

**Kallappa Vs. Mallamma and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/1173095](http://sooperkanoon.com/1173095)

**Court :** Karnataka Dharwad

**Decided On :** Jun-05-2014

**Judge :** A.V. Chandrashekara

**Appeal No. :** R.S.A.No. 5026 of 2011 (PAR)

**Appellant :** Kallappa

**Respondent :** Mallamma and Others

**Judgement :**

(Prayer: This Appeal Is Filed Under Section 100 Of Cpc., Against The Judgment And Decree Dated 19.11.2010 Passed In R.A. No.14/2010 On The File Of The Senior Civil Judge At Kudligi, Allowing The Appeal, Filed Against The Judgment Datd 22.01.2010 And The Decree Passed In O.S. No.31/2004 On The File Of The Civil Judge And Jmfc., Kudligi, Decreeing The Suit Filed For Partition And Separate Possession.)

1. Plaintiff of an original suit bearing O.S. No.31/2004 pending on the file of the Court of Civil Judge (Jr.Dn.), Kudalagi, Bellary District is before this Court. Respondents are the defendants No.1 to 8 in the suit. Parties will be referred to as plaintiff and defendants No.1 to 8 as per the ranking given in the trial Court. Suit was filed for the relief of partition and separate possession by the plaintiff and the suit was contested by the defendants by filing written statement.

2. On the basis of the pleadings the trial Court has framed the following 8 issues for its consideration:

## **ISSUES**

1. Whether the plaintiff proves that the plaint schedule properties are the joint family properties of the plaintiff and the defendants?
2. Whether the plaintiff proves that there is no partition between the plaintiff and the defendants and between their ancestors in respect of the plaint schedule properties?
3. Whether the defendant No.4 proves that already a partition has taken place about 80 years ago amongst the sons of Danappagala Basappa as pleaded by her in para-9(C) of her written statement?
4. Whether the defendant NO.4 further proves that the properties situated in Hanumavva Nagathihalli village of Jagaluru Taluk have to be included in this suit?
5. Whether the defendant No.4 proves that this Court has no pecuniary jurisdiction for the reasons stated in para-9 (a) of her written statement?
6. Whether the plaintiff proves that he is entitled for 1/4th share in the plaint schedule properties?
7. Whether the plaintiff is entitled for partition and separate possession?
8. What order or decree?

(Issues No.5 shall be tried as a preliminary issue)

3. Plaintiff is examined as PW.1 and 8 exhibits have been got marked on his behalf. On behalf of defendants, three witnesses have been examined and 70 exhibits have been got marked. Ultimately, suit came to be decreed granting 1/4th share in the suit schedule properties to be divided through the process of Court by appointing the Court Commissioner as provided under Section 54 of C.P.C.

4. The said judgment and decree dated 21.01.2010 was challenged by filing of an appeal under Section 96 of C.P.C. in R.A. No.14/2010 before the Court of Senior Civil Judge at Kudligi. The said appeal has been allowed and the judgment passed by the trial Court is set aside. Consequently, suit is dismissed.

5. After hearing the learned Counsel for the appellant and perusing the records following substantial question of law is framed by this Court:

"Whether the 1st Appellate Court has committed a serious error in not remanding the case to the Trial Court after having held that all the joint family properties have not been included in the suit and suit is bad for non joinder of necessary parties and thus, the judgment of the 1st appellate Court is perverse and illegal?"

6. Learned Counsel for the appellant has submitted his arguments on merits. Respondents and their counsel absent.

7. Issue No.4 framed by the trial Court is in regard to the non-joinder of necessary parties. As per issue No.4, defendant No.4 was expected to prove that properties situated in Hanumavva Nagathihalli village of Jagalur Taluk will have to be included, but that finding has been answered in the negative by the trial Court. After hearing the arguments from the learned Counsel appearing for the parties, the learned Judge of the 1st Appellate Court has held that plaintiff has not included all the properties and respondents No.2 to 8 have remained absent. According to the 1st Appellate Court, suit for partial partition is not maintainable and therefore, in a suit for partition, all the properties of the joint family and all the persons of the joint family are necessary to be included. The relevant discussion made in page No.7 of the impugned judgment in R.A. No.14/2010 is as follows:

"On the other hand the plaintiff has not included all the properties and respondent No.2 to 8 have remained absent. Accordingly the suit for partial partition without including all the properties without making all the parties is not maintainable and also the names in the RORs separately do not prove the partition. Accordingly the plaintiff has failed to prove that the suit properties are joint family properties and defendant also failed to prove that there was a partition very long back. Hence, under these circumstances unless and until all the properties of the joint family and

all the persons of the joint family and all the names of the persons in the RORs are included. The suit of the plaintiff is not maintainable. Hence the interference in the order of the trial Court is necessary. Accordingly the appeal is to be allowed. Hence, I answer the point No.1 in the affirmative."

9. The Court dealing with a partition suit should give an opportunity to the plaintiff to include all necessary properties and all persons who are necessary parties. If Court comes to the conclusion that some more properties have been left out, nothing comes in the way of the Court to direct the concerned party to include the properties. The purpose of holding judicial proceedings is to ascertain the truth and do justice between the parties. Courts are not umpires so as to allow the contest develop and ultimately to decide as to who has won and who has lost.

10. A Division Bench of this Court in the case of Subbanna Vs Kamaiah reported in ILR KAR 1988(2) 786 has specifically held that that Rule 9 of Order 1 of C.P.C. specifically provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties and therefore the Court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. Sub- rule (2) of Rule 10 of Order 1 C.P.C., empowers the Court to direct the plaintiff to add a person to the suit who ought to have joined whether as plaintiff or defendant whose presence before the Court is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit.

11. In paragraph 42 of the decision rendered by the Hon'ble Supreme Court in A.Shanmugam Vs Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam reported in AIR 2012 SC 2010, it is pointed out that in Civil cases, adherence to Section 30 CPC would also help in ascertaining the truth and do justice between the parties.

12. When the First Appellate Court has come to the conclusion that certain persons have to be added as necessary parties for effectively deciding the matter in controversy and when there are some more properties to be included, nothing came in the way of the First Appellate Court either to direct the parties to rectify those mistakes by directing necessary parties to come on record and by including

all the properties or remanding the matter to the trial Court to add necessary parties and to do all efforts necessary for effectively deciding the matter. Having not done so, the judgment of the First Appellate Court is not sustainable.

13. Even otherwise, the First Appellate Court has all the trappings of the trial Court dealing with the original suit. The matter is of the year 2004 and it is not prudent to remand the matter to the trial Court. on the other hand, it would be better if the matter is remanded to the First Appellate Court, who has all the trappings of the Civil Court dealing with the suit, more particularly, being presided over by a relatively the experienced Judge.

14. Hence, the First Appellate Court has committed a serious error in remanding the matter after having held that all the joint family properties have not been included in the suit. Hence, substantial question of law is answered in the affirmative. Hence, matter is to be remanded to the First Appellate Court.

## **ORDER**

Appeal is allowed. Matter is remitted to the First Appellate Court i.e. the Court of Civil Judge (Sr.Dn.) Kudligi to direct the plaintiff to implead all the necessary parties and to bring all the properties. The parties to appear before the First Appellate Court on 31.07.2014 without fail and thereafter, the parties to cooperate with the Court to dispose of the matter at the earliest.

Defendant shall specifically mention as to which property is to be included and who are the necessary parties to be included for effective determination the dispute in question. Thereafter, plaintiff shall take suitable steps without consuming much time. The learned Judge of the First Appellate Court shall make an endeavour to dispose of the matter on or before 31.03.2015 without fail.

There is no order as to costs.