

(2015) 09 KAR CK 0046
In the Karnataka High Court
Case No : Regular First Appeal No. 454/2013

T.V. Shankaranarayana and Others

APPELLANT

Vs

Kempamma and Others

RESPONDENT

Date of Decision : 14-09-2015

Acts Referred:

Citation : (2015) 09 KAR CK 0046

Hon'ble Judges : H. Billappa, J.

Bench : Single Bench

Advocate : C.R. Gopala Swamy, Advocate, for the Appellant; D.G. Chinnappagowda, Advocate, for the Respondent

Judgement

H. Billappa, J.—This appeal by the appellants is directed against the judgment and decree dated 19.12.2008 passed by the XXII Addl. City Civil Judge, Bengaluru, in O.S. No. 7929/2006.

2. By the impugned judgment and decree, the Trial Court has decreed the suit of the plaintiff granting 1/6th share in the suit schedule property and holding that the plaintiff is entitled for 1/6th share in the rental income received by the 1st defendant till the date of the decree.

3. Aggrieved by that, the appellants 1 and 2 have filed this appeal.

4. The 1st respondent is the plaintiff. The respondents 2 to 6 are the defendants 2 to 6 before the Trial Court. The appellants 1 and 2 were not parties before the Trial Court. They are the L.Rs of the deceased 1st defendant.

5. The parties will be referred to with reference to their rank in the original suit O.S. No. 7929/2006.

6. Briefly stated the facts are:

The 1st respondent-plaintiff filed suit in O.S. No. 7929/2006 for partition and separate possession of the suit schedule property. The defendants 1 to 6 are the

children of the plaintiff. It is stated, the plaintiff and the sons and 1st defendant were living together in the house where the 1st defendant is residing at present. The front house was given to T.V. Gopal by the husband of the plaintiff. After selling the same Gopal shifted to Kengeri. After the death of the plaintiff's husband, the katha of the property bearing No. 113A situated at Vinayaka Extension, Chamarajpet, Bengaluru was transferred to the plaintiff's name. The plaintiff was paying the tax.

7. It is stated, the plaintiff, 1st defendant and his family members were residing together in the II Floor of the house. The plaintiff was looked after by the wife of the 1st defendant with affection for about one year after the death of the plaintiff's husband. Thereafter, she started harassing the plaintiff which caused mental torture to the plaintiff. The plaintiff came out of the house.

8. It is stated, the plaintiff's husband is the absolute owner of the suit schedule property and he died intestate on 16.8.1988. The plaintiff is entitled for equal share in the suit schedule property. The plaintiff is also entitled for 50% of the mesne profits. When the plaintiff demanded her share of the rent, it was refused. Thereafter, legal notice dated 4.8.2006 was sent. It was returned with a shara ? party left the address". Thereafter, the plaintiff filed suit for partition and separate possession of the suit schedule property.

9. The 1st defendant has filed his written statement contending that his father Sri. T. Venkateshaiah had purchased the entire property bearing Municipal No. 7 situated at Vinayaka Extension, K.G. Nagar, Bengaluru measuring 20" x 60" through registered sale deed dated 7.5.1948 for a valuable consideration. The said Sri. T. Venkateshaiah died intestate on 16.8.1988 leaving behind his wife Smt. Kempamma i.e., the plaintiff and sons Sri. H. Ramaswamy, Sri. T.V. Gopal, Sri. T.V. Shankaranarayana (defendant No. 1) and his five daughters who are defendants 2 to 6 as his legal heirs.

10. It is stated, during the life time of his father, the suit schedule property and the other family properties were partitioned orally in the year 1984 between the family members. In the said partition, a portion of the property bearing Municipal No. 7 had fallen to the share of Sri. T.V. Gopal, the brother of the 1st defendant. Another portion of the property bearing Municipal Old No. 7, New No. 113/4 measuring 17" x 21" had fallen to the share of the 1st defendant. It is stated, since then the 1st defendant has been in physical and legal possession of the said property as its absolute owner. It is stated, in the oral partition in the year 1984 the joint family property bearing No. 39 in Sy. No. 63 of Laggere Village, Yeshwanthapura Hobli, Bengaluru North Taluk had fallen to the share of the 1st defendant and his brother Sri. H. Ramaswamy and they are in possession and enjoyment of the same as absolute owners.

11. It is stated, during the life time of Sri. T. Venkateshaiah, the 1st defendant, his brother Sri. Ramaswamy have jointly released and relinquished their right, title and interest in respect of portion of the property bearing No. 7, situated at

K.G. Nagar measuring 17" x 21" in favour of Sri. T.V. Gopal who is the second son of late Sri. T. Venkateshaiah by means of release deed dated 7.2.1986 registered on 17.2.1986. The defendants 2 to 6 have given their consent for partition of the joint family properties and they have no right, title and interest in the property.

12. The 1st defendant contends that the property situated at Laggere allotted to the share of Sri. H. Ramaswamy was purchased out of the joint family funds in the name of Smt. Kempamma by the defendant No. 1, his brother and father.

13. It is stated, a portion of the property bearing Municipal No. 7 situated at Vinayaka Extension, K.G. Nagar, Bengaluru having fallen to the share of Sri. T.V. Gopal under the release deed dated 7.2.1986 has sold in the year 1997 in favour of Sri. B.R. Kumar for a valuable consideration as absolute owner.

14. The 1st defendant acquired the suit schedule property in the oral partition in the year 1984. He has constructed new building in the suit schedule property after demolishing the old structure by raising hand loans and by mortgaging the ground floor and first floor and from other sources of his own funds. Neither the plaintiff nor the other defendants and Sri. H. Ramaswamy and Sri. T.V. Gopal possess any right, title or interest in the suit schedule property. The suit schedule property has fallen to the share of 1st defendant in the oral partition in the year 1984. He has put up construction in the year 1997-98 consisting of ground floor, first floor with RCC roof and 2nd floor with asbestos sheet roof by spending Rs. 8,00,000/- by raising hand loan and also by pledging jewellerys and by mortgaging ground floor under mortgage agreement dated 1.12.1997 in favour of Sri. Govinda Setty for a sum of Rs. 1,75,000/- and mortgaging first floor under mortgage agreement dated 12.4.1998 in favour of Sri. S.G. Parthasarathy for a sum of Rs. 1,75,000/-.

15. It is stated, the 1st defendant after redeeming the mortgage and vacating ground and first floors by the mortgagees Sri. Govinda and Sri. S.G. Parthasarathy, the 1st defendant has mortgaged the ground floor in favour of Sri. A. Balaraj under mortgage agreement dated 19.6.2003 for a sum of Rs. 2,10,000/- and first floor in favour of Sri. Thulasidasi. G. Shanubhog under mortgage agreement dated 28.5.2004 for a sum of Rs. 2,10,000/-. The 1st defendant, his family members including the plaintiff have been residing in the second floor portion. It is stated, the 1st defendant and the plaintiff have jointly approached Sri. A. Balaraj and Sri. Thulasidasi. G. Shanbhog and they have executed the lease agreement in respect of the ground and 1st floor for rent at the rate of Rs. 2,500/- per month each for the purpose of applying for loan in the National Co-operative Bank, Basavanagudi, Bengaluru. It is stated, the 1st defendant was not getting any rent in the suit schedule property as the lease agreement dated 25.5.2006 executed by Sri. A. Balaraj and Sri. Thulasidasi. G. Shanbhog were prepared for the purpose of raising loan from National Co-operative Bank, Basavanagudi, Bengaluru and they have not paid any rent to him.

16. It is stated, though the suit schedule property has fallen to the share of the 1st defendant, katha and other revenue records stand in the name of the plaintiff. It is stated, Sri. H. Ramaswamy and Sri. T.V. Gopal are not made parties to the suit. The suit is barred by limitation. There is no cause of action for the suit. Therefore, the 1st defendant has prayed for dismissal of the suit.

17. The defendants 3, 5 and 6 have jointly filed separate written statement admitting the relationship and contending that they are entitled for equal share in the suit schedule property under the provisions of the Hindu Succession Act.

18. The defendants 2 and 4 have been placed ex parte.

19. The Trial Court has framed the following issues:

1. Whether the plaintiff proves that the suit schedule property is the joint family property of herself and the defendants?

2. Whether the plaintiff proves that her husband T. Venkateshaiah, who is the absolute owner of the suit schedule property died intestate?

3. Whether the plaintiff proves that she is entitled for partition and separate possession of her legitimate share in the suit schedule property?

4. Whether the 1st defendant proves that there was an oral partition in the year 1984 and in that oral partition the suit schedule property has fallen to his share?

5. Whether the 1st defendant proves that he has put up construction of a new building by demolishing the old one by spending Rs. 8,00,000/- by raising hand loan, pledging jewels and mortgaging the property as contended in Para 5 of written statement?

6. What decree or order?

20. On appreciation of the evidence on record, the Trial Court has answered issue Nos. 1 to 3 in the affirmative, issue Nos. 4 and 5 in the negative and consequently has decreed the suit granting 1/6th share to the plaintiff.

21. Aggrieved by that, the appellants who are the L.Rs. of the deceased 1st defendant have filed this appeal.

22. The learned counsel for the appellants contended that the decree is an ex parte decree. The 1st defendant was represented by a counsel. The counsel has retired from the case. There was no opportunity for the 1st defendant to lead his evidence. After the decree was passed in the final decree proceedings, the L.Rs. of the 1st defendant i.e., the appellants have come on record. Thereafter, the appellants have challenged the decree. Having regard to the nature of defence taken by appellants the 1st defendant, an opportunity needs to be given to the appellants to establish their case. He also submitted that I.A. No. 2 of 2013 has been filed by the appellants for additional evidence which clearly show that the other sons of Sri. T. Venkateshaiah had executed release deeds and there was earlier partition. Therefore, the judgment and decree may be set aside and the

matter may be remitted to the Trial Court for reconsideration by giving opportunity to the appellants to lead their evidence.

23. Further he submitted that the appellants and respondents 1, 2, 4 and 6 have filed compromise petition and suitable orders may be passed.

24. The learned counsel for the respondents 1, 2, 4 and 6 submitted that the parties have compromised the matter and therefore, accepting the compromise, the suit may be dismissed.

25. The learned counsel for the respondents 3 and 5 submitted that the suit schedule property was self acquired property of Late Sri. T. Venkateshaiah. All the L.Rs. are entitled for a share. The respondents 3 and 5 being the L.Rs. of Sri. T. Venkateshaiah are entitled for a share along with the other legal heirs. The judgment and decree does not call for interference. The other details can be worked out in the final decree proceedings. In case, if this Court remands the matter, then, opportunity may be given to the defendants 3 and 5 to lead their evidence.

26. I have carefully considered the submissions made by the learned counsel for the parties.

27. It is relevant to note, the plaintiff i.e., the 1st respondent who is the mother of respondents 2 to 6 and 1st defendant had filed suit in O.S. No. 7929/2006 for partition and separate possession of the suit schedule property. According to the plaintiff, the suit schedule property belonged to her husband and after his death, the katha of the suit schedule property was transferred in the name of the plaintiff and she has been paying the tax. She is also entitled for a share in the suit schedule property.

28. The 1st defendant has contended that there was oral partition in the year 1984. The suit schedule property fell to the share of the 1st defendant. He has improved the property by spending huge amount and also by borrowing the amount. His brothers have executed release deeds relinquishing their right. The suit schedule property is the exclusive property of the 1st defendant and the other heirs of Sri. T. Venkateshaiah are not entitled for any share.

29. The defendants 3, 5 and 6 have filed their written statement admitting the relationship and contending that they are also entitled for a share along with the other legal heirs.

30. The Trial Court considering the material on record has held that the plaintiff is entitled for 1/6th share. The appellants and respondents 1, 2, 4 and 6 have filed compromise petition before this Court. They have also admitted the terms of the compromise petition. The defendants 3 and 5 have resisted the compromise petition contending that they are also entitled for a share.

31. The learned counsel for the appellants brought to the notice of the court the Memo filed by the defendants 3, 5 and 6 before the Trial Court stating that they

have no objection to grant their share to the plaintiff who is their mother. Further, the learned counsel for the appellants contended that the 1st defendant has contended that there was prior partition in the year 1984 and the suit schedule property has fallen to the share of the 1st defendant. The counsel for the 1st defendant has retired from the case. Thereafter, there was no opportunity for the 1st defendant to lead his evidence. The order sheet shows that the counsel for the 1st defendant has retired from the case and the 1st defendant has not led any evidence. Before this court L.A. has been filed for additional evidence. The 1st defendant has contended that there was prior partition and in the said partition suit schedule property had fallen to his share and he has improved the property and the others have no right in the suit schedule property which needs to be considered on merits. The defendants 3, 5 and 6 have filed a memo stating that their shares can be allotted to the plaintiff. Now, the defendants 3 and 5 contend that the memo was filed due to certain assurance and they are entitled for a share. There was no opportunity for the 1st defendant or his L.Rs. who are the appellants before this court to lead their evidence. In the circumstances, I consider it proper to remit the matter for reconsideration by giving opportunity to the parties to lead their evidence. No doubt, the appellants and respondents 1, 2, 4 and 6 have filed compromise petition before this court. It is resisted by defendants 3 and 5. Further, the matter requires reconsideration. In the circumstances, the compromise between the appellants and the respondents 1, 2, 4 and 6 cannot be accepted. It is rejected. However, it is left to the parties to compromise the matter before the Trial Court, if they want.

32. In the above circumstances, the appeal is allowed and the impugned judgment and decree passed by the Trial Court in O.S. No. 7939/2006 is hereby set aside. The matter is remitted to the Trial Court with a direction to reconsider the same by giving opportunity to the appellants and also the other parties to lead their evidence. The contention of the defendants 3 and 5 regarding the memo filed by them before the Trial Court on 27.11.2008 is concerned, it is left open to be considered by the Trial Court.

33. The learned counsel for the appellants submitted that the appellants have deposited a sum of Rs. 2,50,000/- and a sum of Rs. 30,000/- has been released in favour of the 1st respondent and the balance amount of Rs. 2,20,000/- may be released in favour of the 1st appellant. Accordingly, the 1st appellant is permitted to withdraw Rs. 2,20,000/- deposited in this case.

34. The parties are directed to appear before the Trial Court on 2.11.2015 without further notice from the Trial Court.

I.A. 2/2013 for additional evidence is disposed of permitting the appellants to lead their evidence before the Trial Court.

Send back the records.