of property as not being available for partition.

c) The existence of a Diesel Jeep and the same being joint family property is not denied. The Plaintiff was hence entitled to share the same.

d) Suit Schedule "D" enumerates the several investments made in businesses and hence are joint family properties. This presumption which was sought to be denied by the contesting Defendants has not been established by them. The Trial Court did not have any basis for denying the Plaintiff's share in the same.

e) The Trial Court has failed to note that the Defendants have not denied the existence of domestic animals belonging to the joint family, though they may have disputed the number. The Trial Court was hence in error in dismissing the claim of the Plaintiff over the same.

20. The Counsel would submit that the Trial Court has completely overlooked the material on record in denying the Plaintiff's share of the property in suit Schedule "C to "E" properties. It is hence prayed that the appeal be dismissed and the cross-objections be allowed.

21. In the light of these rival contentions we proceed to examine the pleadings and the material evidence and the reasons assigned by the Trial Court in arriving at its findings.

22. The contention that the Plaintiff is not the legally wedded wife of late Gurubasappa is a primary question of fact. It was contended by Defendant Nos. 1 to 4 and Defendant No. 6 that the Plaintiff is not the legally wedded wife of Gurubasappa. His wife on the other hand was stated to be one Nagamma, who was said to be residing in her parents' house at Kaplapur, Bidar Taluk. Having contended thus, it was only fifteen years after the suit was filed, namely, in the year 2002 that the Defendants filed an interlocutory application seeking to implead the said Nagamma as a necessary party, in I.A. No. 63. This application was rejected by the Trial Court by an order dated 08.07.2002. It was claimed that one Nagamma, aged 65 years, resident of Markhal, Bidar Taluk, residing at the time of the application at Kaplapur, Bidar Taluk in her parents house was a necessary party. It was observed by the Trial Court while dismissing that application, that it was to the disadvantage of the Plaintiff if she failed to prove whether she was the legally wedded wife of Gurubasappa. Hence, the application was rejected, as it was belated. This order was challenged by way of a revision petition before this Court in C.R.P. No. 3617/2002. The same was rejected, with costs, by an order dated 16.09.2002.

23. On this disputed question of fact, the Trial Court has framed the following issue:

Whether legal representatives of Defendant Nos. 2 and 6 prove that the Plaintiff is not a legally wedded wife of Late. Gurubasappa, hence she is not entitled to

claim partition in the suit properties.

24. The evidence of the Defendants discloses the following:

a) Defendant No. 2 who was examined as DW-1 has asserted that the Plaintiff was the second wife of Gurubasappa. He has asserted that Gurubasappa was married to one Nagamma daughter of Bendappa, of Kaplapur, in the year 1953. He has named several persons who were present at the time of the marriage ceremony including the witnesses who have deposed in this regard. It is stated that Defendant No. 2, his parents, and Late. Gurubasappa with his wife Nagamma resided at Markhal. Since Nagamma had remained childless, Gurubasappa is said to have married the Plaintiff in the year 1965. It is said that the Plaintiff came away to Bidar to avoid discord in the family, along with her husband. Nagamma is also said to have come to Bidar. Late Gurubasappa is said to have moved to a rented house along with the Plaintiff. It is stated that the family did not approve of the marriage of Gurubasappa, with the Plaintiff on account of the age difference of 15 to 16 years between Gurubasappa and the Plaintiff. It is asserted that Nagamma was not divorced during the life time of Gurubasappa.

25. The priest who is said to have performed the marriage of Gurubasappa and Nagamma, namely Chandrayya Swamy is examined as DW-3. His deposition is reproduced hereunder.

1. I know the Defendants and Late Gurubasappa. Gurubasappa is dead now. I have performed the marriage of Late Gurubasappa about 44 years back. The marriage of Gurubasappa was took place with one Nagamma at Kaplapur village. At the time of marriage Gurubasappa was aged about 18 years. And Nagamma was aged about 13-14 years. I am the swamy of Markhal, Malegoan, and Kaplapur villages. Bandeppa is the father of Nagamma. Tippanna is no more now. I am the swamy of the family of Hegge i.e., Defendant family and also family of Bandeppa. Bandeppa called me for performing the marriage of Gurubasappa. One day prior to the marriage during evening hours there was Basangki function was performed at Kaplapur. About 100 persons were gathered at Kaplapur village for Basanki purpose. Myself has performed the Bansanki ceremony. Next day in the morning there was Devara Kari, and Kalasa function and thereafter marriage was performed. Since I am samy of both the family. I myself distributed the Chits of marriage to the relative of Hegge family. After the marriage Ngamma was resided at Markhal village, alongwith Gurubasappa and his brothers. She stayed about 17-18 years at Markhal village. Now she is residing at village Kaplapur village in her parents house. She was issueless. Tippanna was issueless so he has given his all property to Nagamma. Tippanna was the brother of Bandepa. I and myself and one Brahamin performed the marriage and other functions at the house of Hegge family I have got property at Markhal and Kaplapur village.

(Cross-examination deferred at the request of Sri. K. Ravindra, Advocate)

Significantly, this witness has not been cross examined

26. Veershetty, DW-4, is said to be married to a cousin of Nagamma. He has asserted that he was present at the time of the marriage ceremony of Gurubasappa and Nagamma. He has named certain other persons who were present at that time. He asserts that Nagamma was alive as on the date of suit. He affirms that the marriage ceremony was performed by DW-3.

Vithal Rao, DW-5, is another witness who is said to have attended the marriage ceremony of Gurubasappa and Nagamma. He has been cross-examined at length.

On the other hand, the evidence of the Plaintiff's side in relation to the issue is as follows:

The brother and power-of-attorney holder of the Plaintiff an Advocate by profession, is examined as PW-1. He states in his examination in chief. "The marriage of Plaintiff with Gurubasappa took place in 1965-66 or so." He has denied that Gurubasappa's wife was Nagamma. He asserts that Nagamma is a resident of Tatapalli in Andhra Pradesh and that she is the wife of one Basvanth Rao Patil.

Then in cross-examination (para 117) he states that "the marriage of the Plaintiff took place about during 1963-64, but I do not know exactly.

27. The landlord of the premises where Plaintiff and Gurubasappa are said to have lived is examined as PW-2. He is an Advocate by profession. He states "the marriage of Gurubasappa with Plaintiff might have taken place in 1969 or so". "I do not know whether Gurubasappa was already having first wife by name Nagamma of Kaplapur at the time of marriage with Plaintiff."

28. In the face of this evidence, the Trial Court's finding on Issue No. 5 is as follows:

76. The legal representatives of Defendant No. 2 and Defendant No. 6 have filed counter claim W.S. wherein they have asserted that the Plaintiff is not a legally wedded wife of Late Gurubasappa Hegge, hence she is not entitled to claim partition in the suit properties. This artificial plea of the legal representatives of Defendant No. 2 and Defendant no 6 has not been proved. They have failed to substantiate the defence set up in their W.S. On the other hand, as I have already discussed on issue No. 1, the Plaintiff has produced sufficient material like documentary evidence, corroborated with oral testimony of Plaintiff's witnesses that the Plaintiff is a legally wedded wife of deceased Gurubasappa Hegge. Though legal representatives of Defendant No. 2 and Defendant No. 6 have contended that, the Plaintiff is not a legally wedded wife of deceased Gurubasappa Hegge: they have failed to substantiate this defence. The legal representatives of Defendant No. 2 and also Defendant No. 6 have taken up a defence in their counter claim W.S. that the Plaintiff is not a legally wedded wife; on the other hand, one Nagamma is the first wife of deceased Gurubasappa Hegge. On this aspect, I have already discussed at length on issue No. 1, the

Legal representatives of Defendant No. 2 and Defendant No. 6 have utterly failed to substantiate defence set up in the W.S. that the Plaintiff is not legally wedded wife of the deceased Gurubasappa Hegge. On the other hand, the Plaintiff has produced sufficient documentary evidence corroborated with oral evidence of her witnesses that Nagamma so called wife of deceased Gurubasappa Hegge is not a wife of Gurubasappa, but she is a wife of one Baswanthrao Patil of Kaplapur village and having landed properties in her name. The voter list, so also property extract indicates that Nagamma is the wife of one Baswanthrao. The documentary evidence placed on record by the Plaintiff indicates that she is legally wedded wife of the deceased Gurubasappa Hegge living with him with cordial relation and she has served him till his death as a wife as a heir and successor of the deceased Gurubasappa Hegge. The Defendant No. 1 and 2 have not explained nor they produced nay material as to what was the need to deceased Gurubasappa Hegge to execute a registered Will Deed in their favour. Thus, it can be gathered from the very conduct of the Defendant No. 1 and 2 and other Defendant No. 6 that as to how they have managed to create a unworthy document by examining their own hentchman in support of alleged Will. No prudent man can believe that a person will dispose of his share in the joint family properties in favour of his own brothers, during his life time. Such a Will said to have been executed by the deceased Gurubasappa in favour of Defendant No. 1 to 3 to the extent of some properties in favour of Plaintiff is merits to be rejected and it has no sanctity in the eye of law. The Plaintiff has proved that she is legally wedded wife of deceased Gurubasappa Hegge and she is entitled to claim partition in the suit properties. Thus, the legal representatives of Defendant No. 2 and Defendant No. 6 have failed to substantiate their defence set up in the counter claim W.S. Therefore, issue No. 5 is merits to be answered in the negative.

The Trial Court holds that in view of the reasoning on issue No. 1, it is to be accepted that the Plaintiff is the legally wedded wife of Gurubasappa and it ought to be held that the Defendants have failed to prove issue No. 5. Therefore, it is necessary for us to address the reasoning of the Trial Court on issue No. 1 in this regard.

29. At paragraph 62, of the judgment the said reasoning is to he found, which is extracted hereunder:

62) So far, as the marriage of Plaintiff with deceased Gurubasappa is concerned it has been proved from the mouth of PW-2 Channabsappa Halhalli, Advocate and PW-3 one Veerbhadrappa, so also PW-4. Breja Mohan, who have attended the marriage of the Plaintiff with deceased Gurubasappa. Besides that PW-5. Manikappa, a person aged about 65 years has attended the marriage of Plaintiff with deceased Gurubasappa, has also stated that earlier to the marriage the deceased Gurubasappa had no wife and Defendant Nos. 1 and 2 never visited the house of deceased Gurubasappa at Bidar. This witness is closely associated with Hegge family and he has attended the marriage of Gurubasappa, so also

marriage of Defendant No. 2 and 3. Thus the oral testimony of independent witnesses, so also documentary evidence produced by the Plaintiff clearly indicates that she is the legally wedded wife of deceased Gurubasappa. It has also proved by the Plaintiff by produced Ex.P-42 certificate issued from Methodist Hospital that the Nagamma is a wife of Baswanthrao Patil, R/o Kaplapur, she had a caesarian operation on 19.06.1978. This document indicates that Nagamma is not wife of Baswanthrao and name of Nagamma is shown as wife of Basanthrao. Ex. P-63 to 66 photos of family of Hegge i.e., Defendants, wherein Vimalabai is seen that the Plaintiff is wife of deceased Gurubasappa.

30. The reliance placed by the Trial Court on the evidence of PW-2, PW-3, PW-4 and PW-5 to hold that the Plaintiff had established she was the legally wedded wife of Gurubasappa and further that Nagamma was the wife of one Basawanth Rao and not Gurubasappa, is not sustainable.

PW-2 was the landlord of the house, which was rented out by Gurubasappa and the Plaintiff. He puts the year of marriage of the Plaintiff vaguely as, 1969. Whereas PW-1 the power of attorney holder of the Plaintiff puts it equally ambiguously as "1965-66" (in examination in Chief) or "1963-64" (in cross-examination). PW-3 puts the year of marriage as having taken place "twenty seven or twenty eight years ago" (1967/1966). PW-4 is a witness who was acquainted with Gurubasappa only from the year 1974. PW-5 places the possible year in which the Plaintiff's marriage took place as being 1964-65. This is apparently an inconsistency that could not have been reconciled. The witnesses were not even sure about the year of marriage of the Plaintiff. And could not be expected to know anything about Gurubasappa's marriage with Nagamma said to have taken place in 1953.

31. Insofar as arriving at the conclusion that Nagamma was not the wife of Gurubasappa but was the wife of one Baswanth Rao Patil is concerned, the Trial Court has readily accepted the same with reference to a certificate produced as Exhibit P-42. A plain examination of this document does not disclose the basis on which it could be held as referring to Nagamma, the daughter of Bandeppa, of Kaplapur Village. Nagamma named in the said document could not be readily accepted as being the same Nagamma, wife of Gurubasappa.

32. On the other hand, the Trial Court has conveniently ignored the evidence of the Defendants. As pointed out earlier, the evidence of several witnesses of the Defendant, who were said to have been present at the marriage ceremony of Nagamma and Gurubasappa in the year 1953, is consistent and categorical. The priest who performed the marriage ceremony is not even cross-examined.

33. The Trial Court has not addressed the circumstance that there was an admitted difference of age of atleast 15 years between the Plaintiff and the deceased Gurubasappa and would therefore render the assertions of the Defendants, which is hardly denied in cross-examination, a strong probability. In this scenario, if the marriage of Nagamma and Gurubasappa is accepted as an

established fact and if she was not divorced during the lifetime of Gurubasappa and if she was alive at the time of the alleged marriage of the Plaintiff, the same is rendered invalid. It would follow therefore that the Plaintiff is not in a position to claim any right to partition in the joint family properties of Late Gurubasappa.

34. In our opinion, therefore, it would be unnecessary to consider the appeal on any other ground, insofar as the Plaintiff is concerned.

35. Insofar as cross-objection No. 14/2003 is concerned, this is preferred by the legal representatives of Defendant No. 3, it was their claim before the Trial Court that they were in possession and enjoyment of the following properties of the joint family, since October 1994, for their maintenance:

- a) House at No. 7-2-7 of Gorkha Galli, Bidar to the extent of One-third thereof.
- b) Land measuring 6 acres 38 guntas at Koutha-B.
- c) Land measuring 2 acres 15 guntas in survey No. 39/1 of Doddapur.
- d) Land measuring 2 acres 15 guntas in survey No. 39/3 of Doddapur.
- e) Land measuring 13 acres 32 guntas of Morkhal.
- f) One Godown at 9.7.106 (old No. 9.7.1989) at Gandhi gunj, Bidar.

They have disowned the written statement signed by Defendant No. 3 alongwith Defendant No. 1, 2 and 4. It is claimed that the widow of Defendant No. 3 has borne the marriage expenses to the extent of Rs. 10 lakh, of her daughters, raised by way of loans and seeks reimbursement from the joint family funds. The said legal representatives claim one-fourth share in the suit schedule properties, as they succeed to the estate of Defendant No. 3 who, according to them, died intestate. In paragraph No. 3 of their written statement, it is stated that except item No. 6 of Suit Schedule "B", a commission agent's shop, all the other properties defined in suit Schedule "A" to "E" are asserted as being joint family properties.

36. In their objections to the said claim, Defendant Nos. 1 and 2 had contended that Defendant No. 3 having already filed a written statement, his legal representatives could not file a written statement contrary to the same. The assertion by the Defendant No. 3, as to Nagamma being the legally wedded wife of Gurubasappa could not be denied by the legal representatives. So also the assertion as to Gurubasappa having executed a Will bequeathing his undivided share in Schedule "B" to the Plaintiff in Survey No. 180/1 measuring 6 acres 25 guntas, Survey No. 180/2, measuring 6 acres 37 guntas, both the above at Markhal, Bidar, undivided share in house on plot No. 52 at Housing Colony, Bidar. And the properties described in Schedule "A" to the Defendant Nos. 1 to 3.

37. However, since the Plaintiff was not the legally wedded wife of Gurubasappa, it was contended that she could not claim any share.

It is further denied that the widow of Defendant No. 3 had incurred the marriage

expenses of her daughters by raising loans. It is asserted that the Defendant Nos. 1 to 3 had met the expenses. It is admitted that these legal representatives of Defendant No. 3 are in occupation of the house property at Gorkha Galli but it is denied that they have been put in separate possession of any other item of land or property exclusively, in the absence of a partition. It is asserted that Defendant Nos. 1 and 2 are in fact maintaining these legal representatives.

38. The said Defendants had further claimed that Defendant No. 3 had executed a Will dated 3.2.1988, which was duly registered and kept in safe custody in the office of District Registrar, Bidar. It was contended that he had bequeathed his entire undivided share in the family property to Defendant Nos. 1 and 2. only maintenance was to be provided to his widow and children.

39. The widow of Defendant No. 3 has examined herself as DW-6, she has stated that Defendant Nos. 1 and 2 had assured her that since she was a party to the suit, her interest in the family property is assured. She has also asserted that she has borrowed Rs. 4 lakh to perform the marriage of her daughters, four of whom are married. She has also asserted that she is in possession of a godown and 23 acres of land. She has produced the record of rights in respect of certain lands marked as Exhibits D-15 to D-25. She has also produced certified copies of Sale Deeds executed by D-1 and D-2 in respect of certain items of land sold during the pendency of this suit, in suit Schedule "A" marked as Exhibits D-26 to D-29. She has denied the execution of any Will by her husband.

DW-7 one of the panchayathdars who was said to be involved in securing the properties said to be in the possession of the legal representatives of Defendant No. 3 vouches to this effect and has affirmed that they are in possession of those properties, pending the decision in this suit, towards their maintenance.

DW-8, the son-in-law of DW-6 has supported her case that she had borrowed money to perform the marriage of her daughters. DW-9 and DW-10, the daughters of DW-6 have also asserted the fact that their mother had borrowed money to perform the marriages of four of her daughters including DW-9.

DW-1 in his evidence has admitted that several properties as belonging to the family while denying that certain other properties belong to the family.

40. Given the rival contentions and the evidence on record. It is seen that the Trial Court has summarily held that all the properties described in Schedule "A" and "B" are joint family properties and that there is no documentary evidence in respect of Schedule "C and "D" properties. And that there is no material to believe that Schedule "E" properties are in existence. The Trial Court has hence allowed the counter-claim of the legal representatives of Defendant No. 3 in respect of Schedule "A" and "B" properties. The reasoning of the Trial Court in arriving at its findings as regards the suit property is found at paragraph 71 and 74 of the judgment, portions of which are extracted hereunder:

71) In this case, the documentary evidence produced by the Plaintiff Ex.P-1 to

Ex.P-30 clearly indicates that the suit Schedule A properties are joint family properties standing in the name of deceased Gurubasappa Hegge and Defendant Nos. 1 to 3. Further documents produced at Ex.P-31 to 34 with regard to the suit Schedule B properties are joint family properties of deceased husband of Plaintiff and Defendant Nos. 1 to 3. Ex.P-37 indicates that one of the property of suit Schedule B has been purchased by deceased husband of Plaintiff. Ex.P-38 goes to show that another property of suit Schedule B is purchased in the name of deceased husband of Plaintiff. So also Ex.P-39 indicates that another property of suit Schedule B purchased in the name of deceased husband of Plaintiff for consideration of Rs. 2,000/-. Ex.P-40 indicates that another suit Schedule B properties was purchased for sum of Rs. 3,000/- in the name of the deceased husband of Plaintiff, during their jointness....

74)... As I have already stated that so far as, the suit Schedule C, D and E properties are concerned there is no convincing and clinching evidence on behalf of the Plaintiff and Legal representatives of Defendant No. 3 to believe that those properties are joint family properties liable for partition and even there is no sufficient material regarding existence of suit Schedules C, D, E properties. It can be gathered from the material placed on record, the legal representatives of Defendant No. 3 are entitled to claim partition and separate possession of their 1/4th share over the suit Schedule A and B properties only. Accordingly, the counter claim of the legal representatives of Defendant No. 3 is merits to be accepted. Though Defendant No. 1 and 2 have disputed in such a artificial manner their defence is not worthy to be believed. Thus, the legal representatives of Defendant No. 3 have proved their claim of counter claim of 1/4th share over the suit Schedule A and B properties by effecting partition by metes and bounds.

It is clear that the Trial Court has not addressed the contentions as regards the specific items of the suit property which are disputed as being in existence, or belonging to the joint family, or which are even said to be sold during the pendency of the suit. The Trial Court has not adverted to items of property said to be in the possession of the legal representatives of Defendant No. 3.

41. There is no determination of the shares of the parties with reference to their marital status and the law. The accounts said to have been furnished are not scrutinized. Properties both movable and immovable said to have been sold from time to time are not taken into consideration.

42. Further, the Trial Court has directed that the preliminary decree be sent to the Deputy Commissioner u/s 54 of the CPC for execution.

In the light of the above, it is to be observed that the Trial Court failed to consider the facts and circumstances in arriving at its findings and the legal provisions in proceeding to issue the above direction, in the operative portion of the judgment.

Incidentally, insofar as the Will said to have been executed by Late. Gurubasappa

produced as Ex.D11 and the Will said to have been executed by Defendant No. 3 are concerned, the Trial Court having held that the Will said to have been executed by Gurubasappa, not having been proved in accordance with law and the fact that the Will said to have been executed by Defendant No. 3 never having produced before the Court and the same having been negated, does not warrant any interference by this Court as the reasons assigned by the Court below in this regard are justified.

43. Insofar as the legal provisions governing partition are concerned, it is to be noticed that Section 54 of the CPC stands amended by Karnataka Act No. 36 of 1998, with effect from 1.3.2001. The Section reads as follows:

54. Partition of estate or separation of Share.-Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share of such an estate shall be made by the Court in accordance with the law if any, for the time being in force relating to the partition or the separate possession of shares, and if necessary on the report of a revenue officer, not below the rank of Tahsildar or such other person as the Court may appoint as Commissioner in that behalf.

Further Order XX, Rule 18(1) stands substituted by Notification dated 12.8.2001 (w.e.f. 1.7.2001) as follows:

18. Decree in suit for partition of property or separate possession of share therein: Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,--

(1) if and, insofar as the decree related to an estate assessed to land revenue to the Government, the decree shall declare the rights of the several parties interested in the property, and such partition or separation shall be made by the Court, in accordance with such declaration and Section 54.

(2) if and insofar as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

It is well-settled that a preliminary decree only declares the share of the parties and the properties that are to be divided. The properties are to be divided by metes and bounds in the final decree proceedings. In this regard, the principles to be borne in mind while effecting partition is set out in the following passages by the Supreme Court in the case of *M.L. Subbaraya Setty v. M.L. Nagappa*, ILR 2003 Kar 4562.

28. xxx xxx xxx The direction that the Plaintiff is entitled to 2/19th share in the joint family property and that he shall be put in separate possession of the properties giving him share by metes and bounds does not mean that every item

of the property is to be divided between co-sharers. It is correct that the only requirement is that property allotted to each co-sharer should bear approximately the same value as corresponds to his share. It may also not be necessary that if the properties consist of movable and immovable properties then each party must necessarily be given a share in all movable and immovable properties. While effecting partition of joint family properties, it may not be possible to divide every property by metes and bounds. The allocation of properties of unequal value may come to the share of a member of a joint family at the time of effecting partition but for that necessary adjustments have to be made. It can also happen that some of the co-sharer on partition may not get any share in immovable property. No hard and fast rule can be laid. It depends upon the facts of each case. It depends upon the nature of the immovable property and number of such properties as also the number of members to whom it is required to be divided. Properties of a larger value may go to one member. Property of lesser value may go to another. What is necessary however, is the adjustment of the value by providing for payment of one who gets property of higher value. In short, there has to be equalization of shares."

"29. Another question to be determined is as to the date of valuation of the properties in a suit for partition. Ordinarily, it has to be the date of the passing of the final decree and not the date of filing of the suit for partition. In a given case, however, there may be exception of this general rule. It is a matter of common knowledge that such suits for partition take considerable time for disposal. There is a big time lag between date of filing of the suit and date of the decision thereof. There is also considerable lapse of time between passing of preliminary decree and passing of final decree. Take the present case, suit was filed in the year 1948, preliminary decree proceedings were finalised in 1971 by decision of this Court. Thereafter more than 30 years have lapsed, the parties are still no way near the final partition. It would be absurd if it was to be held that the valuation of 1940 or 1948 should be taken. It is also possible that in a given case, the value of one property may appreciate drastically while not so in the case of other properties or it may even decline and some of the parties may be in possession of those properties. It has been the endeavor of the Courts in such suits to protect, preserve and respect the possession of the parties as far as possible. While so protecting, there has to be equalization of shares which has been recognized in law "by making a provision for payment of owelty.

44. Having regard to the law and the lacunae noted above as regards the findings, in our opinion, it would be necessary to take the following measures in this matter:

- a) The matter shall be remitted to the Trial Court.
- b) The legal representatives of Defendant No. 3 shall be transposed as the Plaintiff's.
- c) Nagamma, daughter of Bandeppa resident of Kaplapur, Bidar and the wife of

Gurubasappa shall be impleaded as a Defendant and given liberty to tender evidence as to her status as the legally wedded wife of Late Gurubasappa. In the event that she fails to appear upon service of notice and summons, the Court shall proceed further notwithstanding her absence.

d) The Trial Court shall determine the share of each of the parties interested in the suit property in accordance with law.

e) The Trial Court shall appoint a Court Commissioner to enquire and report in respect of every item of the suit property and its present value thereof. The report shall also indicate the position as regards possession of each of the items of property and income derived and accruing and the recipient thereof. The Commissioner shall be directed to prepare accounts after holding such enquiries as deemed fit of the monetary benefits gains or liabilities incurred by the parties in respect of the suit properties. The Court shall in its discretion fix the remuneration of the Commissioner, which shall, however, be commensurate with the work discharged by the Commissioner from time to time.

f) In the light of the Defendants admitting the willful delivery of possession of properties, movable and immovable in favour of the Plaintiff in recognition of her relationship with late Gurubasappa and as there is no claim in respect of the same by the parties, (See Orders on I.A. No. 4 dated 13.3.1987), the same shall stand excluded from the suit schedule properties. The Plaintiff is found by us as not being the legally wedded wife of late Gurubasappa, her name shall be struck-off and deleted as a party to the suit.

g) The Court may issue such further directions as may be necessary to effect partition in terms of the modified preliminary decree that shall be passed pursuant to this judgment.

h) The parties shall appear before the Trial Court on 15th June, 2009. The Registry is directed to remit the records forthwith to the Trial Court and having regard to the age of the litigation, the Trial Court shall expedite further proceedings and endeavour to dispose of the suits on remand within a period of six months, if not earlier, from this date.

45. In the result, we pass the following:

JUDGMENT

a) The appeal is allowed in part. The judgment and decree in favour of the Plaintiff is set aside. Consequently, RFA Cross-Objection No. 16 of 2003 does not survive for consideration.

b) RFA Cross-Objection No. 14 of 2003 is allowed in part. The claim in respect of suit schedule properties are subject to further enquiry as directed.

c) The matter is remitted to the Trial Court for reconsideration in terms as directed hereinabove.

46. No order as to costs.