

(2008) 12 KAR CK 0009

In the Karnataka High Court

Case No : Regular First Appeal No. 747 of 1997

Sri. Malipatil Basavarajappa

APPELLANT

Vs

Smt. Sarvamangalamma and Others

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Hindu Succession Act, 1956 — Section 8, 9

Citation : (2011) 4 KCCR 2930

Hon'ble Judges : Manjula Chellur, J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : R.A. Patil, for the Appellant; P.S. Malipatil, for the Respondent

Final Decision : Allowed

Judgement

B.V. Nagarathna, J.—This appeal is filed by the Plaintiff challenging the judgment and decree dated 2.9.1997 passed by the Principal Civil Judge, Raichur in O.S. No. 19/1989 by which the suit tiled by the Plaintiff has been dismissed with costs.

2. For the sake of convenience the parties shall be referred to in terms of their status before the trial court.

3. According to the Plaintiff, he and Defendant No. 2 & 3 are the sons of late Shanthanagouda, Defendant No. 1 is the wife of Shanthanagouda, Defendant Nos. 4 to 8 are the daughters of late Shanthanagouda and sisters of Plaintiff and Defendant No. 2 & 3. Shanthanagouda died on 2.7.1985. During the lifetime of Shanthanagouda, he along with his sons constituted a joint Hindu Family and were owning the properties shown in schedule "A" of the plaint. There was a partial partition amongst the members of the Joint Family wherein agricultural lands namely items 1 to 11 of Schedule "A" came to be partitioned by an oral partition in April 1970 and the same was subsequently registered in the year 1974 as registered document No. 40/1974-75 dated 7.5.1994. Under the said partition agricultural lands were divided between late Shanthanagouda and Plaintiff and his two other sons namely Defendant No/2 & 3. The family

continued to be a Hindu Joint Family in respect of other properties detailed in Schedule "A" of the plaint namely item Nos. 12 to 20.

4. It is the ease of the Plaintiff that the joint family was running a shop as a Commission Agency at Rajendra Gund, Raichur, which is a joint family business concern and which was continued even after the death of the Plaintiff's lather Shanthanagouda; that Shanthanagouda died intestate and undivided in respect of items in Schedule "B" which are nothing but item No. 12 to 20 of Schedule-A properties and the said properties devolved by succession on his legal representatives. The separate properties of Shanthanagouda are listed as "C" schedule properties, In spite of repeated requests and demands, Defendant Nos. 1 to 3 were not inclined to partition the properties in "B" & "C" schedule properties and had not even replied to the legal notice sent by the Plaintiff. In the above circumstances, the Plaintiff has sought for 1/4th share in "B" schedule properties and 1/36th share in "C" Schedule properties by filing the suit. Plaintiff has also sought for declaration of his share in "B" & "C" schedule properties and partition of the same by metes and bounds and a decree against Defendant Nos. 2 & 3 for rendition of accounts of joint family properties which is shown at Sl. No. 5 of schedule "B" and for other incidental reliefs.

5. In response to the service of notice by the trial court, Defendant Nos. 1 to 3 appeared and filed a written statement denying the allegations made in the plaint and specifically contending that the partition that took place in the year 1970 and which was registered on 7.6.1974 was not a partial partition but it was a complete partition of the joint family properties and that the Plaintiff had insisted that he should be allotted his share in the joint family properties. Therefore, during the life time of their lather Plaintiff was allotted his share in the schedule "A" properties and in addition cash amount of Rs. 70,000/- was given to him in lieu of other movable and immovable properties and therefore, the Plaintiff had severed his relationship with joint family. Therefore, he had no right, title and interest in respect of "B" schedule properties and hence sought for dismissal of the suit.

6. As far as "C" schedule properties are concerned they admitted that the said properties were allotted to their father at the partition in April 1970 and registered on 7.6.1974 and that he died intestate. But they however, denied that the Plaintiff had a share in the "C" schedule properties. They even denied that Defendants 4 to 8 who are the daughters were entitled to any share in the "C" schedule properties as the said properties are joint family properties and only Defendant Nos. 2 & 3 were entitled to succeed to the said properties by survivorship. On the above contentions Defendants 1 to 3 sought for dismissal of the suit

7. Based on the above pleadings the trial court framed the following issues:

1. Whether the Plaintiff proves that the partition taken place in April, 1970 or recorded in writing or registered subsequently in 1974 is only the partial partition

in respect of suit lands item No. 1 to 11 shown in the plaint "A" schedule properties?

2. Whether the Defendants prove that the Plaintiff took his whole entire share in the properties including cash of Rs. 70,000/- in the partition of April, 1970 and went out of the Hindu Joint Family?

3. Whether the Plaintiff proves that the shop No. 77 in Rajendra Gunj, Raichur is the joint family properties of the Plaintiff and Defendant?

4. Whether the Defendants prove that the suit shop No. 77 in Rajendra Gunj is the partnership firm that the Plaintiff not being the partner is not entitled for share in the suit shop?

5. Whether the Plaintiff is entitled for 1/4th share in plaint "B" schedule properties and for 1/36th share in plaint "C" schedule and for separate possession?

6. Whether the Plaintiff is entitled for rendition of accounts in respect of commission business at Sl. No. 14 of the plaint "B" schedule property?

7. What decree or order?

8. In support of his case the Plaintiff examined himself as PW.1 and got marked Ex.P1 to P7 whereas the Defendant No. 1 was examined as DW. 1 and Defendant No. 3 was examined as DW.2 and no documentary evidence were produced on their behalf. On the basis of the above material, trial court answered issue No. 1, 3, 5 & 6 in the negative and answered issue No. 2 & 4 in the affirmative and dismissed the suit of the Plaintiff with costs. Being aggrieved with the said dismissal of the suit, the Plaintiff has preferred this appeal.

9. We have heard Sri. R.A. Patil, learned Counsel for the Appellant and Sri. P.S. Malipatil, learned Counsel for the Respondents.

10. It is submitted on behalf of the Appellant/ Plaintiff that the learned trial Judge was not right in dismissing the suit of the Plaintiff by reasoning that there was an earlier partition in the year 1974 and that the Plaintiff had severed his relationship with the joint family and that with regard to the other items of joint family properties, the Plaintiff was paid a sum of Rs. 70,000/- in lieu of his relinquishment in the said properties and that the Plaintiff had constructed a house at Bangalore and there were no source of funds for putting up the said construction and therefore, the evidence of DW.1 clearly proved that the Plaintiff had indeed relinquished his right over the "B" & "C" schedule properties by accepting Rs. 70,000/- and therefore, was not entitled to maintain the partition suit. He further submits that Ex.P7 was a document under which landed properties only belonging to the joint family were partitioned and that not only the father of the Plaintiff, but his three sons were granted their shares and that after the death of the father of the Plaintiff, his properties devolved to his legal representatives as he had died intestate and hence he had a right to 1/36th

share in the "C" schedule properties also which aspect was also not appreciated by the learned trial Judge. He therefore, requests this Court to re-appreciate the evidence and grant the relief sought in the suit by setting aside the judgment and Decree passed by the trial court.

11. Per contra, it is submitted on behalf of the Respondents that the Plaintiff was granted his share of the properties as per Ex.P7 and as far as the other properties are concerned, which are admittedly joint family properties, the Plaintiff was given a sum of Rs. 70,000/- in lieu of his share in the said properties and that the rest of the family continued to be a joint family, but as far as the Plaintiff was concerned, he had separated from the joint family and therefore, had no right to maintain a suit for partition and separate possession in respect of "B" & "C" schedule properties. Learned Counsel further contends that the firm which was being run from the joint family was closed and that there was no business was carried on and without ascertaining the true facts, the Plaintiff had sought untenable reliefs by including several items in "B" & "C" schedule of the plaint. He therefore submits that the judgment passed by the trial court does not call for any interference and hence the appeal ought to be dismissed.

12. Having heard the learned Counsel on both sides, the following points arise for our consideration:

1. Whether the Plaintiff is entitled to maintain the suit for partition in respect of "B" &

1. Whether the Plaintiff is entitled to maintain the suit for partition in respect of "B" & "C" schedule properties?

2. Whether Ex.P7 effected a complete partition of the joint family properties of the Plaintiff and Defendants?

3. If the answer to above points are in the affirmative, then whether the Plaintiff is entitled to the reliefs sought for in the suit?

13. It is not in dispute that the Plaintiff and the Defendants constituted a Hindu Joint Family and were owning and in possession of several immovable properties as well as movable properties as well as a business concerned. It is also not in dispute that by virtue of Ex.P7, Kartha of the family at that point of time namely late Shanthanagouda and his sons entered into a memorandum of partition whereby due to old age of the kartha and due to differences which had arisen between his sons, partition was effected in April 1970 and immovable properties shown at schedule "A" to "D" of Ex.P7 were divided amicably between late Shanthanagouda and his three sons and it was also agreed between them that they could effect transfer of patta and be in exclusive possession of the said properties. Subsequently, the said partition was recorded in the form of Ex.P7 and each of parties to Ex.P7 realized his interest in the properties allotted and assigned to the other parties and retained the properties allotted to each party as absolute owner. Schedule A, B, C and D of Ex.P7 are the properties which fell

to the share of late Shanthanagouda, Basavarayappa Mali Patil, Pampanagouda and Umapathi respectively. From the documents it becomes apparent that the partition between the kartha and mate members of joint family was in respect of the immovable properties only. Hence the said partition has to be viewed as a partial partition and not a partition of the entire joint family properties.

14. Apart from Ex.P7 the Plaintiff has produced Ex.P1 to P4 which are the record of right extracts, Ex.P5-Mutation extract, Ex.P6 is the office copy of the legal notice with acknowledgment due slips as Ex.P6(a), (b) & (c) and a photo copy of the partition deed is at Ex.P7. In support, of these documents PW.1 the Plaintiff has stated that the properties at schedule "A" are the joint family properties and that there was a partial partition in respect of the landed properties only which took place in the year 1970 and the same was recorded and registered in the year 1974 vide Ex.P7 and has also stated about the lands which were allotted to him. Apart from the landed properties, the joint family was carrying out Commission Agency business at Gunj area, Raichur which was continued even after the death of his father and that his father died intestate. Therefore, he has a share in the properties which fell to the share of his father. The Defendants 2 & 3 were looking after the business after the death of his father and they have failed to give accounts despite several demands made by him and therefore, he has the right to seek his share in the joint family properties that were not partitioned between the years 1970-74. In cross-examination he has admitted that he had joined Government service in the year 1962 and that after the partition of 1974, his father was cultivating the land allotted to his share and pay the earnings out of the said lands to him. He had purchased a house in the year 1980 at Bangalore. The business that was carried on at Shop No. 97 was not a partnership business, but it was a joint family business and that he had obtained loan from the government and purchased the house for a sum of Rs. 90,000/- and thereafter he had put up first floor on the said house and that he continued to be a member of the joint family even after the partition between the years 1970 and 1974 and that he was appointed as Tahsildar and at the time of giving his evidence, he had been promoted.

15. As opposed to this evidence, Defendant No. 1 who was about 72 years of age has deposed that the Plaintiff was separated from Defendant No. 2 & 3 and herself and that the Plaintiff had demanded his share in the joint family property and he had taken 21 acres of land and Rs. 70,000/- towards his share in the joint family properties and that after the death of her husband she and Defendants 2 & 3 were residing jointly. The Commission Agency business was carried on as a partnership firm in which her husband and Defendant Nos. 2 & 3 were partners and that she became a partner in place of her husband and said firm was dissolved six years prior to the deposition due to loss. The Plaintiff after taking his share of Rs. 70,000/- had constructed a building at Bangalore. She has also stated that the Plaintiff used to save out of his salary and constructed a house. In cross-examination she has stated that she does not know about the partition in agricultural land during 1970 nor about the registered partition deed

or that her husband was allotted certain lands at the said partition or that the Plaintiff and Defendant Nos. 2 & 3 were allotted certain other lands. She also has no knowledge of mutation being effected after the partition, but states that after the death of her husband, she got mutated the land standing in his name to her name and that her husband had given the Plaintiff a sum of Rs. 70,000/- and 21 acres of land as his share in the joint family properties. She has also states that there is no documents to show the share given to the Plaintiff by her husband with regard to 21 acres of land and Rs. 70,000/- and that the same was given to the Plaintiff by her husband. She also does not know whether Defendant Nos. 2 & 3 knew about giving the share to the Plaintiff and that a sum of Rs. 70,000/- was given in lieu of schedule "B" properties. She admits that her husband died intestate, but denies that the Plaintiff got 1/36th share in schedule "C" properties or 1/4th share in schedule "B" properties. She also admits that Commission Agency business was in existence for about 32 years and that continued even after the Plaintiff took his share. She admits that the tractor and trailer was purchased by her husband prior to the Plaintiff taking his share and denies that the partition has taken place in "B" schedule properties but Plaintiff took a sum of Rs. 70,000/- towards his share in "B" schedule properties.

16. On a combined reading of the deposition of PW.1 and Dw. 1 what emerges is that the parties herein were possessed by the joint family and that as per Ex.P7 only the landed properties were divided between the male members of the joint family and that there was no division of the other immovable or movable properties. In fact Ex.P7 does not state that the said document has effected the complete partition of the properties of the joint family. While PW.1 has stated that out of his own earnings he had purchased a house at Bangalore and thereafter put up construction as he was employed as government servant since the year 1962. DW. 1 has admitted that there is no document regarding the share given to the Plaintiff about 21 acres of land and Rs. 70,000/- . She has also admitted that her husband died intestate and thereafter she has got her name mutated in respect of the lands that were standing in his name, but at the same time feigns ignorance about Ex.P7. She has also admitted that Commission Agency business was in existence for about 32 years and after the death of her husband she has been one of the partners in the said business. Under the circumstances it has to be held that the evidence of DW.1 is full of contradictions and inconsistencies and contrary to the documents Ex.P7 which is admitted by the Defendants in their written statement.

17. The joint family is the normal condition of the Hindu Society and every such family is ordinarily joint not only in estate but, in food and worship. Hence a Hindu Family is presumed to be joint and burden of proving separation is upon a person alleging it. Where a Hindu Family is shown to have been once joint, the presumption is that it continues to be joint even afterwards and hence where property is shown to have been once the property of joint family, it must be presumed to continue joint till the contrary is shown.

18. The share in the ancestral estate which a coparcner has with his co-sharers would become his separate property after he separates from the joint family. In Hindu Law the father who acts as a kartha is competent to make a partition during his life by virtue of the power conferred on him and the same is binding on his sons.

19. An agreement to partition joint family property or interest and right does not require to be embodied in a deed or instrument in writing and may simply be a parole agreement. Ordinarily, in a transaction of partition negotiations are carried on orally and even finality is reached orally. But if the parties intend that the oral contract so concluded should not be binding until embodied in a document and at some subsequent stage agree to substitute a written instrument for the oral agreement, then the ultimate contract is deemed to be contained in the instrument alone and no oral evidence of its terms can be given thereafter.

20. Partition may be in general or partial. A general partition is that which is brought about in respect of the entire joint family property by all the members getting themselves separated from one another. A partial partition on the other hand, is that which takes place either in respect of only a portion of the joint family property or in respect of only some of the joint owners. Therefore, it is open to the members of the joint family to make a division and severance of interest in respect of a part of the joint estate, while retaining the rest as the properties of the joint and undivided family. Hence a partial partition between the coparceners either in respect of property only or in respect of the persons making it may be a partial partition which is permissible in law also indicates whether there is a partial partition which is proved. There is no presumption that there has been complete partition both as to parties and properties, Though a partition may be partial by mutual agreement of parties, no coparcener can enforce partial partition against the other coparceners. The suit must be one for a complete partition. The general rule is a suit for partition must comprise of the joint family properties and that all the persons interested in such property such as sharers must be main parties to the suit, but suit for partition in respect of only a portion of the property is maintainable when the other portion of the property is held jointly have already been partitioned and there is no dispute with regard to such a partial partition.

21. In this context it is relevant to refer to the decision of the Hon"ble Supreme Court in the case of *Kalloomal Tapeswi Prasad (HUP), Kanpur v. The C.I.T., Kanpur* reported in AIR 1982 SC 760 wherein the Hon"ble Supreme Court while dealing with Section 171 of the Income Tax Act which deals with total and partial partition of Hindu Undivided Family held as follows:

Under Hindu Law partition may be either total or partial. A partial partition may be as regards persons who are members of the family or as regards properties, which belong to it. Where there has been a partition, it is presumed that it was a total one both as to the parties and property but when there is a partition between brothers, there is no presumption that there has been partition between

one of them and his descendants. It is however, open to a party who alleges that the partition has been partial either as to persons or as to property to establish it. The decision on that question depends on proof of what the parties intended—whether they intended the partition to be partial either as to persons or as to properties or as to both. When there is partial partition as to property, the family ceases to be undivided so far as properties in respect of which such partition has taken place but continues to be undivided with regard to the remaining family property. After such partial partition, the rights of inheritance and alienation differ accordingly as the property in question belongs to the members in their divided or undivided capacity. Partition can be brought about (1) by a father during his lifetime between himself and his sons by dividing properties equally amongst them, (2) by agreement or (3) by a suit or arbitration....

22. in the instant case since the Respondents have admitted that as per Ex.P7 only the immovable properties or the lands were divided and they continued to be joint even after the execution of Ex.P7 and they have also admitted that suit items in "B" schedule continued to be a joint family properties. The only conclusion that can be arrived at in the instant case is that there was a partial partition as per Ex.P7 restricted to only to the lands and that the parties herein continued to remain joint in respect of the "B" schedule properties and hence the Plaintiff/ Appellant is entitled to 1/4th share in the said schedule property.

23. Another aspect of the case is with regard to the light of the Plaintiff to the "C" schedule properties in the partition that took place in the year 1970 which was registered in the year 1974, "C" schedule properties were allotted to the Plaintiff's father. He died intestate and the question that now arises is with regard to the succession to the said properties since any property, which falls to the share of a coparcener, at a partition is his separate property unless he has undivided sons or grand-sons. The said separate property would have to be succeeded to in terms of the Hindu Succession Act as per Section 8 & 9 of the said Act. u/s 8 of the said Act, the class-I heirs take amongst themselves jointly and equally a share in the property of a divided coparcener. Therefore, the Plaintiff along with the Defendants is jointly entitled to equal share in the "C" schedule properties by way of succession and not by way of partition since the Plaintiff's father died intestate. Therefore, the Plaintiff is entitled to 1/36th share in the "C" schedule properties.

24. Thus the Plaintiff is entitled to 1/4th share in respect of "B" schedule property and further the Plaintiff is entitled 1/36th share along with the Defendants in 1/4th share of the father of the Plaintiff with regard to "B" schedule properties.

25. In view of the above reasons we set aside the judgment and Decree passed by the learned Prl. Civil Judge. Raichur and grant the reliefs Sought by the Appellant in the suit by allowing this appeal. Keeping in mind the relationship between the parties, the parties to bear their own costs.