
(2012) 01 KAR CK 0331

In the Karnataka High Court

Case No : Regular First Appeal No. 1295 of 2005

Sri Hemanth Kumar Naik

APPELLANT

Vs

Sri G.H. Ajay and Others

RESPONDENT

Date of Decision : 05-01-2012

Acts Referred:

Citation : (2012) 01 KAR CK 0331

Hon'ble Judges : L. Narayana Swamy, J;K.L. Manjunath, J

Bench : Division Bench

Advocate : Ramesh. for Sri T.N. Raghupathy, for the Appellant; M.G. Sateesha, Advocate for Respondents 1 to 3 Respondents 4 and 5 - Served and Unrepresented Respondent 6 (A to E) - Served, for the Respondent

Judgement

K.L. Manjunath, J.—The appellant is challenging the legality and correctness of the judgment and decree passed by the Civil Judge (Sr. Dn.), Chamarajanagar in O.S. No. 26/2002 (old No. O.S. 46/19981 dated 10.6.2005, wherein the suit filed by respondent Nos. 1 to 3 came to be decreed holding that they are having 3/4th share in the plaint schedule property. The facts leading to this appeal are as hereunder:

Plaintiffs 1 to 3 are the children of appellant who is defendant No. 1 in the suit. They were minors on the date of filing the suit. The suit was instituted through their mother for partition and separate possession of their 3/4th share. According to plaint averments, defendant No. 1 married their mother Atmosheela and the same was solemnised on 19.6.1983 at Mysore. Out of their wedlock, the plaintiffs are born to them. The relationship between the plaintiffs mother and defendant No. 1 was cordial for sometime. Later due to conduct of defendant No. 1 who was addicted to alcohol and other bad vices and he had contracted second marriage with one Kullamma resident of Gundlupet town, the marriage solemnised between the mother of the plaintiffs and defendant. No. 1 was dissolved. The plaintiffs' mother had also filed a suit for maintenance in C. Misc. 241/1990 on the file of the Civil Judge, Mysore and maintenance was also

awarded.

Contending that the plaint schedule properties are the joint family properties and were allotted to the share of defendant No. 1 in a partition drawn on 9.3.1990, the suit was filed for partition and separate possession.

2. The defendant contested the suit on the ground that there was no partition drawn on 9.3.1990 and that the properties of the joint family were divided on 2.7.1990 and the same has been acted upon. According to him, first item of the plaint schedule property has been allotted to the share of Chinnamma. Therefore the suit is not maintainable. He also raised several other contentions on the ground that item No. 2 - Sardar Touring Talkies does not belong to the family and he is not running the theatre and the suit item No. 3 has been sold to one Sujatha W/o Naganaika and that the suit Tiled by the plaintiff is not maintainable.

3. Based on the above pleadings the Trial Court has framed the following issues:

1. Whether the plaintiffs prove that the suit schedule properties of this case are the joint family properties of the plaintiffs and the 1st defendant?
2. Whether the plaintiffs prove that the 1st defendant has alienated suit item No. 4 in favour of the 4th defendant for his avyavaharika dealings and hence that sale does not bind the share of the plaintiffs in suit item No. 4?
3. Whether the defendants prove that the suit item No. 3 have been sold long back jointly by the mother of the plaintiffs and the 1st defendant for legal necessity?
4. Whether the defendants prove that suit item No. 1 belongs to the mother of the 1st defendant by name Chinnamma and not liable for partition?
5. Whether the defendants prove that the site of suit item No. 2 belongs to one Shivanna S/o Chennappa and the 1st defendant has taken lease of the site and running the touring talkies in the site?
6. Whether the plaintiffs are entitled to 1/4th share each in the suit properties?
7. Whether the plaintiffs are entitled for separate possession?
8. What order or decree?

Additional Issues

1. Whether the first defendant proves that on 02.07.1990 there was a registered partition between him and his mother and his brother as alleged in para 4(a) of the written statement?
2. Whether the first defendant further proves that the alleged partition deed dated March 1990, is concocted and created by the plaintiffs as alleged in para 4(a) of the written statement?
4. In order to prove the respective contentions the mother of the plaintiffs was

examined as PW1. She relied upon Exs. P1 to F30. The defendant was examined as DW1. He has produced the judgment in M.C.No. 115/2000 as Ex. D1.

5. The Trial Court after appreciating the evidence of both the parties held issues 1, 2, 3, 6 and 7 in affirmative and issues 4, 5 and additional issue Nos. 1 and 2 in negative and ultimately the suit of the plaintiff came to be decreed holding that they are entitled to 3/4th share in all the plaint schedule property This judgment and decree is called in question in this appeal.

6. Sri Ramesh learned counsel for the appellant contends that the Trial Court has committed an error in decreeing the suit by holding that the plaint schedule properties were allotted to the share of defendant No. 1 under a partition deed dated 9.3.1990; disbelieving the contention of defendant No. 1 that the joint family properties were divided on 2.7.1990 as contended in paragraph 4(a) of the written statement. According to him item No. 1 of the plaint schedule had already been allotted to the share of his mother Chinnamma; item No. 2 - Sardar Touring Talkies was run by defendant No. 1 by tailing the same on lease; and that the lease has come to an end and therefore the said property is not available for partition. He further submits that suit item No. 3 has been sold to one Sujatha W/o Naganaika and without making her as a party, the suit is not maintainable. Similarly item No. 4 has been sold by defendant No. 1 in favour of defendant No. 4 - Subbegowda and as such the decree granted by the Trial Court has to be set aside.

7. Per contra, learned counsel for respondents 1 to 3 contended that the grounds urged by the appellant are not tenable because the joint family properties were divided on 9.3.1990 amongst the brother of defendant No. 1, mother and his 3 sisters Chandralekha, Bhagya and Nagarathna and in the said partition the plaint schedule properties had fallen to the share of the plaintiffs. Therefore, the second partition set up by defendant No. 1 as per Ex.P28 namely partition deed dated 2.7.1990 is concocted and created only to knock off the valuable right of the plaintiffs. He further submits that in paragraph 3 of the cross-examination the appellant herein has admitted execution of the partition deed dated 9.3.1990. When he has admitted the execution of the partition deed dated 9.3.1990, defendant No. 1, his mother and his brother could not have entered into another partition on 2.7.1990 without mentioning the earlier partition and reasons for change of properties. He further submits that even 3 sisters of defendant No. 1 are not parties to the partition deed dated 2.7.1990 as per Ex.P28. In such circumstances, the Trial Court has rightly disbelieved the second partition dated 2.7.1990.

According to him item No. 1 has fallen to the share of the appellant under the partition deed dated 9.3.1990 and as such the plaintiffs are entitled to claim their share in the aforesaid property.

He further submits that even item No. 2 was available on the date of filing the suit as the appellant was running the talkies as a lessee along with defendant No.

2.

He further contends that item No. 3 had not been sold by defendant No. 1 on the date of filing of the suit, since the suit was instituted in the year 1998. Any property sold during the pendency of the suit does not bind the rights of the plaintiffs. Similarly, even though the appellant contends that suit item No. 4 has been sold by him to one Subbegowda who is defendant

No. 4, as defendant No. 4 is not challenging the decree, the appellant cannot be permitted to contend that the suit property is not available for partition.

8. Having heard learned counsel for the parties, we have to consider the following points in this appeal:

Whether the judgment and decree granted by the court below holding that the plaintiffs are entitled to 3/4th share in all the plaint schedule properties is just and proper and whether these properties are available for partition?

9. Defendant No. 1 though has set up the partition deed dated 2.7.1990, has admitted in his cross-examination about the earlier partition deed dated 9.3.1990 which is produced as Ex.P1. As per Ex.P1, plaint schedule properties had fallen to the share of the appellant. Therefore, it is clear that as on 9.3.1990 defendant No. 1 was the owner of plaint schedule properties and he was managing the same as kartha of the joint family consisting his wife and children. The appellant contends that the joint family property was disrupted on 2.7.1990 as per Ex.P28. The same has been rightly disbelieved by the court below when defendant No. 1 admits the partition deed dated 9.3.1990 as per Ex.P1. In the second partition no reasons are assailed for the change of properties and alteration of the earlier partition. In addition to that 3 sisters of defendant No. 1 - Chandralekha, Bhagya and Nagarathna who were parties to the earlier partition are not parties to the second partition. It is the specific ease of the plaintiffs that the second partition is set up only to defeat their claim. In view of the clear admission of defendant No. 1 in his cross-examination about the partition deed dated 9.3.1990. the court below has rightly disbelieved the second partition set up by the plaintiff. The appellant has not examined any witnesses to prove the second partition. In the circumstances, we are of the view that the properties mentioned in the plaint were allotted to the share of defendant No. 1 under Ex.P1.

10. Having held that defendant No. 1 was allotted plaint schedule properties, we are of the view that item No. 2 of plaint schedule property is not available for partition since defendant No. 1 was a lessee of the theatre and that the learned counsel for the parties during the course of argument admit that after the efflux of lease period the theatre in question is not run by the appellant. Therefore to the aforesaid extent, the decree granted by the Court has to be set aside, as item No. 2 is not available for partition.

11. So far as item No. 3 is concerned admittedly as on the date of filing suit, the

same was not alienated. According to defendant No. 1 half of the site is sold prior to the institution of the suit for which the plaintiffs mother was also a signatory. But unfortunately no document is produced before the Court. Even if we consider that there was an agreement to sell the property the same has not been sold prior to the institution of the suit. If any transactions have taken place subsequent to the institution of the suit, the same would not bind the plaintiffs share. Accordingly, we hold that the plaintiffs are entitled for share in the aforesaid property.

12. Then the last point to be answered is in regard to item No. 4. So far as item No. 4 is concerned though a decree is passed, the purchaser has not challenged the same, even though he is a party to the same. In the circumstances, we are of the view that the judgment and decree of the Trial Court has to be confirmed in regard to the suit item Nos. 1, 3 and 4 and not in regard to item No. 2. In the result the appeal is allowed in part. The judgment and decree of the court below is confirmed only in respect of suit item Nos. 1, 3 and 4 and the claim of respondents 1 to 3 in respect of suit item No. 2 is set aside.

Parties to bear their costs. Registry is directed to draw the modified decree in the aforesaid terms.