

(2010) 12 KAR CK 0039

In the Karnataka High Court

Case No : Regular First Appeal No. 363 of 2005

Sri. Chikkarangaiah since deceased by his L.R and Another APPELLANT
Vs

Sri. Gurusiddaiah and Others RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Karnataka Land Reforms Act, 1961 — Section 33, 44, 45

Citation : (2011) 4 KarLJ 467 : (2011) 2 KCCR 1097

Hon'ble Judges : Subhash B. Adi, J

Bench : Single Bench

Advocate : Shekar Shetty, for the Appellant; B. Vinayaka, for Ashok Harnahalli, for Respondent 1, Muralidhar Yadav, for Respondent 3, M.L. Dayanand Kumar, for Respondents 4, 6 and 7, Sunil, for T. Seshagiri Rao, for Respondent 5, Nalina K., for S.K. Venkata Reddy, for Respondents 8 to 11 and N.R. Naik and Associates for Respondents 13(a) to (c), for the Respondent

Final Decision : Dismissed

Judgement

Subhash B. Adi, J.—This appeal is by the Defendant Nos. 1 and 2 against the judgment and decree in O.S. No. 193/2001 on the file of Principal Civil Judge (Sr. Dn.), Tumkur dated 2.2.2005.

2. Parties are referred to as per their ranking in the Trial Court.

3. Respondent No. 1 is the Plaintiff. Respondent Nos. 2 to 13 are the remaining Defendants. Suit is one for partition and separate possession of 1/3rd share in the suit schedule property.

4. Case of the Plaintiff is that, one Rangaiah had three sons and four daughters viz., Chikkarangaiah - Defendant No. 1, Hucharangaiah - Defendant No. 13, Gurusiddaiah - Plaintiff, Chikkamma - Defendant No. 9, Jayamma - Defendant No. 10's mother, Huccharangamma - Defendant No. 11 and Garudamma - Defendant No. 12. The suit schedule property item Nos. 1 to 5 are the ancestral

properties of Rangaiah, who is the father of the Plaintiff. The Schedule "1" property was a tenanted property and Rangaiah cultivated the same as tenant for more than 30 years. After his death, first Defendant being elder son of Rangaiah and as Manager of Hindu Joint Family started cultivating the land along with the Plaintiff as a tenant. Accordingly, after coming into force of the Karnataka Land Reforms Act (hereinafter referred to as "the Act"), he sought for grant of occupancy rights by filing an application in Form No. 7 for and on behalf of the joint family. However, after the death of mother of Defendant No. 1, Defendant No. 1 turned hostile to the interest of the Plaintiff and in collusion with Defendant No. 2 - Doreswamy, he started creating some documents and finally denied the share of the Plaintiff, as such, the Plaintiff was constrained to file a suit for partition and separate possession.

5. Defendant Nos. 9 to 12 were impleaded as per the order of this Court. They are the sisters of the Plaintiff and Defendant Nos. 7, 8 and 14 were made parties as they had purchased the portion of the property from Defendant No. 1.

6. Defendant No. 1 appeared through Advocate and filed his written statement through his General Power of Attorney Holder contending that, suit Schedule property No. 1 was not cultivated by the father of the Plaintiff viz., Rangaiah, Defendant No. 1 was cultivating the same in his personal capacity. The tenancy rights are exclusively granted to Defendant No. 1. Rangaiah died in 1967. After his death, the tenancy has been vested with respect to suit Schedule No. 1 property with Defendant No. 1 and the said fact is confirmed in O.S. No. 439/1970. That, his father Rangaiah had made a family arrangement i.e., partition on 21.6.1964. Since the father of the Defendant No. 1 was poor economically, he was unable to maintain his sons. Hence, Defendant Nos. 1 and 13 were driven out from the house when they were minor and since then, Defendant No. 1 started residing under the shelter of one Kodaiah, father of Defendant No. 2 and Hucharangaiah went to Madras and settled there. The property acquired by Defendant No. 1 is an exclusive property, which is not available for partition, as such, the suit is not maintainable.

7. Second Defendant filed separate written statement, claiming Defendant No. 1 is the absolute owner of item No. 1 property. It is exclusive tenancy granted in favour of Defendant No. 1. Defendant No. 1 has converted the suit property into sites by spending huge amount. Plaintiff with intention to knock off the property of Defendant No. 1 has filed a false suit.

8. Defendant No. 4 adopted the written statement filed by the Defendant No. 2.

9. Defendant Nos. 5, 6 and 8 are the purchasers of the sites from Defendant Nos. 1 to 4. They appeared through Advocate, filed written statement inter alia alleging that, prior to the purchase of the sites from Defendant Nos. 1 to 4, they had verified the documents and thereafter, they got portion of the suit properties registered in their favour for valuable consideration. Defendant Nos. 9 to 12, who are the sisters of Plaintiff, they also filed separate written statement admitting

the genealogy and also admitted that, their father died in 1967, they alleged that, item No. 1 property is granted in favour of Defendant No. 1 as a Manager of the joint family and now they are married and residing in their husbands' houses. But being the daughters of Rangaiah, they are entitled for legitimate share in the suit property. Defendant No. 14 contended that, he is the bonafide purchaser of portion of item No. 1 property. Defendant No. 13 remained absent and was placed *ex parte*.

10. On the basis of these pleadings, the Trial Court framed as many as 10 issues as under:

1. Whether Plaintiff proves that suit schedule property No. 2 to 5 are the joint family properties and suit Schedule No. 1 property is a tenanted property allotted to joint family of Defendant No. 1 as Kartha?

2. Whether Plaintiff further proves that he is entitled for 1/3rd share in the suit schedule properties?

3. Whether Plaintiff further proves that he is entitled for partition and separate possession of 1/3 share in the suit schedule properties?

4. Whether Defendant No. 9 to 12 prove that they are L.Rs and daughter of deceased Rangaiah and they are also having share in the suit schedule properties?

5. Whether Defendant No. 1 proves that there was a partition made by his father Rangaiah between 3 sons i.e. Plaintiff No. 1, Defendant No. 1 and Defendant 13 under a partition deed dtd: 21-6-1964 and all the sharers are in actual possession of their respective shares in view of said partition deed?

6. Whether Defendant No. 1 further proves that he is exclusive tenant and owner of suit Schedule No. 1 property in his personal capacity as per the order of the Land Reforms in KL. 773/74-75 as contended in para No. 2(d) of his written statement?

7. Whether Defendant No. 2 proves that this Court has no jurisdiction to try suit u/s 48A of Land Reforms Act as contended in para-8 of his written statement?

8. Whether Defendant No. 5 to 8 and 14 proves that they are the purchasers of portion of suit schedule property for valuable consideration without the notice of the suit. Hence their right over the property deserves to be protected?

9. Whether Court fee paid is correct?

10. What decree or order?

11. The Power of Attorney Holder of the Plaintiff was examined as P.W.-1 and Exs. P1 to P24 were marked in his evidence. Defendant No. 2 - the Power of Attorney holder of Defendant No. 1 was examined as D.W.- 1 and also examined D.Ws.-2 to 7 and Exs. D1 to D23 were marked in their evidence.

12. Trial Court on appreciation of the evidence held that, the suit Schedule item No. 1 property is a tenanted property allotted to the joint family of Defendant No. 1. The Plaintiff has proved that he is entitled for share of 1/3rd in the suit schedule property. Plaintiff is also entitled for partition and separate possession of 1/3rd share. Defendant Nos. 9 to 12 as legal representatives of deceased Rangaiah are also entitled for the share in the suit schedule property. Defendant No. 1 has failed to prove that the grant of occupancy rights was exclusive and is a separate property. On these findings and others, the Trial Court decreed the suit granting 1/3rd share to the Plaintiff in the suit schedule property. It is against this judgment and decree, the Defendant Nos. 1 and 2 are in appeal.

13. Sri. Shekar Shetty, learned Counsel appearing for Defendant Nos. 1 and 2 submitted that, suit for partition in respect of schedule property item No. 1 is not maintainable, as undisputedly the father of the Defendants died in the year 1967. After the death of his father, Defendant No. 1 was in exclusive cultivation of the schedule property item No. 1 and on coming into force of the Act, the land got vested in the State by virtue of Section 44 of the Act. Vesting was free from all encumbrances and right to claim occupancy rights was conferred only on tenant, who was cultivating the land personally. As on the date of 1.3.1974, only Defendant No. 1 was personally cultivating the land and he alone had made an application for grant of occupancy rights and as such, the property granted to Defendant No. 1 is a separate property. As such, the said property is not available for partition.

14. He further contended that, there has been already partition in the family and insofar as the item No. 1 is concerned, it was not the subject matter of partition as it was not cultivated by the joint family and as such, the tenancy is conferred only on Defendant No. 1 and in view of the same, the Plaintiff has no right to claim any share in the suit schedule property.

15. He also contended that, the Civil Court has no jurisdiction to decide, whether the land was cultivated by Defendant or was cultivated by the Plaintiff and Defendants, whether the tenancy is individual or it is a Joint family tenancy. Such issues have to be decided only by the competent Land Tribunal. The Act expressly excludes the jurisdiction of the Civil Court and as such, u/s 9 of the Code of Civil Procedure, the Civil Court's jurisdiction having been ousted, the Civil Court ought not to have considered the case of the Plaintiff as regard to maintainability of suit in respect of item No. 1 of the property, as the said issue is beyond the jurisdiction of the Civil Court. In this regard, he referred to the provisions of Section 2 Sub-section (11) of the Act, the definition of "to cultivate personally" and submitted that, "to cultivate personally" means to cultivate land on one's own account (i) by one's own labour, or (ii) by the labour of any member of one's family, or (iii) by hired labour or by servants on wages payable in cash or kind, but not in crop share, under the personal supervision of oneself or by member of one's family. He relied on Section 2(12) of the Act, the definition of "family" and submitted that the definition of "family" does not

include other than spouse or spouses and their minor sons and unmarried daughters. Plaintiff is neither a spouse nor a minor son nor unmarried daughter of the Defendant No. 1, as such, he does not come within the meaning of the "family" of Defendant No. 1 to claim any share in the property of the Defendant No. 1. There is no evidence as to the cultivation of the land by the joint family. By virtue of Section 44 of the Act, all tenanted lands as on 1.3.1974 stood vested in the State free from all encumbrances and it only conferred right on the permanent tenant, protected tenant and other tenants cultivating such land to claim occupancy right and only the tenants, who were in personal cultivation of the land as on 1.3.1974, were given right to make an application for grant of occupancy rights u/s 48A of the Act. Plaintiff was neither a tenant nor was cultivating the land personally as on 1.3.1974. When the land was cultivated by the Defendant No. 1 exclusively as on 1.3.1974 and after the vesting of the land, the right is conferred exclusively only on the Defendant No. 1 and not on the Plaintiff or any other Defendants.

16. He relied on the provisions of Section 133 of the Act and submitted that, the issues, which are required to be decided by the Tribunal or the competent authority under the Act, cannot be tried and decided by the Civil Court. Sections 132 and 133 create bar on the Civil Court to settle, decide or deal with the question, which is by or under the Act require to be settled, decided or dealt with. Question as to whether the land was an agricultural land, whether the person claiming to be in possession or whether he is a tenant of the land prior to 1.3.1974 are all the questions, which have to be decided exclusively by the Tribunal. Hence, the Civil Court holding that the Plaintiff is also entitled for share in the occupancy rights granted in favour of Defendant No. 1 is per se contrary to Sections 132 and 133 of the Act.

17. To support his contention, he relied on the judgments reported in Mudakappa Vs. Rudrappa and others, and submitted that, the Apex Court after considering the provisions of Sections 44 and 45 of the Act, duties of the Tribunal and the bar created u/s 133 has held that, question to be decided by the Tribunal u/s 48A read with Section 133 cannot be decided by the Civil Court. The Tribunal constituted under the Act has been invested with the power and jurisdiction to determine the rival claims, it should record the evidence and decide the matter, so that its correctness could be tested either in an appeal or by judicial review under Article 226 or Article 227, but it cannot by necessary implication be concluded that when rival claims are made for tenancy rights, the jurisdiction of the Tribunal is ousted or its decision is subject of the decision once over by the Civil Court.

18. He also relied on the decision of the Apex Court reported in Ishwaragouda and Others Vs. Mallikarjun Gowda and Others, and submitted that, the Apex Court following the decision in Mudakappa's case (supra) has held that the Civil Court had no jurisdiction to decide as to whether the joint family or one of the members was a tenant, when that question was considered finally and

authoritatively on merits by the Tribunal. He also relied on another decision reported in ILR 1997 Kar 2905 in the matter of Y.R. Veeranna v. State of Karnataka and Ors. and submitted that, when the person has not been cultivating the land, even though he has a status of co-owner or a Kartha of a joint family. The finding of the Tribunal that it is cultivated by the sons, does not entitle the father as Kartha to claim partition in the said granted property.

19. He further submitted that, in this case, the Plaintiff has not entered into a witness box and as such, the Trial Court ought not to have relied on the evidence of P.W.-1 and instead, it ought to have drawn an adverse inference against the Plaintiff. To support this, he had relied on the judgment of the Apex Court reported in Vidhyadhar Vs. Manikrao and Another, and submitted that, where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that, the case set up by him is not correct. Relying on these judgments and also the provisions of the Act, he further submitted that, when the property is a separate property of Defendant No. 1, the Plaintiff being not the member of the family of Defendant No. 1 is not entitled to claim any relief much less the partition in respect of the suit Schedule item No. 1 property. Further, whether it is a joint family cultivation or cultivation by the individual is also not a matter, which could be decided by the Civil Court. When expressly the jurisdiction of the Civil Court has been ousted under Sections 132 and 133 of the Act, framing an issue and holding that the tenancy is a joint family tenancy is illegal and contrary to the provisions of Sections 132 and 133 of the Act.

20. Supporting the argument of Sri. Shekar Shetty, learned Advocates appearing for Defendant Nos. 4, 5, 6 and 7 submitted that, in view of the provisions of Section 24 of the Act, right of inheritance is available only w.e.f. 1.3.1974, as the said provision was got amended w.e.f. 1.3.1974 and it is only the heirs of such tenant as on 1.3.1974 and the members of the family as defined under the definition of "family" are entitled to claim the partition and separate possession from amongst the family of the deceased tenant. In this case, Defendant No. 1 being the tenant, the Plaintiff being not a member of the family nor a heir of Defendant No. 1 is not entitled for claim of partition.

21. On the other hand, learned Counsel appearing for the Plaintiff submitted that, it is not in dispute that, Rangaiah is the father of Plaintiff, Defendant Nos. 1 and 9, 11, 12 and 13 and Defendant No. 10's mother. From Ex. P2 it is clear that the Defendant No. 1, who filed an application for grant of occupancy rights in Form No. 7, had categorically stated that the land is cultivated from the time of his father i.e., for more than 30 years. Defendant No. 1 has not claimed tenancy on the basis of his exclusive cultivation. He had claimed tenancy on the basis of cultivation by the father and Defendant continued cultivation after the death of his father. Ex. P4 ? Record of Rights shows the entry of the names of all the sons of Rangaiah. The order of the Land Tribunal Ex. P16 granting occupancy rights in the name of Defendant No. 1 also refers to the cultivation by the father of

Defendant No. 1 and his name appeared in the Record of Rights from 1958-59 to 1966-67, however, from 1969-70 and 1970-71, the column No. 12 of the Pahani was overwritten. The Tribunal has relied on the entries from 1958-59 to 1966-67 to show that, Defendant No. 1's father i.e., Plaintiffs father was in the cultivation of the land and on the basis of these entries, the occupancy right has been conferred on Defendant No. 1. The grant of occupancy rights admittedly was not on the basis of exclusive cultivation by the Defendant No. 1 nor Defendant No. 1 claimed that he has been cultivating the land exclusively, but his claim itself was based on his father's cultivation.

22. He strongly relied on the written statement filed by the Defendant No. 1 before the Tribunal wherein he has admitted in categorical terms that it was his father, who was cultivating, after the death of father, he has been cultivating, his father's name was entered in the Pahani and after the death of his father, the entry was corrected. He has also admitted that, the tenancy is heritable and accordingly, it has been inherited by him. This statement of Defendant No. 1 clearly establishes that, what was claimed by the Defendant before the Tribunal was on behalf of the joint family and not in his individual capacity.

23. He also relied on the plaint copy of Defendant No. 1 in O.S. No. 439/1970 wherein he admits that, the Plaintiffs father was in possession and enjoyment of the suit schedule property about 30 years as a tenant and he died about 3 years prior to the suit and thereby he is continued in possession. He also relied on the evidence of Defendant No. 1 in the said suit admitting the tenancy of the Plaintiffs father i.e., Defendant No. 1's father and his cultivation till his life time.

24. Before the Tribunal, Defendant No. 1 has given a statement wherein he admits that, it was father, who was cultivating the land and after his death, he has been cultivating. These undisputed documents clearly prove that the cultivation of land by Defendant No. 1 was not in individual capacity, but it was as a member of the family particularly as a heir of deceased Rangaiah.

25. Since Rangaiah was deceased prior to 1.3.1974 and his interest had devolved on his heirs by survivorship, Defendant No. 1 being the eldest member of the family, he filed an application for grant of occupancy rights and it has been granted by the Tribunal. The grant of occupancy rights from the admitted material is for and on behalf of the joint family and not in his individual capacity. In this regard, he relied on the provisions of Section 2 Sub-section (11) Explanation II to state that cultivation personally means, cultivation as a member of joint family and also relied on the provisions of Sections 48A, 132 and 133 and submitted that, the Civil Court is neither deciding as to who is cultivating nor deciding the tenancy nor it is called upon to decide such issues, which are required to be dealt by the Tribunal or the authority under the Act. It is on admitted facts, the partition suit is filed, as the cultivation is by the family and in the case of cultivation by the family, the other members of the family, who are having an interest, are entitled for share. That the interest of deceased Rangaiah devolves on his heirs.

26. Insofar as decision relied by the learned Counsel for Defendant Nos. 1 and 2, he submitted that, Mudakappa's case relates to rival tenancy and in case of rival tenancy, the Tribunal is the competent authority to decide the issues and not the civil Court, however, this is not a case where there is a claim of rival tenancy and it does not amount to rival tenancy as nobody is claiming against each other, what is claimed is that the tenancy being on behalf of the family, the right already accrued was sought to be partitioned. As far as decision in the matter of Y.R. Veeranna (supra), he submitted that, an application filed by the father for grant of occupancy rights having been rejected as his sons are cultivating thereafter, he cannot claim that the property is a co-parcenary property and he is a kartha and entitled for the share, as such, the said decision is not applicable to the facts and circumstances of this case. He also relied on the decision in Ishwaragouda's case (supra) and submitted that, the said case was also a case of claim of rival tenancy in which tenants had claimed that it is a joint family cultivation, when such claim is made, it is the Tribunal, which had the jurisdiction to decide, whether tenancy is a joint family tenancy or the member or one of the members was the tenant and that was the case where it was already decided by the Tribunal and after having decided the issue, it was not open for the civil Court to decide the same again. However, there is no such decision in this case by the Tribunal.

27. As regards to the Power of Attorney having been examined, he submitted that, Plaintiff is incapable of speaking and it is in this regard, the brother-in-law of the Plaintiff has been examined as P.W.-1 and P.W.-1 has spoken out of his personal knowledge, as such, there is no bar of examining P.W.-1 though as Power of Attorney, whatever stated by P.W.-1 is on the basis of personal knowledge and such evidence is admissible. Learned Counsel further submitted that, the Trial Court relying on the undisputed documents and also admission by the Defendant No. 1 has decreed the suit, there is no error, which calls for interference by this Court.

28. In the light of the rival contentions, the points that arise for consideration are:

1. Whether the Civil Court has jurisdiction to grant relief as claimed for by the Plaintiff?
2. Whether the grant of occupancy rights in favour of Defendant No. 1 is separate, exclusive and not available for partition?
3. Whether the evidence of Power of Attorney Holder examined on behalf of the Plaintiff is acceptable?
4. Whether the Power of Attorney holder of Defendant No. 1 can sign the written statement and lead evidence?

POINT No. 1:

29. It is not in dispute that, Rangaiah had three sons and four daughters.

Plaintiff, Defendant Nos. 1 and 13 are the sons. Defendant Nos. 9, 11, 12 and Defendant No. 10's mother are daughters. Defendant No. 2 is the brother of Rangaiah.

Defendant No. 3 is the wife of Defendant No. 1. Defendant No. 4 is the son of second Defendant. Defendant Nos. 5, 6, 7, 8 and 14 are the purchasers. In this case, the dispute is as regard to the item- No. 1 of the suit schedule property. Item No. 1 of suit schedule property is a tenanted property. It is also not in dispute that, by virtue of Section 44 of the Act, the land stood vested in the State. Defendant No. 1 has filed an application for grant of occupancy rights as per Ex. P2. In Ex. P2, he has stated that:

He also states that, land has been cultivated for last 30 years. This application is filed on 24.5.1977 and as on 24.5.1977, he was aged 38 years as per Ex. P20. It cannot be said that, he was cultivating personally for last 30 years. It necessarily means that his father was cultivating and after his father, he continued the cultivation. Now the statement of Defendant No. 1 for grant of occupancy rights before the Tribunal is marked as Ex. P20. In Ex. P20 he states as under:

My father was in possession of about 2 Acres 26 Guntas in Survey No. 17/3A and 3 of Upparahally having taken the service on lease from Haralappa. He was a tenant for over 30 years prior to his death in the year 1968. I was cultivating the land along with my father and after his death I have continued as a tenant paying the Land Lord share regularly....

The statement of the Defendant No. 1 before the Tribunal for grant of occupancy rights shows that, his father was cultivating the land for 30 years i.e., till his death and Defendant No. 1 was also cultivating along with his father. It is not the case of Defendant No. 1 that his father had surrendered his tenancy. By the time of the death of the father of Defendant No. 1, the Mysore Land Reforms Act, 1961 was in force. It is in this regard, his written statement filed before the Tribunal marked as Ex. P17 is also material to be noticed. At para-3, he states as under:

The tenant Petitioner's father was in possession and enjoyment of the suit land for about 30 years as tenant. The tenant Petitioner was cultivating the suit land along with his father and after the death of his father, in the year 1967 also, he has been cultivating the suit land as a tenant paying the land share regularly.

At para-8 Sub-para-(i) he states as under:

...the name of the Petitioner's father has been noted. The pahani copies for the year 1967-68 are not traceable by both the parties. For the years 1968 to 70 and subsequent years, Pahanies are in the name of Second Respondent mentioned in column No. 2.

At para-8 Sub-para (vii) he states as under:

As per the Mahazar Ex. P13 it is clear that subsequent to the death of the

Plaintiffs father, the Plaintiff has been cultivating the suit land as a tenant. From the Pahani copies, it is clear that the Plaintiffs father was cultivating the suit land upto 1966-67 as per the entries in the Pahanies and no Pahani copies have been produced by either of the parties for the year 67-68....

At para-8 Sub-para (xi) he further states that:

In view of the fact that in Pahanies Ex. P1 to P9 the Plaintiffs father's name has been shown as the guttadar and as there is sufficient evidence that the Plaintiffs father has died 3 or 4 years earlier to the suit, necessarily the Plaintiff must have been cultivating the suit land as a tenant subsequent to his father's death, since the tenancy rights are heritable. The documentary evidence on behalf of the Plaintiff clearly goes to show that the Plaintiffs father was the tenant and after his death the Plaintiff must have come into possession of the property as a tenant being the heir of his father. So it could be taken as conclusively established that even on the date of suit, the Plaintiff has been in possession of the property lawfully as a tenant.

(Underline supplied)

This document is not in dispute. This is written statement filed before the Land Tribunal for grant of occupancy rights. From this statement, it is clear that, Defendant No. 1 never treated that he alone was cultivating the land, never claimed that he is in exclusive possession or he is cultivating the land as a tenant exclusively. All that the Defendant No. 1 has claimed before the Tribunal is that, his father was cultivating till his death and after his death, he was cultivating. He in categorical terms also admits as a heir, the tenancy has devolved on him. It is in these circumstances, it is required to be considered as to, whether the Civil Court has a jurisdiction to grant partition or not.

30. Section 45 of the Act provides for registration of tenant as an occupant. Every person, who was a permanent tenant, protected tenant or other tenant or where a tenant has lawfully Sub-let such Sub-tenant shall, with effect on and from the date of vesting, be entitled to be registered as an occupant in respect of the lands of which he was a permanent tenant, protected tenant or other tenant or Sub-tenant before the date of vesting, which he has been cultivating personally. Now the definition of tenant, permanent tenant, protected tenant is defined u/s 2 Sub-sections (34), (23) and (27) of the Act. Definition of tenant is defined u/s 2 Sub-section (34) means an Agriculturist, who cultivates personally the land he holds on lease from a land-lord and includes a person who is deemed to be a tenant u/s 4, etc.,. For the purpose of this case, Section 4 is relevant to be noticed to know as to who are the deemed tenants. A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not a member of the owner's family or a servant or etc.,. "To cultivate personally" is also defined u/s 2 Sub-section (11) of the Act wherein cultivation by one's own labour, labour of any member of one's family or hired labour or servants on

wages payable in cash or kind, but not in crop share, under the personal supervision of oneself or by member of one's family. Cultivation by member of one's family also amounts to cultivate personally. Explanation II to Section 2 Sub-section (11) clarifies that in case of a Joint family, the land shall be deemed to be cultivated personally, if it is cultivated by any member of such family. A tenant cultivating personally is entitled for grant of occupancy rights. If a tenant is cultivating as a member of joint family, is still called as cultivating personally. The undisputed material produced before the Tribunal and order of the Tribunal clearly shows that the father of the Defendant No. 1 was cultivating the land and after the death of father, Defendant No. 1 has been cultivating the land. It is in this context, Section 24 of the Act requires to be noticed. If a tenant dies intestate, tenancy devolves on the heirs. Before amendment to Section 24, the other heirs were also included, however, by virtue of amendment Act of 1.3.1974, it confined only to the heirs of tenant. If father of Defendant No. 1 was admittedly cultivating the land as a tenant, and after his death, Defendant No. 1 is cultivating as a heir, if the Defendant No. 1 has also not disputed before the Tribunal that his cultivation is traceable to his father's cultivation and it devolved on him as a heir as admitted by him, it cannot be said that, it excludes other heirs of the original tenant and that issue requires to be decided by the Tribunal.

31. No doubt, Sections 132 and 133 of the Act exclude the jurisdiction of the Civil Court in respect of the matter, which are required to be decided by the Tribunal or authority under the Act. It is not a case where the Civil Court is required to decide as to whether the land is an agricultural land, as to whether the party claiming is a tenant and seeks grant of occupancy rights or as to whether the person claiming to be in possession or not. The issue in this case is whether the admitted grant made by the Tribunal is for the family or joint family or it is granted exclusively. The Civil Court is not required to go into the question as to whether Defendant No. 1 was cultivating or not, whether the Plaintiff was cultivating or not, but if it is granted in favour of a member of the family or member of a joint family and if the tenancy was of Joint family or the family, person personally cultivating, which includes cultivation by a member of the family and also member of the Joint family. On the basis of admitted facts, if it is a grant in favour of a member of joint family, and the other members of joint family claim their share as heir of original tenant, there is no bar in deciding the shares of the members of the joint family. The Civil Court without going into the question, which is required to be decided by the Tribunal, amongst the members of the members of the family or joint family, if tenancy is granted in favour of one of the members of the joint family, all that the Civil Court decides is, whether they are the members of the joint family, whether they are entitled to the respective share. The documentary evidence referred to above, which are not in dispute as they are part of the records before the Tribunal and what is held by the Tribunal, if all these documents are considered, it is clear from these documents that (sic) Rangaiah, father of Defendant No. 1 was cultivating the land and (sic) cultivated the land till 1967; (ii) Defendant No. 1 claimed his

cultivation after the death of Rangaiah; (iii) Defendant No. 1 claimed cultivation as a heir of Rangaiah. If the cultivation by Defendant No. 1 is as a heir of Rangaiah, he cannot exclude the other heirs as the tenancy being heritable and if it has been inherited by the Defendant No. 1, it means that the other members have also inherited. There is no prohibition under the Act for making an application for grant of occupancy rights by one of the members of the family or joint family, if the cultivation is by one of the members of the family or the joint family, such cultivation is called as cultivation personally. It does not mean that the rights of the other members of the Joint family are excluded or got extinguished. Cultivation on 1.3.1974 does not mean only as on 1.3.1974, but cultivation prior to 1.3.1974. If the tenancy is inherited, it is inherited by all the heirs and not only one or few heirs. The statement of Defendant No. 1 before the Tribunal, his written statement before the Tribunal and the order of the Tribunal, they are conclusive and clear, they establish that the father's name was entered in the revenue record till his death. Thereafter the name of the Defendant No. 1 is not entered, but it is cultivated by him. He does not dispute that he has not independently acquired the tenancy rights and independently he has cultivated, if that is so, it does not become his separate property. No doubt, under the Hindu Law, even a co-parcener can hold a separate property. But when the Defendant No. 1 does not dispute that his cultivation is traceable only through his father, it cannot be held that, he being one of the heirs, the other heirs deemed to have been excluded only because he alone has made application.

32. In case of rival claims, necessarily there are two claims and if there are two claims, as to who is cultivating, is the question, which is required to be decided. It is in this context, the decision relied by the learned Counsel for Defendant No. 1 particularly Mudakappa's case (supra) at para-7 assumes importance wherein the Apex Court has held as under:

7. It is seen that the words "tenant" "the Tribunal" and "the joint family" have been defined under the Act. If one of the members of the family cultivates the land, it is for and on behalf of the joint family. Under these circumstances, pending the suit, when the question arose whether the Appellant or joint family is the tenant, the question should be decided by the Tribunal alone u/s 48A read with Section 133 and not by the civil Court. It is needless to mention that when the Tribunal constituted under the Act has been invested with the power and jurisdiction to determine the rival claims, it should record the evidence and decide the matter so that its correctness could be tested either in an appeal or by Judicial review under Article 226 or under Article 227, as the case may be. But it cannot, by necessary implication, be concluded that when rival claims are made for tenancy rights, the jurisdiction of the Tribunal is ousted or its decision is subject of the decision once over by the civil Court. It is clear from Section 48A(5) and Section 11 2B(bbb) read with Section 133, that the decision of the Tribunal is final u/s 133(iii). The civil Court has power only to decide other issues. It is, therefore, difficult to accept the contention that the rival claims for tenancy rights or the nature of the tenancy are exclusively left to be dealt with

by the Civil Court.

However, no such issues, which required to be decided by the Tribunal or the authority under the Act, are called upon to be decided by the Civil Court, as such, on admitted facts, if the tenancy is a joint family tenancy, the other heirs do have the right in the said property.

33. The decision in Ishwaragouda's case (supra) is also a case where the Tribunal had decided the issue and once it is decided, it is not open to the Civil Court to decide the said issue once again on the ground that, it is a joint family cultivation. It is in this context, the Apex Court has observed as under:

17. ...Thus in view of the aforesaid decision, we hold that the civil Court had no jurisdiction to decide as to whether the Joint family or one of the members was a tenant, when that question was considered finally and authoritatively on merits by the Land Tribunal, Gadag. Therefore, we are of the view that the learned Additional Sessions Judge, Dharwad, was perfectly justified in view of ouster of jurisdiction of the civil Court u/s 133 of the Act, in setting aside the judgment of the Trial Court to this extent....

34. Here it is not a case where the issue has been finally decided by the Tribunal. In the judgment reported in AIR 1978 Kar 136, the question was whether leasehold rights are joint family or individual. This Court has held that, in case if the dispute as regard to leasehold rights arises, the competent authority is the Tribunal and not the Civil Court.

POINT No. 2:

35. Considering these decisions and also considering the evidence on record in this case, when the Defendant No. 1 has claimed occupancy rights as having inherited the same from his father, Plaintiff being one of the heirs, the tenancy being heritable, it devolves not only on one of the heirs, but it devolved on all the heirs. May be, the other heirs might not have filed an application for grant of occupancy rights, but it being the estate of the deceased, he having died intestate, by succession, by survivorship, it devolves on the heirs of the deceased, Plaintiff being one of the Class I heirs, he is also entitled to the share. No doubt, if the Defendant had claimed exclusive cultivation independent of his father and had claimed his tenancy not by inheritance, but by acquisition by himself, if the other heirs had claimed right out of the said grant, the Civil Court could not have decided the said issue, but it is not a case here that the Defendant No. 1 had claimed his exclusive separate tenancy, but he having claimed as successor to his father, it cannot be said that one of the successors alone is entitled for grant particularly in the light of the definition "to cultivate personally."

POINT NO. 3:

36. No doubt, the Power of Attorney may not have the personal knowledge of the party, as his evidence cannot become an evidence of a party, on whose behalf he

deposes. But if he has the personal knowledge of the facts and from out of his personal knowledge if he speaks, it cannot be said that his evidence is not acceptable. P.W.-1 though is a Power of Attorney Holder, he has been examined on behalf of the Plaintiff, who is incapable of speaking. But the evidence of P.W.-1 also shows that P.W.-1 being a close relative, he has the personal knowledge of the facts and the facts within his knowledge has been spoken to by P.W.-1. I do not find that the evidence required to be discarded, even otherwise also, without even going into the evidence of P.W.-1, materials produced on record are not disputed by Defendant No. 1 and they clearly clinches the issue and prove the case of the Plaintiff.

POINT NO. 4:

37. As far as the Power of Attorney of Defendant No. 1 filing the written statement, it is alleged that the Power of Attorney has come into existence after the written statement is filed, as on the date of filing of the written statement, he had no power. But Defendant No. 1 has not disputed having conferred authority on the Power of Attorney, he has rectified his authority. In these circumstances, though the Power of Attorney could not have filed the written statement, as he had no authority, but Defendant No. 1 having rectified, it is not necessary to go into the said issue.

38. Considering these evidence on record, I find that, (i) the Plaintiff has proved that the cultivation by the Defendant No. 1 is on behalf of the joint family; (ii) he has claimed occupancy rights as a heir of Rangaiah; (iii) Civil Court has only considered as to whether the cultivation is by the family, member of the joint family or not and it has not gone into the issue of tenancy. In these circumstances, the grant made in favour of Defendant No. 1 is for and on behalf of the joint family and the other heirs of Rangaiah, who have succeeded to his estate, are entitled for the share.

39. In the circumstances stated above, I find that the Civil Court on proper appreciation of the evidence has come to the right conclusion and the said conclusion is based on legal, valid and acceptable evidence. I do not find any error in the judgment and decree of the Trial Court. Accordingly, I pass the following:

ORDER

Appeal fails and same is dismissed. Since the parties are close relatives and considering the circumstances, I find that there should not be order of cost, accordingly, no order as to the cost.