

**(1987) 06 KAR CK 0034**

**In the Karnataka High Court**

**Case No :** Regular First Appeal No. 231 of 1987

Rangappa

APPELLANT

Vs

Jayamma

RESPONDENT

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**Date of Decision :** 17-06-1987

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18 (2), Order 7 Rule 7

**Citation :** (1987) ILR (Kar) 2889 : (1987) 2 KarLJ 369

**Hon'ble Judges :** P.P. Bopanna, J;K.A. Swami, J

**Bench :** Division Bench

**Advocate :** H.G. Ramesh, for the Appellant; M. Raghavendrachar, for the Respondent

**Final Decision :** Partly Allowed

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## **Judgement**

K.A. Swami, J.—This appeal by the plaintiff is preferred against the judgment and decree dated 24-10-1986 passed by the Learned Additional Civil Judge, Shimoga in O.S. No. 10/1985 declaring that the plaintiff is the owner of one half of the suit properties and refusing to grant an injunction as prayed for and also further refusing to pass a decree for Rs. 8000/- The Trial Court has held that the plaintiff and the defendant are the owners of the suit properties and each of them is entitled to share them equally.

2. Having regard to the contentions urged, only two points arise for consideration. They are :

- 1) Whether the Trial Court is justified in law in not giving effect to the will dated 10-7-1980 Ex. P-1 claimed to have been executed by Smt. Nagamma ?
- 2) Whether the Trial Court is justified in law in not passing a decree for partition in conformity with the finding arrived at by it ?

POINT NO 1 :

3. The will Ex. P.1 as per the case of the plaintiff was executed by Smt.

Nagamma on 10-7-1980 in favour of the plaintiff-appellant. It is unregistered. As per the terms of the will, it is the case of the plaintiff that he is entitled to be declared as owner of the suit properties to the extent of 3/4 share. The Trial Court has held that the will Ex. P.1 is not genuine and it is not free from suspicious circumstances. Accordingly it has rejected the will. It is very relevant to notice that subsequent to the death of Nagamma-the testator -and prior to filing of the present suit, there was a suit O.S. 14/1984-filed by the defendant against the plaintiff claiming title to the suit properties. If really there was a will executed by Smt. Nagamma as per Ex.P.1, the very first defence in that suit would have been the will itself. This will was not made a defence in O.S. No. 14/1984 by the present plaintiff who was the defendant in that suit. This conduct of the plaintiff being inconsistent with the existence of the will, as rightly held by the Trial Court, creates a great suspicion about the execution of the will by Smt Nagamma. In addition to this, Learned Trial Judge has also referred to number of suspicious circumstances such as the plaintiff himself taking an active part in getting the document-Ex.P.1-executed by Nagamma, and further there being no circumstance to show that the late Smt. Nagamma was in any way ill-disposed towards the defendant. As far as the plaintiff and defendant are concerned, both are great grand step-children of Smt. Nagamma. Therefore, there was no reason whatsoever to Smt. Nagamma to exclude or deprive the defendant from her legitimate share in the suit properties. The evidence of the attestors to the will is also in variance. They have given different versions. Hence taking into consideration the relevant evidence on record, we are satisfied that the finding recorded by the trial Court that the plaintiff has failed to establish due execution of the will by Smt. Nagamma is correct and it does not call for interference. Accordingly point No. 1 is answered in the affirmative.

**POINT NO. 2 :**

4. The grievance made by the appellant is that the Trial Court having come to the conclusion that the plaintiff is entitled to one half share in the suit properties, it ought to have passed a decree for partition and separate possession of his half share. Para 41 of the judgment of the Trial Court is brought to our notice to show that in fact the defendant herself requested the Court to grant a decree for partition to avoid another suit for partition. The Trial Court is of the view that since it is a suit for a declaration of title and injunction, it is not just and appropriate to pass a decree for partition and separate possession. In the facts and circumstances of the case, we are of the view, that the Trial Court has taken a very technical view of the matter.

5. There is no doubt that the plaintiff-appellant has sought for a declaration of his title to the suit properties and for permanent injunction and also for recovery of a sum of Rs. 8000/- being the past mesne profits. The plaintiff has claimed that he is the exclusive owner of the suit properties. The Trial Court has held that the plaintiff and the defendant are entitled to one half share each. The facts established we; that the suit properties originally belonged to one Dodda

Rangappa. He died in the year 1945. He had three wives by name Balamma, Nagamma and Nagamma. Balamma pre-deceased her husband Dodda Rangappa, leaving no issue. Nagamma died issue less in the year 1982. The Plaintiff claimed that Nagamma had executed a will dated 10-7-1981 (Ex.P.I) in his favour, the due execution of which, as found by us on point No. 1, has not been proved. Ningamma died leaving behind her only daughter Gangamma. She executed a gift deed dated 2-12-1052 Ex. D.2 in respect of the suit properties in favour of Gangamma. This Gangamma had a daughter by name Gowramma. The plaintiff is the son of the said Gangamma and the defendant is her daughter. The defendant is elder to the plaintiff. Thus the plaintiff and the defendant are brother and sister. Gowramma succeeded to the suit properties to the extent of the share of Ningamma as a heir to her mother Gangamma who got it through the gift deed Ex-D.2 As far as the share of Nagamma who died in the year 1982 is concerned, it has devolved upon the plaintiff and the defendant equally. Thus apart from the plaintiff and the defendant, there are no other heirs of Gangamma entitled to have a share in the suit properties. Apart from the suit properties, there are no other properties of Gowramma and Nagamma in which the plaintiff and the defendant are entitled to a share.

6. In this background, the point that arises for consideration is, whether in these circumstances, the trial Court is justified in law in refusing to pass a preliminary decree for partition only on the ground that it is not one of the reliefs sought for in the suit and the suit is only for a declaration of title and injunction :

7. Order VII Rule 7 C.P.C. reads thus :

"Relief to be specifically stated : Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

The words "and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for" are wide enough to empower the Court to grant such relief as the plaintiff is entitled to, on the facts established on the evidence on record, even if such relief has not been specifically prayed for.

8.1. The provisions of Order VII Rule 7 of the C.P.Code are so widely worded that they do enable the Court to pass a decree for partition in a suit for declaration of title to Immovable property and possession thereof where it turns out that the plaintiff is not entitled to all the interest claimed by him in the suit property. In such a situation there is nothing unusual in giving relief to the parties by directing partition of the suit property according to the shares of the parties established in the suit. The normal rule that relief not founded on the pleadings should not be granted is not without an exception, Where substantial matters

constituting the title of all the parties are touched in the issues and have been fully put in evidence, the case does not fall within the aforesaid rule. The Court has to look into the substance of the claim in determining the nature of the relief to be granted. Of course, the Court while moulding the relief must take care to see that relief it grants is not inconsistent with the plaintiff's claim, and is based on the same cause of action on which the relief claimed in the suit, that it occasions no prejudice or causes embarrassment to the other side; that it is not larger than the one claimed in the suit, even if, the plaintiff is really entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint.

8.2. No doubt the plaintiff has sought for exclusive title and he has not been able to prove his exclusive title; but has been able to prove that he is entitled to a half share in the suit properties. When a party claims exclusive title to the suit property and is able to establish that he is entitled to half of the suit property, it will not be unusual for the Court to pass a decree for partition and possession of his half share. In fact such a relief flows from the relief prayed for in the plaint that he is the exclusive owner of the entire property. When a larger relief is claimed and what is established is not the entire relief claimed in the suit but a part of it, as whole includes a part, larger relief includes smaller relief, and it also arises out of the same cause of action. Therefore in the instant case, nothing prevented the Court to pass a decree for partition, in order to avoid another suit for partition and to give relief to the party in conformity with the right he had established.

8.3. The Supreme Court in *Kidar Lall Seal and Another Vs. Hari Lall Seal*, has observed that :

"The Court would be slow to throw out a claim on a mere technicality of pleading when the substance of a thing is there and no prejudice is caused to the other side and it is always open to a Court to give the plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs."

In the instant case, as already pointed out, even the defendant herself requested the Court to pass a decree for partition to avoid another suit for partition. Hence there is no question of any prejudice being caused to the defendant.

8.4. In AIR 1952 202 (Nagpur) a Division Bench consisting of Bose and Hidayathulla, JJ. (as they were then) did not see any reason as to why "a suit for exclusive possession of 16 Annas cannot be turned into a suit for partition and possession of such share as may be determined to belong to the plaintiff, if the defendants, contend or it is found that the plaintiff is not entitled to the whole but only to a part".

8.5 A Division Bench of the High Court of Patna in *Katihar Jute Mills Ltd. Vs. Calcutta Match Works (India) Ltd. and Another*, has observed that the phrase

"general or other relief" occurring in Order VII Rule 7 C.P.C is an omnibus phrase wide enough to cover all such reliefs as are consistent with the averments made in the plaint.

8.6 Coming nearer, in *M. Lingappa v. Chennabasappa* (1917) 22 Mys 293, a Division Bench of the former Mysore Chief Court held as valid a decree for partition and separate possession passed by the Trial Court to the extent of the share of the plaintiff-coparcener in a suit filed by him to set aside the alienation made during his minority by his undivided brother and mother of a specific portion of the whole of the family property and to eject the alienee from the entire lands alienated, on a finding that the alienation was not binding on the plaintiff's share. It was further observed that :

"In these cases one object of the parties and the Courts must be to prevent unnecessary litigation so far as may be ; the position of a purchaser from a member of a joint family is somewhat anomalous (*Gurulingappa v. Nandappa* ILR (1896) Bom. 797) and in working out his rights as between himself and members of the family who are not responsible for the sale to him, we must bear in mind on the one hand the fact that his purchase is valid and on the other the fact that the members of the family are not to be prejudiced. It will therefore, be right to deal with each case on its own merits and not to try to lay down a hard and fast rule applicable to all cases. The question will be how can the rights of the contending parties be settled with the least inconvenience and without injustice to any of them."

Again in *Ramaiah v. Siddalingappa* (1943) 48 Mys 317 following the aforesaid decision in *Lingappa's* case<sup>4</sup> in a suit, brought by the purchasers of specific plots in a particular property belonging to a Hindu Joint Family owning extensive property, for possession of what they had purchased and in the alternative for partition of that particular property, on being found that the plots sold to the plaintiffs were less than the share of the vendor at the time of the sale, it was held that the suit was maintainable though it was not for a general partition ; that in the circumstances of the case, the plaintiffs were entitled to a decree for partition of a particular item of the joint family property they had purchased.

8.7 In *Rame Gowda v. Kuntalinge Gowda and Ors.* b (1950) 55 Mys 240, a Division Bench following the aforesaid two decisions in *Lingappa*<sup>4</sup> and *Ramaiah's* cases<sup>5</sup> held thus :

"Though this is a suit for declaration of title and possession only, there is nothing unusual in giving relief to the parties by directing a partition of the properties as has been done in other cases of this kind in order to avoid unnecessary litigation and waste of time of Courts ; vide *Lingappa v. Chennabasappa* (1917) 22 Mys. 293) and *Ramaiah v. Siddalingappa* (1942) 48 Mys. 317)."

Thus, apart from the fact that the view taken by us is quite in conformity with the provisions contained in Order VII Rule 7 of C.P.C. which are in very wide terms, it also receives support from the several authorities referred to above. For

the reasons stated above, we hold that the Trial Court is not justified in refusing to pass a preliminary decree for partition and separate possession of the plaintiff's half share in the suit properties. Point No. 2 is accordingly answered in the negative and in favour of the plaintiff-appellant.

9. For the reasons stated above, the appeal is allowed in part. In modification of the decree of the Trial Court, there shall be a preliminary decree for partition and separate possession of the plaintiff's half share in the suit properties. The house property shall be partitioned through a Court Commissioner and the landed properties assessed to revenue shall be partitioned in accordance with the preliminary decree as per Section 54 of the C.P. Code. There shall be an enquiry into future mense profits under Order XX Rule 18(2) of the C.P. Code. In this appeal, there will be no order as to costs.