
(2014) 02 KAR CK 0198

In the Karnataka High Court

Case No : Regular Second Appeal No. 545/2009 [PAR]

Rathnamma and Rukkamma

APPELLANT

Vs

Hiriyamma and Others

RESPONDENT

Date of Decision : 19-02-2014

Acts Referred:

Registration Act, 1908 — Section 17

Citation : (2014) 2 AKR 477 : (2014) ILR 2759 : (2014) 6 KarLJ 559 : (2014) 2 KCCR 1196

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : V.S. Hegde, Advocate for the Appellant; H.S. Chandraiah, Advocate for R4, K.J. Jagadeesha, Advocate for G. Papireddy, Advocate for R5 - 7 and Dildar Shiralli, Advocate for R8, Advocate for the Respondent

Final Decision : Allowed

Judgement

Ram Mohan Reddy, J.—Appellants, along with one Ramappa, son of Nanjappa, jointly instituted OS No. 246/2000 before the Additional Civil Judge [Jr. Dn.], Kolar, arraigning respondents 1 to 7 as defendants 1 to 7, for declaration, partition and separate possession of the suit schedule properties, alleging existence of a joint Hindu Undivided Family with ancestral properties. Appellants 1 and 2 asserted to be female heirs of the Propositus by name Nanjappa, residing with respondent No. 8 - Ramappa and Defendants 1 to 7, in a joint family. The suit was resisted by filing written statement of Defendants 5 to 7, inter alia, contending:-

- (i) the plaintiffs are not members of the Hindu Undivided Family;
- (ii) the suit schedule properties are not joint family properties;
- (iii) the 4th defendant was not the Kartha of the joint family;
- (iv) Nanjappa's five sons, namely, Narayanappa, Muniswamappa, Channappa, Byrappa and Ramappa, together constituted a joint Hindu Undivided Family, of

which Nanjappa was the "Manager" and the family possessed ancestral properties described in suit schedule, more appropriately suit items:

(1) Sy. No. 46/5 measuring 20 guntas of Balageri;

2(1) Sy. No. 3/2 measuring 3 acres 1 gunta of Mylandahalli;

2(3) Sy. No. 9/1 measuring 5 guntas of Mylandahalli;

2(5) Sy. No. 78/1 measuring 3 guntas of Mylandahalli; three house properties and one vacant site at Mylandahalli,

2(2) Sy. No. 63 measuring 1 acre 9 guntas at Mylandahalli;

2(4) Sy. No. 9/3 measuring 10 guntas;

2(6) Sy. No. 104/3 measuring 21 guntas;

and

2(9) Sy. No. 71, measuring 1 acre 26 guntas of Mylandahalli; were the separate acquisitions of the defendants;

(v) the first son by name, Narayanappa died during the year 1958 and during the lifetime of the Propositus - Nanjappa, in the year 1960, the other sons by name Muniswamappa, Channappa and widow of Narayanappa, namely, Varalakshamma, at a Panchayat divided the ancestral properties, whence, each secured 1/5th share and thereafterwards, having taken separate residence are enjoying their shares, independently;

(vi) neither Nanjappa nor his wife Chowdamma took any share in the partition, but continued to live under the care and protection of their son Byrappa until death of Nanjappa during the year 1961, whereafterwards, Byrappa and Ramappa the 3rd plaintiff continued to live in joint by enjoying the remaining two Hissas of ancestral properties and income derived there from;

(vii) from out of the income so derived, Suit item 2(6) being Sy. No. 104/3 measuring 1 acre 2 guntas, of Kurubur Amanikere, being 21 guntas, was purchased by Byrappa and Narayanappa S/o. Banappa, each, from Venkatareddy under a registered sale deed dated 28.6.1963;

(viii) Byrappa acquired suit item 2(4) being land in Sy. No. 9/3 measuring 10 guntas of Mylandahalli, under registered sale deed dated 28.06.1963 from Venkatareddy;

(ix) Suit item 2(2) in Sy. No. 63 measuring 1 acre 9 guntas of Mylandahalli from M. Abdul Sab under registered sale deed dated 8.11.1965;

(x) that Ramappa and Byrappa, divided their properties through panchayathdars in December 1963 and each obtained 1/5th share in the ancestral properties and one half share in the joint family properties in Sy. No. 104/3;

(xi) consequent upon the partition on 28.6.1971, Ramappa conveyed all his properties in favour of Byrappa through a registered sale deed of even date for valuable consideration and put him in possession and left the village to settle at Chaldiganahalli, Srinivasapur Taluk, whereafterwards, Byrappa alone is in possession and enjoyment of the said properties as absolute owner;

(xii) Byrappa purchased suit item No. 2(9) being land bearing Sy. No. 71 measuring 22 guntas out of 1 acre 26 guntas situated at Balagere Village from one Musthafa Beig and his son Ismail Beig under a registered sale deed dated 29.12.1972;

(xiii) Smt. Varalakshamma, for herself and as guardian for her minor children plaintiffs 1 and 2, released all rights in the immovable properties fallen to the share of her husband late Narayanappa under a release deed dated 12.11.1967 in favour of Byrappa who became the absolute owner of the properties too;

(xiv) Smt. Varalakshamma, it is alleged, left the village along with plaintiffs 1 & 2 to reside at Banasawadi Village in Bangarpet Taluk;

(xv) on the death of Byrappa, on 20.9.1983, Defendants 5 to 7 being his legal heirs, succeeded to his estate;

(xvi) the other son, by name, Muniswamappa died and his legal heirs, namely, Defendants 1 to 3 succeeded to his estate and his son i.e., the 2nd defendant purchased wet land in Sy. No. 9/2 measuring 12 guntas and a vacant site at Mylandahalli from one Venkatasubbaiah under two separate registered sale deeds and hence are the self acquisitions of the 2nd defendant;

(xvii) the 4th defendant and his son Nagaraj are said to have purchased wet lands bearing Sy. No. 94, measuring 1 acre 3 guntas, of Kurubur Amanikere from one Venkatasubbaiah under a registered sale deed and hence self acquisition of Nagaraj, son of Channappa;

(xviii) the defendants allege that in the wake of Varalakshamma - mother of plaintiffs 1 & 2 having executed an unregistered release deed, releasing and relinquishing all her rights over the immovable properties that fell to the share of her husband Narayanappa in favour of Byrappa and since plaintiff No. 3 [i.e., 8th respondent herein], namely, Ramappa, having conveyed his share of the properties in favour of Byrappa under a registered sale deed dated 28.6.1971, are disentitled to seek partition.

2. In the premise of pleadings of parties, the trial court framed the following issues:

1. Whether the plaintiffs prove that they are the members of Hindu undivided joint family of defendants as contended by them?

2. Whether the defendants prove that they got divided from the joint family as contended in para 11 of the written statement?

3. Whether the defendants further prove that the properties mentioned in para. 11 to 13 of their written statement are the self acquired properties of late Byrappa and defendant No. 1 to 3?

4. Whether the plaintiffs are entitled for partition of 2/5th share in the suit schedule properties?

5. Whether the defendants further prove that the suit is not properly valued and the court fee paid is insufficient?

6. What Order or Decree?

3. The 1st plaintiff was examined as P.W. 1 and marked Ex. P1 to P8, while the Tahsildar, Malur taluk, was examined as P.W. 2 through whom Ex. P9 was marked, whereafterwards, B.N. Venkatesha Gowda was examined as P.W. 3, while for the defendants, the 6th defendant was examined as D.W. 1 and Ex. D1 to D23 were marked while K. Narayanagowda, D. Venkataramaiah and Smt. Varalakshamma were examined as D.Ws. 2, 3 and 4 and Exhibits D24 & D25 marked in the cross examination of P.W. 2.

4. The trial court, having regard to the material on record and the evidence, both oral and documentary, returned findings, partly in the affirmative, over issues 1 to 4 and in the negative over issue No. 5, to partly allow the suit, declaring that the plaintiffs 1 & 2 were entitled to 1/15th share each in the suit items 1 to 8, while declining a share in the suit item No. 9 on the premise that it is the self acquisition of Defendants 5 to 7, by Judgment and decree dated 28.7.2003.

5. Ramappa - Plaintiff No. 3, against whom the suit was dismissed, preferred RA No. 165/2008 [old No. 200/2004], while defendants 5 to 7 preferred RA No. 141/2008 [old No. 139/2004], whence, the II Additional District & Sessions Judge, Kolar, clubbed the two appeals and by common Judgment and decree dated 25.11.2008, reversed the findings of the trial court, and dismissed the suit by allowing RA No. 141/2008 while RA No. 165/2008 was dismissed. Hence this second appeal by plaintiffs 1 & 1 in so far as allowing R.A. No. 141/08.

6. The substantial question of law for decision making is,

Whether, the Lower Appellate Court, was justified in accepting as admissible evidence, the unregistered release deed dated 12.11.1967 Ex. D19, executed by Varalakshamma - mother of plaintiffs 1 & 2, releasing and relinquishing all the right, title and interest in the immovable properties that fell to the share of her husband Narayanappa [since deceased], to hold separation of the joint family status due to relinquishment of rights of one of the coparceners in the joint family properties, to dismiss the suit for declaration, partition and separate possession instituted by the children of the deceased coparcener?

7. At the request of learned counsel for the parties, the appeal is finally heard and disposed of by this Order.

8. Facts not in dispute are that:

One Nanjappa the Propositus had five sons of whom Narayanappa, the first son, and father of the plaintiffs 1 & 2, though predeceased the Propositus - Nanjappa, nevertheless along with other sons, namely, Muniswamappa, Channappa, Byrappa and 3rd plaintiff - Ramappa, constituted a joint Hindu Undivided Family.

9. The defence of Defendants 5 to 7 is that there was a separation of the joint family status during the year 1960, whence, ancestral properties held in joint were partitioned amongst the coparceners and 1/5th share fell to each of the five sons of Nanjappa, while the propositus and his wife took no share, and the first son Narayanappa since died, represented by his wife Smt. Varalakshamma, the mother of plaintiffs 1 and 2, executed an unregistered release deed dated 12.11.67, Ex. D. 19.

10. There is no dispute over the relationship between the parties and that Narayanappa, one of the coparceners died leaving behind his widow and two minor daughters - plaintiffs 1 & 2, admittedly, when the parties lived in joint. Therefore, plaintiffs 1 & 2 were entitled to their father's share of the joint family ancestral properties. Defendants 5 to 7 having advanced the plea of prior partition, by way of oral partition, in a Panchayat during 1960 after the death of Narayanappa, in the year 1958, in order to non suit the plaintiffs' burden was upon them to prove the factum of oral partition.

11. The Lower Appellate Court, it is to be noticed at the threshold, on an incorrect premise of burden of proof, observed that the initial burden of proof was upon the plaintiffs' to prove that the suit properties are joint family properties, despite the admission of defendants 5 to 7 in the written statement that some items of the suit schedule properties i.e., [i] Sy. No. 46/5 measuring 20 guntas of Balageri; [ii] Sy. No. 3/2 measuring 3 acres 1 gunta of Mylandahalli; [iii] Sy. No. 9/1 measuring 5 guntas [iv] Sy. No. 78/1 measuring 3 guntas; and 3 house properties of Mylandahalli; and one vacant site, were joint family properties.

12. The 2nd defendant - son of Muniswamappa, having not offered resistance to the suit by filing a written statement, nevertheless, Defendants 5 to 7 alleged that land measuring 12 guntas in Sy. No. 9/2 and a vacant site at Mylandahalli, were purchased from Venkatasubbaiah, and are the self acquisition of the 2nd defendant. The 4th defendant - Channappa too, though did not file a written statement, nevertheless, defendants 5 to 7 alleged that the land measuring 1 acre 3 guntas in Sy. No. 94 of Kurubara Amanikere was purchased by Nagaraj and the 4th defendant Channappa, from Venkatasubbaiah, under a registered deed of sale, hence their self acquisition.

13. The principles of law relating to Hindu joint family and joint family property may be summarized thus:-

[i] The legal position is that the joint and undivided family is the normal condition of Hindu Society. An undivided family is not only joint in estate but also in food and worship. The existence of joint estate is not essential requisite to

constitute a joint family and a family which does not own any property may nevertheless be joint. The presumption of union is the greatest, in the case of father and sons. The strength of presumption necessarily varies in every case. But the presumption is strong in the case of brothers.

[ii] It is settled law that the proof of existence of a joint family does not lead to the presumption that it possess joint property. The property held by a member of a joint family cannot also be presumed to be the joint family property. In a suit for partition, a party who claims that any item of suit property is joint family property, the burden of proving that it is so, rests on the party who asserts it. However, in a case where it is established that the joint family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property claimed to be joint family property may have been acquired, the presumption arises that it was joint family property and the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of joint family. It is also well settled that when at the date of acquisition of a particular property, the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of the family funds and was to form part of the joint family property unless the contrary is shown. It is more so in the case of a Kartha of a joint family possessing sufficient nucleus at the time of acquisition of the property in his name to prove that he acquired it independent of and without the aid of the joint family funds.

[iii] Where there was no partition in the family, the fact that any one of the members of the family enjoyed these properties would not be construed as adverse to other members of the family there being no overt act of ousting the other members and enjoyment of the properties to the exclusion of the other family members.

[iv] In a Hindu undivided family governed by Mitakshara law, no individual member of that family, while it remains undivided can predict that he has a certain definite share in the property of the family. The rights of the coparceners are defined at a partition. Partition consists in defining the share of coparceners in the joint property, actual division of the properties by metes and bounds is not necessary to constitute partition. Once the shares are defined, whether by agreement between the parties or otherwise, partition is complete. The parties may thereafter choose to divide the property by metes and bounds, or may continue to live together and enjoy the property in common as before. If they live together, the mode of enjoyment alone remains joint, but not the tenure of the property.

[v] Partition may ordinarily be effected by institution of a suit, by submitting the dispute as to division of the properties to arbitrators, by a demand for a share in the properties, or by conduct which evinces an intention to sever the joint family; It may also be effected by agreement to divide the property. In each case, the conduct must evidence unequivocally intention to sever the joint family

status. It is from the intention to sever followed by conduct which seeks to effectuate that intention that partition results; mere specification of share without evidence of intention to sever does not result in partition. Merely because one member of a family severs his relation, there is no presumption that there is severance between the other members, the question whether there is severance between other members is one of facts to be determined on a review of all the attendant circumstances. Severance between members of the branches inter se may not in the absence of expression of unequivocal intention be inferred.

[vi] The entries in the Record of Rights regarding the factum of partition is a relevant piece of documentary evidence in support of the oral evidence to prove the factum of partition. 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. When the factum of partition is evidenced by entries in the record of rights maintained in official course of business, the correctness thereof is not questioned corroborates the oral evidence of the party, lending assurance to accept it.

[vii] An order made in mutation proceedings, is no doubt, not a judicial determination of title of the parties, but it has evidentiary value.

14. Reference may be made to the following reported opinions:

[i] AIR 1945 128 (Privy Council)

[ii] Girja Nandini Devi and Others Vs. Bijendra Narain Choudhury,

[iii] M.R. Rajasekharappa Vs. H.N. Siddananjappa,

[iv] Digambar Adhar Patil Vs. Devram Girdhar Patil (died) and another,

15. Applying the well settled principles of law, *supra*, to the facts of this case, the allegation of prior partition during the year 1960, in the presence of Panchayathdars, after the death of father of plaintiffs 1 and 2, and plaintiff No. 3, the 4th defendant, as well as father of Defendant No. 2 and father of Defendants 6 and 7 along with the Propositus Nanjappa, was required to be established by cogent and acceptable evidence both oral and documentary by Defendants 5 to 7. Hence, the burden of proof over prior partition was not upon plaintiffs.

16. The two documents upon which defendants 5 to 7 place reliance to prove partition of the year 1960 are Ex. P19 the unregistered release deed dated 12.11.1967 executed by the mother of plaintiffs 1 & 2 and the registered sale deed dated 28.6.1971 executed by the 3rd plaintiff in favour of Byrappa, the husband of Defendant No. 5 and father of defendants 6 & 7, conveying his share of the properties Ex. P17 & P18.

17. In support of proof of execution of Ex. P19, the mother of the plaintiffs 1 & 2, by name Varalakshamma is examined as D.W. 4, who speaks to a partition

after the death of Narayanappa, the first son of Nanjappa, without disclosing the date of partition except saying in the year 1960. The Panchayatdars, before whom the division of properties by metes and bounds were not examined, nor as to what properties were held by the joint family. D.W. 4 admits to have received Rs. 15,000/- as consideration for release and relinquishment of all the right title and interest including that of minor children plaintiffs 1 & 2, in the husband's share of joint family properties, though admits that she does not know to read or write in Kannada language.

18. The witness to Ex. P19 is examined as D.W. 2 by name K. Narayan Gowda, and speaks to the execution of the document by mother of plaintiffs 1 & 2. The witness admits that his wife is from Mylandahalli, the village where the joint family resides, while he is a resident of another village. The deed writer [scribe] by name B. Venkatanarayanaiah, is examined as D.W. 3 who speaks to the writing of Ex. P19. Both the witnesses are admittedly not the Panchayatdars in whose presence the partition of the joint family properties allegedly was effected between the coparceners during the year 1960.

19. The covenants in Ex. P19 unregistered release deed state about the death of father of plaintiffs" 1 & 2, and subsequent partition of the joint family properties without disclosing the date of partition. None of the brothers nor the father Nanjappa, apart from Byrappa, father of Defendant 6 & 7, are signatories to Ex. P19. The 3rd plaintiff and the 4th defendant the living brothers were not examined as witnesses to support and corroborate the defence of prior partition as advanced by defendants 5 to 7 in their written statement, much less the oral testimony of DW 1, none other than defendant No. 6. However the fact that parties are living separately is not seriously disputed, since plaintiffs 1 & 2 are females given in marriage and are residing with their respective husbands.

20. The sale deed Ex. P17 of the year 1971 executed by plaintiff No. 3 conveying his share of the joint family properties in favour of Byrappa, the father of Defendant 6 & 7 does covenant about the partition between the brothers without disclosing the date of partition.

21. The RTC phanies being the revenue records Ex. P1 to P8 pertaining to the year 1970, in respect of some of the suit schedule properties stand in the name of Nanjappa the propositus or his widow Chowdamma.

22. Thus from the aforesaid evidence both oral and documentary, what can be inferred is that the parties being members of a coparcenery are living separately and there is no direct evidence of either an arrangement over separation of the joint family status or a partition during the year 1960. The unregistered release deed Ex. P19, is inadmissible in evidence, as rightly pointed out by the trial court, in view of the document being compulsorily registrable u/s 17 of the Registration Act. Even assuming the admissibility of the document for a collateral purpose of establishing a partition, that too is unavailable since there is no direct evidence over partition effected before the panchayathdars during the year 1960.

There being no evidence indicating parties living separately under a permanent arrangement or partition, the defence of defendant 5 to 7 of prior partition is not proved, hence a strong presumption in favour of Hindu brothers i.e. the children of Nanjappa and the properties constituting the joint family, without a partition.

23. The admission of existence of joint family properties being agricultural lands and other properties, indicate a nucleus, and that the income therefrom was the joint family income, it is needless to state that the acquisition of the properties in the name of Byrappa the father of defendant Nos. 6 & 7, for valuable consideration was from out of the joint family income, hence the said acquisition are joint family properties.

24. The trial court having considered the evidence, both oral and documentary adduced by the parties, declined to accept the plea of separation, as well as the release and relinquishment of the share of Narayanappa by his widow in favour of Byrappa. The lower appellate court without making reference to the legal position over evidence necessary to establish a prior partition and the admissibility of Ex. P19, in my considered opinion, recorded perverse findings to reverse the findings recorded by the trial court. Mere extraction of contents of Ex. D. 19 and the covenants in Exs. D. 17 and D. 18, sale deeds executed by 3rd plaintiff cannot ipso facto be held that the plaintiffs 1 and 2 had not made out a case for declaration, partition and separate possession of the joint family property.

25. At this stage, learned Counsel for plaintiffs 1 and 2/appellants herein submits that plaintiffs would be satisfied with the confirmation of judgment and decree of the trial court although suit item No. 9 is excluded as the self acquired property of Byrappa, while there is no representation for respondents 1 to 4 and 8.

26. Respondent No. 8, none other than the plaintiff No. 3 having suffered a judgment and decree of the trial court and lower appellate court in R.A. No. 165/2008 has not chosen to prefer a second appeal nor a cross appeal, hence disentitled to any relief.

27. In the circumstances, the substantial question of law is answered in the negative holding that there was no justification for the lower appellate court to reverse the findings recorded by the trial court over the issues relating to allegations of prior partition and release and relinquishment of the right, title and interest of Narayanappa by his widow Varalakshamma, mother of plaintiffs 1 and 2, in the joint family properties at item Nos. 1 to 8 of the suit schedule. In the result, this appeal is allowed. The common judgment and decree of the lower appellate court in so far as R.A. 141/08, is set-aside and the judgment and decree of the trial court is confirmed, subject to the observations supra.