

(2015) 08 KAR CK 0327

In the Karnataka High Court

Case No : Regular Second Appeal No. 1925 of 2012

Somamma Kom Puttappa and Others

APPELLANT

Vs

Nagappa and Others

RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:

Citation : (2015) 08 KAR CK 0327

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : S.R. Hegde Hundlamane, for the Appellant; Vijaya M.N., Advocate for Basavaraj M. Mekki, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar, J—Defendants-1(a), 2(b), 3(c), 4(d), 5(e), 2, 3(g), 5, 4 have filed this second appeal questioning the correctness and legality of the judgment and decree passed by Senior Civil Judge, Soraba in R.A. No. 70/2010 dated 04.07.2012 whereunder judgment and decree passed by Civil Judge & JMFC, Sorab in O.S. No. 405/2006 dated 12.11.2010 decreeing the suit for partition and separate possession came to be affirmed.

2. Though matter is listed for admission, by consent of learned Advocates appearing for parties, appeal is taken up for final disposal, having regard to the fact that suit is of the year 2006 and records of Courts below having been secured.

3. I have heard the arguments of Sri S.R. Hegde Hudlamane, learned Advocate appearing for appellants and Smt. M.N. Vijaya, learned Advocate appearing on behalf of Sri Basavaraj M. Mekki for respondents-1 (a) to (c). Respondents-2, 3 and 5 are served and represented by Sri R.S. Ankalkoti, learned Advocate. Respondent-4 having expired, is represented by respondents-2 and 3 as recorded by this Court vide order dated 20.02.2014. Respondents-6, 7, 9 & 10 are served and unrepresented. Respondents-8 & 11 are served and represented

by Sri M. Ramesh, learned Advocate.

4. It is the contention by Sri Hegde Hudlamane, learned Advocate appearing for appellants that Courts below committed a serious error in not relying upon the partition deed dated 09.04.1964 which came to be marked as Ex. D-3 which evidences that there was a prior partition in the joint family properties and non-consideration of this vital documentary evidence available on record in proper perspective has resulted in great miscarriage in the administration of justice.

5. He would elaborate his submission by contending that when plaintiff had not challenged the said registered partition deed, he is estopped from contending that there was no partition in this suit and contends that when plaintiff has also not sought for cancellation of the said partition deed within three years from the date of his attaining majority he would be bound by it and non consideration of these vital aspects has resulted in an erroneous judgment and decree being passed. He would also submit that vital admissions of the plaintiff in his cross examination would clearly demonstrate that plaintiff was aware of the execution of the partition deed in the year 1964 i.e., Ex. D-3 and as such, burden was cast on the plaintiff to disprove that there was no such prior partition and in the absence of any material placed by the plaintiff in this regard, Courts below could not have accepted the version of the plaintiff to decree the suit. He would also submit that admission in the cross examination being vital piece of evidence, same ought to have been taken note of by Courts below to dismiss the suit rather than decreeing the suit. He would also contend that defendants had perfected their title to the suit schedule properties by adverse possession namely, property which was allotted to the share of the plaintiff and defendant No. 1 under partition deed - Ex. D-3 had continued to be in possession of appellants and this was evident from the admitted fact that plaintiff as well as first defendant had left Kuppe village immediately after such partition and they were residing elsewhere which also clearly indicated that they were never in possession of suit schedule property and this vital fact has been completely ignored by the Courts below and as such he contends that Courts below had erroneously dismissed the suit. Non consideration of these aspects has resulted in great prejudice to the appellants and as such, he contends that substantial questions of law formulated in the appeal memorandum would arise for consideration for being framed, adjudicated and answered in favour of the appellants.

6. Per contra, Smt. M.N. Vijaya, learned Advocate appearing on behalf of Sri Basavaraj Mekki for respondents-1(a) to (c) would support the judgment and decree passed by Courts below and would contend that Courts below have given a categorical finding with regard to alleged partition deed dated 09.04.1964 -Ex. D-3 having not been acted upon, which is a finding of fact based on appreciation of both oral and documentary evidence, as such, she contends it does not give rise for formulating substantial questions of law as canvassed by appellants and she submits that findings recorded by Courts below are purely question of facts

which do not call for interference.

7. She would further elaborate her submission by contending that the fact that plaintiff is not a signatory to the document Ex. D-3- alleged partition deed and claim of the plaintiff accordingly came to be accepted by the Courts below, particularly in the background of there being no dispute with regard to relationship between the parties and properties being ancestral properties of original propositus Sri Ajjappa. She would also submit that deed of exchange entered into between the parties to the suit at an undisputed point of time i.e., 12.08.1957 (Ex. P-10) clearly indicated that plaintiff as on the said date was a minor aged about 14 years and as such, in 1964, plaintiff was a major and he ought to have been arrayed as a party to the said deed in that capacity and not as a minor and when there is no dispute to the fact that he was not made as a party as major to the partition deed, recitals therein or the allocation of shares would not be binding on the plaintiff. Hence, he would contend that said factor was taken note of by the Courts below to disbelieve the theory of prior partition pleaded by appellants and as such, she submits there is no flaw in the judgment and decree passed by the trial Court as affirmed by the lower appellate Court. Hence, she prays for dismissal of the appeal.

8. Having heard the learned Advocates appearing for parties and on perusal of the records, this Court is of the considered view that following substantial question of law would arise for consideration:

"Whether the Courts below were justified in decreeing the suit by ignoring Ex. D-3, namely partition deed dated 09.04.1964 which was entered into between Sannappa and his children representing one branch and Sri Bangarappa representing himself and branch of his father Sri Ramappa and his brother Nagappa (plaintiff)?"

FACTUAL MATRIX:

9. A perusal of the records would indicate that plaintiff is the son of Sri Ramappa and younger brother of Sri Bangarappa. Said Sri Ramappa and Sri Sannappa are sons of original propositus Sri Ajjappa. It is the specific case of the plaintiff that he and defendant No. 9 are uterine brothers and remaining defendants are cousin brothers and father of plaintiff by name Sri Ramappa and father of defendants by name Sri Sannappa are own brothers and both are children of Sri Ajjappa @ Puttappa who is grand father of plaintiff and defendants. It was contended that there was no partition in the family during the life time of Sri Ajjappa @ Puttappa and it was managed by father of plaintiff Sri Ramappa and after his demise, it was managed by father of first defendant - Sri Sannappa and after the death of Sri Sannappa, wife of Sri Sannappa was managing the suit properties and on her death, her eldest son i.e., Sri Puttappa was managing the suit schedule properties. It was contended that on account of difference of opinion between the family members, plaintiff sought for division of the properties and on being denied his legitimate share, suit in question was filed.

10. On service of suit summons, defendants appeared and filed written statement admitting relationship and specifically contending that during the year 1964 there was a partition entered into between 9th defendant, first defendant and his sons and also Sri Nagappa i.e., Sri Sannappa's brother's son whereunder 9th defendant i.e., Sri Bangarappa s/o Sri Ramappa representing his father's branch has also acted as guardian brother of Sri Nagappa - plaintiff and they have received 2 acres 39 guntas khushki land and 2 acres 23 guntas of Tari land in Sy. No. 57 and remaining 7 acres 11 guntas were allotted to the share of Sri Sannappa and his children. Hence, it was contended that question of re-opening the partition which has already taken place does not arise and plaintiff is estopped from claiming any share in the property. By way of alternate plea, it was also contended by defendants-1 to 8 that subsequent to the partition deed dated 09.04.1964, defendant No. 9 as well as plaintiff took share under the said partition but abandoned their property and as such, it continued to be in possession of defendants-1 to 8 and accordingly having exercised their right of ownership of these lands, they have perfected their title to the said share allotted to the plaintiff and 9th defendant by way of adverse possession. On this ground, he has sought for dismissal of the suit.

11. Trial Court on the basis of pleadings of the parties, has formulated the following issues for its consideration:

"(1) Whether the plaintiff proves that the suit properties are joint family properties of plaintiff and defendants?

(2) Whether the defendant No. 1 to 5 proves that there was a partition between Sanyappa and plaintiff and 9th defendant on 9.4.1964?

(3) Whether the defendant No. 1 to 5 prove that Sanyappa has taken possession and started to enjoy the properties which have gone to the share of plaintiff and 9th defendant in the partition, from 10.4.1964 and has perfected his title to the said property by adverse possession by continues uninterrupted enjoyment till 10.4.1976?

(4) Whether the valuation of suit for the purpose of Court fee and jurisdiction is proper?

(5) Whether the plaintiff is entitled for partition and separate possession of Y4 share in the suit property?

(6) Whether the plaintiff is entitled for enquiry regarding income of suit property?

(7) What decree or order?"

Before the trial Court, plaintiff got himself examined as P.W.1 initially. He subjected himself for cross examination. After cross examination on two dates, for reasons best known, he did not turn up for further cross examination despite being given the opportunity. Hence, he was not further cross examined and his side of evidence was closed. It is thereafter plaintiff executed a General Power of

Attorney in favour of his son and got himself examined as P.W.2. Said witness has reiterated the statement made by his father - plaintiff. To what extent said evidence can be eschewed will be discussed during the course of this judgment. On behalf of plaintiff, 14 documents were produced and got marked as Exs. P-1 to P-14. Second defendant got himself examined as D.W.1 and on behalf of defendants, Exs. D-1 to D-14 were marked.

FINDING RECORDED BY TRIAL COURT:

12. On appreciation of evidence, both oral and documentary, trial Court decreed the suit by assigning the reason that partition deed dated 09.04.1964 set up by defendants was not acted upon and also held that even otherwise, plaintiff was not a party to the said registered partition or even accepting the plea of defendants-1 to 8 that plaintiff was a party to the said document, he had been erroneously described as a minor though he was a major and as such, said partition is not binding on the plaintiff. On these grounds, trial Court decreed the suit.

FINDING RECORDED BY FIRST APPELLATE COURT:

13. Being aggrieved by the abovesaid judgment and decree, appellants pursued their grievance before lower appellate Court. Lower appellate court, on re-appreciation of entire evidence, found that there was a deed of exchange entered into between the parties to the suit way back in the year 1957 i.e., on 12.08.1957 which came to be marked as Ex. P-10 whereunder it has been depicted that plaintiff was aged about 14 years and if same is accepted as correct, then, obviously, age of the plaintiff as on 1964 cannot be 14 years and it ought to be 21 years i.e., plaintiff was a major and as such, he ought to have been added as a party in the said partition deed as a major and he had been described erroneously as minor. On this ground among others, lower appellate Court dismissed the appeal and affirmed judgment and decree passed by the trial Court.

FINDINGS ON SUBSTANTIAL QUESTION OF LAW:

14. At the outset, it requires to be noticed that main thrust of the argument of Sri Hegde Hudlamane, learned Advocate appearing for appellants is there was a prior partition entered into between the parties i.e., on 09.04.1964 itself and plaintiff is a party to said partition and he cannot now seek relief of partition. It is also contended that question of re-opening the partition does not arise particularly when the plaintiff himself had not sought for setting aside the said partition of 1964. Said document came to be marked as Ex. D-3. It is to be noted that defendants-1 to 5 raised a plea of prior partition in the written statement and as such, issue No. 3 was rightly framed casting burden on them to prove said issue. In order to prove this issue, defendants have very heavily relied upon the admission made by P.W.1 in his cross examination dated 08.07.2009 which reads as under:

This admission is sought to be pressed into service by defendants-1 and 8 to buttress their argument that plaintiff himself had admitted about there being a partition of suit schedule properties in the year 1964 between family members and as such, defendants are not required to prove any thing further. This is the only stray admission of the plaintiff - P.W.1 in the cross examination about prior partition. However, at all other subsequent stages in the cross examination, he has specifically denied partition deed alleged to have been executed on 09.04.1964 or same being acted upon. In the above extracted cross examination of P.W.1 on 08.07.2009, he has specifically contended that though such document came into existence in 1964 he has also specifically asserted that there was no division of the suit properties. Yet again in paragraph 10 of his cross examination of even date, plaintiff has specifically denied that he had received any share in the property along with 9th defendant as indicated in Ex. D-3. Again, in paragraph 11 he has denied that he had taken possession of the share allotted to him under partition deed - Ex. D-3. As such, defendants-1 to 5 cannot be heard to contend that such stray admission alone is sufficient for accepting that there was existence of prior partition. However, this admission would have enured to the benefit of defendants, if all other attendant circumstances indicated that there was partition in the joint family properties, same was acted upon and parties were put in possession of their respective shares as per Ex. D-3 and pursuant to the same, they had acted upon said partition. None of these ingredients are present in the instant case and they have been discussed extensively by the trial Court.

15. In order to answer substantial question of law formulated herein above, it would be apt and necessary to concisely state as to why trial Court has rightly disbelieved prior partition setup by defendants to hold same has not been acted upon and reasons assigned by trial Court are crystallized as under:

"(1) Alleged partition took place on 09.04.1964 as per Ex. D-3 and no application has been submitted till the year 1979 for mutating the revenue records.

(2) Only in the year 1979 an application came to be submitted by second defendant i.e., D.W.1 seeking for mutation of the revenue records and if really there was partition in 1964 and parties had acted upon it, it cannot be accepted that a person of ordinary prudence would to have kept quite for 15 long years without seeking mutation of revenue records.

(3) Even according to defendants-1 to 5, plaintiff and 9th defendant had received their share of the property as per Ex. D-3 and they left the village without exercising their right of ownership over the share allotted to them under Ex. D-3 and as such defendants claim is to be accepted as gospel truth, it cannot be believed that defendants were in possession of the entire 13 acres 23 guntas of land in Sy. No. 57 since they had not exercised their right of ownership over said property either getting the revenue entries mutated to their names or taking any other steps to assert their right over said land for 15 long years."

For these reasons trial Court has rightly disbelieved and has not accepted the plea putforward by defendants-1 to 5 that there was prior partition on 09.04.1964 under Ex. D-3 and same has been acted upon. This Court find no good ground to take a different view from the said finding recorded by trial Court as affirmed by the lower appellate Court.

16. Yet another factor which swayed in the minds of the Courts below to accept the version of plaintiff that joint family properties were not divided amongst members of the family was the fact that defendants-1 to 5 had pleaded in the year 1964 when the alleged partition took place as per Ex. D-3, plaintiff was aged about 17 years and was a minor and was represented by his brother. To substantiate the age of plaintiff, no evidence came to be placed by them except self serving testimony of D.W.1. On the other hand, plaintiff has produced material to show as to what was his age even as on 1957 and this fact is also admitted by none other than the father of defendant - 1 namely, Sri Sannappa. Said documentary evidence tendered by the plaintiff is deed of exchange entered into between Sri Basappa Gowda, family members of the plaintiff with one Sri K.P. Basappa Gowda wherein it is clearly stated that age of the plaintiff when deed of exchange dated 12.08.1957 - Ex. P.10 was executed, was about 14 years. If age of the plaintiff in the year 1957 was 14 years, it cannot be imagined or presumed or inferred that age of the plaintiff as on 1964 was 17 years. When 7 years is added from 1957, age of the plaintiff as on 1964 would not be less than 21 years. As such, documentary evidence which came to be placed by plaintiff was more susceptible to acceptability as truth rather than self serving testimony of DW-1 and as such, plea of plaintiff came to be accepted by Courts below. There is no infirmity whatsoever committed by the Courts below in this regard. When the age of plaintiff as on 1957 is accepted to be 14 years and when there is no other contrary material to arrive at the conclusion that his age was something else, the one and only inference drawn by the Courts below that he was major is based on the said documentary evidence. A recital found in the registered document prevails over oral testimony/admission of DW-1. Hence, stray admission with regard to execution of partition deed in 1964 by P.W.1 in his cross examination dated 08.07.2009 would not alter the factual situation.

17. One another factor which swayed in the minds of the Courts below to decree the suit for partition was the fact that P.W.1 was a rustic villager and he cannot be expected to have a worldly knowledge with regard to his actual age and as such his stray admission in his cross examination would not be a ground to accept the plea putforward by defendants-1 and 5 or deny the relief of partition. Thus, it cannot be held that defendants were able to demonstrate or prove that there was prior partition and same had been acted upon. Said plea having been negatived, question of considering alternate plea of adverse possession does not arise and rightly so, trial Court has decreed the suit for partition by allotting 1/4th share in favour of plaintiff which came to be affirmed by the lower appellate Court.

18. For myriad reasons indicated hereinabove, this Court is of the considered view that substantial question of law requires to be answered in the affirmative i.e., in favour of plaintiff and against defendants-1 to 5.

19. For the reasons aforesated, I proceed to pass the following:

"ORDER

(1) Appeal is hereby dismissed by answering substantial question of law in favour of plaintiff and against defendants.

(2) Judgment and decree passed by Senior Civil Judge, Soraba in R.A. No. 70/2010 dated 04.07.2012 whereunder judgment and decree passed by Civil Judge & JMFC, Sorab in O.S. No. 405/2006 dated 12.11.2010 came to be affirmed, is hereby confirmed.

(3) Costs made easy."

In view of appeal having been dismissed on merits, I.A.2/2012 for stay does not survive for consideration and same stands rejected.