

(2008) 12 KAR CK 0021

In the Karnataka High Court

Case No : Regular First Appeal No's. 734 and 755 of 1997

Narappa Gouda and Others etc.

APPELLANT

Vs

Smt. Tulasawwa and Others etc.

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Hindu Succession Act, 1956 — Section 6, 6 (i), 8

Citation : AIR 2009 Kar 180 : (2009) 4 KCCR 2352

Hon'ble Judges : Subhash B. Adi, J;S.R. Bannurmah, J

Bench : Division Bench

Advocate : V.T. Rayaraddi, for the Appellant; M.H. Sawkar and P.H. Gothkindi, for the Respondent

Judgement

Subhash B. Adi, J.—Both these appeals arise out of the judgment and decree in O.S. No. 10/1994 dated 19th August 1997 on the file of 1st Additional Civil Judge (Sr. Dn.) Dharwad.

R.F.A. No. 734/1997 is by the defendants-1 to 4, R.F.A. No. 755/1997 is by the plaintiff.

2. Parties will be referred to as per their ranking in the trial Court.

3. Suit is one for partition and separate possession of 1/6th share by metes and bounds.

4. Plaintiff is the mother of defendant Nos. 1 and 5. Defendant Nos. 2 and 4 are children of defendant No. 1. The genealogy of the family is as under:

Venkanagouda	Patil	(propositus	ahead)	
Tulasawwa (Plff.)	Narappagouda	Deft.-1	Suvarna W/o Venkanagouda	s/o
plaintiff & (daughter)	Patil	propositus	deft.-5	Venkanagouda Patil
Venkanagouda	Arunagouda	Anand	Gouda	Defendant-2 Defendant-3

Defendant-4 Venkanagouda Patil died on 24-1-1964, leaving behind the plaintiff-wife, defendant No. 1 - son and defendant No. 5 - daughter. After the death of Venkanagouda Patil, defendant No. 1 relinquished his right, title and interest over the suit property in favour of his then minor sons - defendant Nos. 2 to 4 by means of mutation entry No. 2507. Accordingly, the names of defendant Nos. 2 to 4 were mutated -in the record of rights both to the agricultural lands and the house properties. It is because of the said entry in the record of rights, defendant Nos. 2 to 4 are also made as party to the suit.

5. Plaintiff alleged that, she and defendant No. 5 grew chilly, cotton, wheat and jowar crops in the suit property. Defendant No. 1 - son in the capacity of guardian for defendant Nos. 2 to 4 and taking the advantage of the old age of the plaintiff, he tried to evict her from the suit property. Suit properties are joint family properties and there is no partition and, despite her repeated request for partition and separate possession of her share, defendants 1 to 4 are neither partitioning the suit properties nor allowing her to take her crop grown on the lands. Plaintiff claimed 1/6th share for herself and for defendant No. 5.

6. Defendant No. 1 on his behalf and also on behalf of defendant Nos. 2 to 4 - minor children filed written statement. Defendants admitted the relationship of the parties. However, he alleged that defendant No. 5 got married about 18 to 20 years back and at the time of marriage, she was given 15 tholas of gold and Rs. 10,000/- cash towards her share in the suit schedule properties, and alleged that, she has no right, title and interest in the suit property. Further alleged that, plaintiff and defendant No. 5 never cultivated the lands nor they have any right in the suit property. Further alleged that, plaintiff as a mother, she cannot maintain a suit for partition in respect of co-parcenary property. Defendants denied the share of the plaintiff.

7. Based on the pleadings, the trial Court framed the following issues:

1. Whether the suit filed by the plaintiff is maintainable?
2. Whether the plaintiff has got share in the suit properties? If so, to what extent?
3. Whether the defendant No. 5 has got share in the suit properties? If so, to what extent?
4. Whether defendant No. 5 proves that the land Sl. No. 338 measuring 2 acres 26 guntas of Nalvadi village and open space meant for background, is also joint family property of plaintiff and defendants?
5. Whether Krishnagouda, Basanagouda Sheshanagoudar is necessary party to this suit?
6. To what relief, plaintiff is entitled?
7. What decree or order?
8. Before the trial Court, plaintiff got herself examined as P.W. 1, defendant No. 1

got him self examined as D.W. 1, he also examined two witnesses as D.Ws. 2 and 3. Plaintiff produced Exs P1 to P5, however, defendants did not produce any document.

9. Trial Court relying on the judgments reported in Ramachandra Bhimappa Murgod and Another Vs. Sushila and Others, judgments of this Court and the Apex Court held that the widow can maintain a suit for partition against her son and also held that the plaintiff is entitled for 1/6th share in the suit schedule property.

10. Sri V.T. Rayaraddi, learned Counsels appearing for the defendants 1 to 4 submitted that, the plaintiff being a mother, she on her own cannot maintain a suit for partition in respect of co-parcenery property, she will get share only when partition takes place between the co-parceners. In this regard, he relied on the provisions of Article 316 of Hindu Law by Mulla and submitted that mother cannot compel a partition so long as sons want to remain united, if the partition takes place between the sons, she is entitled to a share. He further submitted that, neither wife nor the mother nor grand mother are entitled to enforce partition against the sons, who have a right to remain undivided as long as they choose. As a wife and mother, she may be entitled for maintenance, but she is not entitled to seek partition. In this regard, he referred to the plaint and submitted that, plaintiff being a mother of defendant No. 1, she alone has filed a suit for partition and she has admitted that, the suit schedule properties are co-parcenery properties. He further submitted that, in view of the admitted facts, the suit is not maintainable. He further submitted that, after the death of Venkanagouda, the suit properties are transferred to the Katha of defendant No. 1 and thereafter the defendant No. 1 has relinquished his right, title and interest In favour of defendant Nos. 2 to 4, as such, the plaintiff is not entitled for share in the suit properties.

11. Sri M. H. Sawkar, learned Counsel appearing for the plaintiff submitted that, plaintiff being a widow, she is entitled to sue for partition and she is also entitled for a share equal to that of the son. A prohibition to seek partition is only in case where there is more than one co-parcener. He further submitted that, in this case, defendant No. 1 being the only co-parcener, question of co-parceners remaining united does not arise. He submitted that, the question as to whether a widow or a mother is entitled for share or not is considered by the Supreme Court in a reported decision, reported in Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum and Others, and submitted that, in the said decision, the plaintiff was mother, who had sought for partition against two sons after the death of her husband. The Apex Court considering the provisions of Section 6 of the Hindu Succession Act and proviso and explanation thereto, has held that, widows claim to obtain share in the interest, which her husband had at the time of his death in the co-parcenery property, depends on determination of share is her husbands share and husband's own, in the co-parcenery property. Son, daughter and widow are mentioned as Class-I heir in the schedule. In case of

partition of a co-parcenary property, one has to imagine the state of affairs a little prior to the death of the propositus, the partition of co-parcenary property has to be effected notionally between deceased and other members of the co-parceners, as if the partition has taken place, during the lifetime of the husband, wife could not claim partition, but when notional partition takes place little prior to the death of the husband of the plaintiff, plaintiff would be entitled to a share along with her son and the husband and further she is also entitled to share in the share of husband.

12. He also relied, on a Full Bench decision of Bombay High Court, reported in *Sushilabai Ramchandra Kulkarni Vs. Narayanrao Gopalrao Deshpande and Others*, and submitted that, the right conferred upon the mother under the Hindu Law is not affected by any of the provisions contained in the Hindu Succession Act, as partition is provided u/s 6 for determining the interest of the deceased co-parcener. Upon partition taking place immediately before the death of Venkanagouda Paul, there are only two co-parceners namely, father and son, naturally, mother would get one share along with her husband advisor. He also relied on another decision of this Court reported in *Basavalingamma (by L. R.'s) and Others Vs. Sharadamma*, and submitted that, in the said case, widow of a co-parcener, after coming into force of the Hindu Succession Act while living in joint status can still institute a suit on the death of her father-in-law to claim a share in the estate of the deceased, as she is a Class-I heir to him as mentioned in Schedule to Section -8 of the Hindu Succession Act. Relying on these decisions, he further submitted that, in this case, Venkanagouda Patil has left behind the plaintiff and defendant No. 1 as wife and son, there is no other co-parcener in their family. If the property is to be divided, it has to be divided only between mother and son. Mother being the widow and entitled for a share on the notional partition that takes place immediately prior to the death of Venkanagouda Patil. The provisions of Hindu Law do not prohibit suit for partition by a widow against only son.

13. Though trial Court has found that the plaintiff is entitled for partition while considering the determination of share, the trial Court has not considered, to what share the plaintiff is entitled. He submitted that, in view of the notional partition taking place prior to the death of Venkanagouda Patil, plaintiff, defendant No. 1 and Venkanagouda Patil get one share each i.e. $\frac{1}{3}$ each. The $\frac{1}{3}$ rd share of deceased Venkanagouda Patil is again divided amongst the plaintiff, defendant No. 1 and defendant No. 5 i.e. each will get $\frac{1}{9}$ th share each and accordingly, plaintiff would be entitled to $\frac{4}{9}$ th share. He further submitted that, the plaintiff has filed an application for amendment of the plaint to claim $\frac{4}{9}$ th share instead of $\frac{1}{6}$ th share. He submitted that, it is only a correction of extent of share and does not require any evidence.

14. In the light of the rival contentions, the points that arise for consideration in these appeals are:

i) Whether widow can maintain the suit for partition against her son?

ii) Whether she, is entitled to share equal to that of her son?

15. The relationship between the parties is not in dispute. Plaintiff is mother of defendant No. 1 and defendant No. 5, and defendant Nos. 2 to 4 are children of defendant No. 1. Property is co-parcenary property. It is also not in dispute that, husband of the plaintiff namely, Venkanagouda Patil died in 1964 leaving behind wife, defendant No. 1 - son and defendant No. 5 daughter. Except defendant No. 1, there is no other co-parcener at the time of filing of the suit. Under the Hindu Law wife or mother can not seek partition or division as long as the co-parceners want to remain undivided. The co-parceners have right to remain undivided. In this case, there is no other co-parcener, who wants to remain undivided. The question as to whether widow can maintain a suit for partition was considered by this Court in a decision reported in Ramachandra Bhimappa Murgod and Another Vs. Sushila and Others, and this Court has followed the earlier decision. The Apex Court in a decision reported in Satrughan Isser Vs. Smt. Subujpari and Others, has also considered as regard to the right of widows to seek partition. The said matter has been considered by this Court in a judgment reported in Shivalingappa Vs. Gouravva, by the Gujarat High Court in a judgment, reported in Vidyaben Vs. Jagdishchandra Nandshankar Bhatt and Others, and so also by the Orissa High Court in Kamini Bewa Vs. Srimati Dei and Others,

16. Explanation to proviso to Section 6 of Hindu Succession Act 1956, provides for notional partition, as if the partition has taken place little before the death of propositus i.e., Venkanagouda Patil in this case.

17. In the light of the proviso to Section 6, which contains the formula for fixing the share of the claimant and the explanation contains the formula for deducting the share of the deceased (Venkanagouda Patil) by application of proviso in the absence of any testamentary document, plaintiff - the widow, defendant No. 1 - son and deceased propositus, all being the Class-I heirs, they simultaneously take equal share.

18. As regards to the working out as to the share of the plaintiff in a notional partition, explanation (i) to Section 6 of the Hindu Succession Act, which contains a formula for determining the share of the deceased, provides for notional partition little before the death of Venkanagouda by providing a share to the deceased, as if the partition has taken place and share is allotted to him. One has to imagine the state of things in which little prior to the death of Venkanagouda Patil, the partition would be effected. Venkanagouda Patil and defendant No. 1 though the plaintiff not being a co-parcener was not entitled to demand partition yet in the partition between Venkanagouda Patil and defendant No. 1, she would be entitled to receive share equal to that of a son and this is clear from the Commentary in Mulla's Hindu Law 14th Edition paras 403 and 350. Since the notional partition takes place little prior to the death of Venkanagouda Patil, in which event, plaintiff gets a share in the notional partition and further she becomes entitled to claim the partition. As on the said date, if the suit schedule property is divided, notionally Venkanagouda Patil will get one

share, son will get one share and plaintiff will also get one share. The share of Venkanagouda Patil further undergoes division between the plaintiff, defendant No. 1 and defendant No. 5 i.e. $\frac{1}{3}$ rd is divided into $\frac{1}{9}$ th each that means, $\frac{3}{9}$ th + $\frac{1}{9}$ th to plaintiff, she would be entitled to $\frac{4}{9}$ th share. Initially the plaintiff has claimed $\frac{1}{6}$ th share in the suit schedule properties, however, during the pendency of these appeals, an application is filed by the learned Counsel for the plaintiff for amendment of paragraphs 7, 10, 11(1) of the plaint inter alia, correcting $\frac{1}{6}$ th share as $\frac{4}{9}$ th share. This Court by its order dated 2-9-2005 has directed I.A.I/2005 seeking permission to amend the plaint be considered along with the main matter.

19. No doubt, the plaintiff has mentioned that she is entitled to $\frac{1}{6}$ th share in those paragraphs, however, in law, she is entitled to $\frac{1}{3}$ rd share along with husband and son in a notional partition and thereafter she is entitled for share in the husband's share. Though the application is opposed, however, considering the admitted relationship between the parties, considering the actual share to which the plaintiff is entitled, we are of the opinion that the application requires to be allowed.

20. Since it is only question of Working out of the shares, it does not warrant for further evidence. Accordingly, we allow the plaintiff to amend the plaint. In view of the same, plaintiff is entitled for $\frac{4}{9}$ th share, defendant No. 1 is entitled for $\frac{4}{9}$ th share and defendant No. 5 is entitled for $\frac{1}{9}$ th share in the suit schedule property.

In the light of the above, R.F.A. No. 755/ 1997 filed by plaintiff stands allowed and judgment and decree stands modified inter alia, declaring that the plaintiff is entitled for $\frac{4}{9}$ th share in the suit schedule property. Appeal filed by defendant Nos. 1 to 4 in R.F.A. No. 734/1997 stands dismissed. Office is directed to draw decree accordingly.