

Ambawwa and Others Vs. Sharanappa and Others

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Court : Karnataka Gulbarga

Decided On : Feb-25-2014

Judge : A.S. Pachhapure

Appeal No. : Regular First Appeal No. 1678 of 2007

Appellant : Ambawwa and Others

Respondent : Sharanappa and Others

Judgement :

(Prayer: This Rfa Is Filed Under Section 96 Of CPC Against The Judgment And Decree Dated 02.04.2007 Passed In Os No.84/2005 On The File The li Addl. Civil Dudge (Sr.Dn) Gulbarga Dismissing The Suit For Partition And Separate Possession.)

1. The appellants have challenged tne judgment and decree dismissing their suit for partition and separate possession of their l/3rd share in the suit property, the agricultural land described in para 2 of the plaint.

2. The facts relevant for the purpose of this appeai are as under:

Parties will be referred as per their rank be-Fore the Trial Court for the sake of convenience.

The appellants herein are the LRs of first plaintiff and the second plaintiff. Defendants 1 and 3 are the cousin brothers of deceased plaintiffs 1 and 2. Devappa is the propositus who had three sons, the first one is Hunchappa and defendant No.3 is the person who represents the branch of Hunchappa. The second is Bhimarma and the first defendant represents his branch.. The plaintiffs are the daughters of Irappa, the third son of Devappa and they represent the third branch. The family owned the suit Sy.Nos.31 and 32 and the plaintiffs instituted the present suit seeking their 1/3rd share in the suit property bearing Sy.No.31 measuring 36 acres 27 guntas described in para 2 of the plaint. It is their contention that it is the ancestral joint family property and there is no partition. It is also averred that they have joint 1/3rd share in the suit property. As the defendants did not grant their share, the present suit came to be instituted seeking partition and separate possession of their share.

The third defendant has filed his written statement denying the averments made and it is contended that 4 acres of land in the suit property has been sold by the first defendant to the second defendant. It is his specific contention that there was a registered partition between the parties and the suit property fell to the share of defendant Nos.1 and 3. Defendant No.1 is said to have sold 4 acres of land for the legal necessity of joint family. He has referred to the dispute relating to the mutation entry in the record of rights and the pendency of proceedings in the office of Deputy Commissioner,' He has taken up a contention that as there was a partition earlier, the question of giving the share to the plaintiffs does not arise.

The second defendant has filed his written statement and he claims that 4 acres of land out of the suit property has been sold to him for legal necessity of the joint family under the registered sale deed dated 03.07.1991 for a valid consideration and his name is entered in the records. In addition to this, he has taken up a defence referring to the ROR proceedings,. On the aforesaid grounds, the defendants have sought for dismissal of the suit.

On the basis of these pleadings, the Trial Court framed the following issues:

"1. Whether the plaintiffs prove that the suit property is being jointly cultivated by them alongwith defendant Nos.1 and 3 and crops are being distributed among

themselves?

2) Whether the defendant No.3 proves that there was a partition between himself, plaintiffs and defendant No.1 under a registered partition deed dated 10.11.1970?

3) Whether the defendant No.3 proves that the defendant No.1 has sold 4 acres of land in suit land to the defendant No.2 for his legal necessities?

4) What order or decree?"

The first plaintiff was examined as PIAI and a witness PW2 and in their evidence, Exs-P1 to P8 were marked. The defendants examined Dws.1 to 8 and got marked documents Exs.D1 to D13. After hearing the counsel and on appreciation of the evidence on record, the suit came to be dismissed holding that there was a partition earlier. Aggrieved by the judgment and decree of the Trial Court, the present appeal was filed by the plaintiffs,.

During the pendency of this appeal, the first appellant died and his LRs are brought on record. The application was filed under the provisions of Order 41 Rule 27 CPC seeking permission to produce certified copy of the judgment and decree in OS No.283/1999 and the copy of judgment in RSA 7037/2011. The memo has been filed stating that the appellants do not press the claim as regards the sale of 4 acres of land by defendant No.1 to the second defendant under the registered sale deed dated 03.07.1991. Counsel for the respondents submit that in case if for any reason IA under Order 41 Rule 27 CPC is allowed, he does not have further evidence to be led.

3. In the aforesaid circumstances, I have heard the counsel -For both the parties.

4. The points that arise for my consideration are:

"1) Whether the appellants are entitled to i/3rd share in the suit property?

2) Whether IA filed under the provisions of Order 41 Rule 27 CPC deserves to be allowed?

3) Whether any grounds are made out to interfere with the impugned judgment and decree?"

5. Learned Counsel for the appellants submit that there was no partition earlier and despite the fact that there is a finding about the invalidity of the registered partition deed, the Trial Court has ignored this fact and committed an error in dismissing the suit holding that there was a partition earlier. Ho submits that as the suit property is an ancestral joint family property, and as the plaintiffs represent one branch amongst three, they are entitled to 1/3rd share in the suit property excluding the land which has been sold by the first defendant to the second defendant.

6. On the other hand, learned Counsel for the respondents supports the judgment and decree of Trial Court.

7. It is not in dispute that the suit property is the ancestral joint family property. The only question to be determined is as to whether there was a partition earlier as contended by defendants in the written statement. On this aspect of the matter, it is relevant to note that the deed of partition has been produced by the defendants at Ex.D10. Ex.D10 the registered partition is dated 13.08.1970. Perusal of the contents of partition deed produced at Ex.D¹⁰ would clearly indicate that there was a partition in respect of the land bearing Sy.No.32. There is no reference of suit property in the partition deed.

8. That apart, the suit came to be instituted in OS No.314/80 by plaintiffs seeking the relief of declaration that the land bearing Sy.No.32 is their exclusive property and also for injunction. The exparte decree of injunction was granted and the certified copy of decree has been produced at Ex.D10, the copy of judgment is at Ex.D6, the copy of plaint has been produced at Ex.D5. So in view of this decree, the plaintiffs were held to be the absolute owner of Sy.No.32. This decree was challenged by defendants 1 and 3 in OS 283/1999.

This suit came to be dismissed. The copy of plaint has been produced at Ex.D8 and that of the written statement is at Ex.D9. The copy of judgment and decree in this suit have been produced for the first time in the appeal by filing the application

under the provisions of Order 41 Rule 27 CPC.

9. Perusal of this judgment would indicate that the suit instituted by the first defendant came to be dismissed. The first appeal was also dismissed and also second appeal and the certified copy of the judgment and decree in RSA 7037/2011 has been produced alongwith the application which reveals that dismissal of suit was affirmed by this Court. In view of this judgment and decree, the decree obtained in OS No.314/1980 has attained finality.

10. That apart, perusal of the judgment and decree in OS No.283/1999 would reveal that the Court had framed issue No.3 which is extracted hereunder:

"3. Whether the plaintiff further proves that the suit property was partitioned by the parties under a registered partition deed dated 13.08.1970 as alleged?"

This issue has been answered in 'Negative' holding that the registered partition deed dated 13.08.1970 was not proved. The LRs of defendant No.3 were The plaintiffs in the suit whereas the third defendant in the-: said suit is the first defendant in this suit. This decree which has been attained finality is binding on the parties. Wren once it is held by the Court in OS No.283/1999 that there was no partition under the partition deed dated 13.08.1970, this question cannot be considered again in a subsequent suit i.e., in the present suit and this contention is hit by principle of res- judicata.

11. Perusal of the judgment in OS No.283/1999 would clearly indicate that issue was raised on the basis of pleadings and it was decided after hearing both the parties. So when once it is held that there was no partition, defence put forth by defendants 2 and 3 in the written statement cannot be accepted. Apart from this defence, there are no other contentions raised by the defendants. In the aforesaid circumstances, the plaintiffs were entitled to their share in the suit property as there is no dispute about property being the ancestral property.

12. An application filed under Order 41 Rule 27 CPC is only to produce the certified copy of judgment and decree in the suit bearing OS No.283/1999 and judgment and decree in the second appeal disposed of by the Court affirming the

decree of the Trial Court. Production of these documents would be necessary to do justice to the parties as the parties to this suit were also parties to the said suit. Mere delay in production does not come in the way in allowing this application. Therefore, by allowing the said application, the judgments are considered and as there is no counter evidence to be produced, I do not find any grounds to remit this matter for fresh consideration.

13. The Trial Court has lost sight of the fact that there was an issue raised in OS 283/1399 probably for the reason that certified copy of the judgment and decree was not produced. If this document had been produced before the Trial Court, I think it could have granted a decree in favour of the plaintiffs. In view of the production of documents by filing an application under Order 41 Rule 27 CPC and perusal of the same would reveal that the plaintiffs have 1/3rd share in the suit property. So far as the property which has been sold by defendant No.1 in favour of defendant No.2 to an extent of 4 acres in the suit Survey number is concerned, the appellants have filed a memo stating that they do not challenge the said sale deed or claim any share in the suit property. In view of this memo, the appellants are entitled to 1/3rd share in the remaining property excluding 4 acres out of the suit property i.e., after deducting 4 acres remaining portion will be 32 acres and 27 guntas. To the extent of their 1/3rd share, the plaintiffs are entitled to a decree in their favour. Accordingly, points 1 to 3 are answered in 'Affirmative-'.

Consequently, IA No.1/2014 is allowed and the appeal is allowed in part. The judgment and decree impugned in this appeal is set aside.

The suit of the plaintiffs is decreed in part and they are entitled to 1/3rd share in the suit property excluding 4 acres of land sold by defendant No.1 to defendant No.2. i.e., only cut of the remaining land measuring 32 acres 27 guntas, in the suit survey number.

Draw a decree accordingly.

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