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Court : Karnataka Dharwad

Decided On : Jun-23-2015

Judge : Ravi Malimath &Amp; P.S. Dinesh Kumar

Appeal No. : Regular First Appeal No. 3129 of 2011

Appellant : Shashikanth and Another

Respondent : Devaru and Others

Judgement :

1. Aggrieved by the judgment and decree dated 9-11-2009 in O.S.No.198 of 2005 passed by the Civil Judge (Senior Division), Sirsi in partly decreeing the suit of the plaintiff for declaration etc., the defendants 3 and 8 have filed this appeal.

2. Parties shall be referred to as per their rank in the Trial Court.

3. The case of the plaintiff is that defendants 1 to 3 are the brothers. Defendants 4 to 7 are the sisters of the plaintiff. Defendant 8 is the wife of defendant 3 and they are members of the Hindu undivided family. The suit schedule properties are the joint family properties and therefore, the plaintiff and defendants have a share in that. The plaintiff and defendants 1 to 3 have 9/40th share and defendants 4 to 7 have 1/40th share. The propositus of the family Ganapati Ramayya Hegde died on 18-2-2002 and their mother Gouramma died on 26-1-2003. The plaintiff and defendants 1 to 7 are the only legal heirs. Some of properties have been acquired from out of the income of the joint family properties. The family of the plaintiff does

not have any income other than the income of the joint family agricultural lands. Even though some of the properties were acquired by their father, they have been cultivated and developed by all the family members. After the death of their father, defendant 2 started to manage some of the suit schedule properties. Except the said properties which are in possession of the plaintiff, the other properties are in joint possession and enjoyment of the plaintiff as well as defendants 1 to 7. That the sole intention to avoid agricultural income tax, the father of the plaintiff had arranged to show that the partition between himself and his sons. Accordingly, mutation entries have been affected. At that point of time, plaintiff and defendants 1 and 2 were minor and defendant 3 was not yet born. However, the actual partition did not take place and the properties were not physically divided. When the defendant 1 demanded his share of the family properties, at the intervention of the panchayat, an agreement was entered into on 21-12-1986 and the same was signed by the plaintiff, defendants 1 to 3 and their father. They have acted upon the said agreement. Therefore, the plaintiff has legitimate share over the joint family properties. That defendants 1 to 3 are not furnishing proper accounts of the joint family income, notwithstanding the intervention by the Counsels. The plaintiff was regularly demanding his partition by metes and bounds. Applications were filed by the plaintiff as well as defendants before the Revenue Authorities to change the entries. In the interregnum, defendant 10 also moved the Revenue Authorities on the basis that his father executed a Willdated 27-8-2001 in favour of her son and Revenue Authorities have sanctioned M.E.No.1005. Two Willswere set up by defendants 1 to 8 which have not been proved. Hence, the instant suit was filed for declaration and partition. On summons being issued, defendants 2, 3 and 7 have filed separate written statements. Defendants 5 and 6 have filed a memo adopting the written statement filed by defendant 7. Defendant 4 has adopted the written statement filed by defendant 2. Defendant 8 have filed a memo adopting the written statement of defendant 3. Defendant 1 has stated in his written statement that he admits relationship. However, the other averments were denied. That even though there is partition in the year 1958, it was intended only to avoid agricultural income. Subsequently, in the year 1986, an actual partition has taken place and the parties are enjoying their respective shares since then. Defendant 1 was allotted suit Sy.Nos.1, 3, 20, 21 and he is in possession of

the same. Apart from that Sy.No.31 in CSchedule and 2 acres of coconut garden in forest Sy.No.112 was also allotted to the share of defendant. That he has encroached 30 guntas of forest land and developed his area garden. That DSchedule property does not exist. The Willexecuted by the deceased in favour of defendant 2 was challenged before the Assistant Commissioner, wherein it was held that the legal heirs of the deceased have been ordered to be entered in the records. That the father of the plaintiff has constructed two multi storage building at Sirsi. Plaintiff is in possession, but has not included in the schedule. Hence, suit is not maintainable. Defendant 2 has denied the existence of the joint family and 9/40th share of the plaintiff in the suit schedule property. All the other averments are also denied. Based on the pleadings, the Trial Court framed the following issues:

1. Whether the plaintiff proves that there still exist a joint family status in respect of suit schedule properties between himself and defendants as alleged?

2. If so, whether the plaintiff further proves that the suit schedule properties are the joint Hindu family properties of himself and defendants and till date no partition has taken place in between them in respect of the said properties as alleged?

3. Whether the plaintiff further proves that defendant 2 used to manage some of the suit properties and father of plaintiff and defendant used to look after the suit properties till his death as alleged?

4. Whether the plaintiff further proves that during 1999 there was a family arrangement in respect of the suit properties and plaintiff was given to cultivate R.S. Nos.17, 18, 19, 23 and 32 properties and partition of betta R.S.Nos.125 and 112/7 of Huvinamane Village and he was put in possession of the said properties?

5. Whether the defendant 1 prove that already there is a partition and parties to the said partition are cultivating independently of their respective properties as contended in his written statement?

6. Whether 1st defendant further proves that deceased Ganapati Ramayya Hegde died intestate and defendant 2 is managing his properties as family manager as

contended in his written statement?

7. Whether the defendant 1 further proves that, the house in possession of plaintiff is the joint family constructed by his father when the family was in joint as contended in his written statement?

8. Whether the plaintiff proves that the alleged so-called wills alleged to have been executed by his father dated 24-6-1999 and by his mother dated 27-8-2001 are the concocted, illegal, unauthorised document and hence not binding on his shares as alleged in plaint?

9. Whether the plaintiff proves that, the description of the suit properties as mentioned in the plaint as correct?

10. Whether the 2nd defendant proves that, he has invested huge funds for improvement of his properties allotted to his share as contended in his written statement?

11. Whether the 2nd defendant proves that, the suit of the plaintiff is barred by law of limitation?

12. Whether defendant 3 proves that suit is bad for misjoinder of defendant 8 as contended in her written statement?

13. Whether the plaintiff is entitled for equitable partition of his alleged 9/40th share as claimed in the plaint?

14. Whether the plaintiff is entitled for the declaration decree so prayed?

15. To what reliefs the parties are entitled to?

16. To what order or decree?

Additional issue framed on 30-10-2006:

1. Whether the defendants prove the due execution of the Will dated 24-6-1999 and 27-8-2001 by their father Ganapati Ramayya Hegde as contended in this written statement?

Additional issued framed on 11-3-2008:

1. Whether defendants 5 to 7 prove that suit of the plaintiff is barred by law of limitation as contended in their written statement?

2. Whether defendants 5 to 7 further proves that, without seeking cancellation of earlier partition, this suit is not maintainable as contended in their written statement?

3. Whether defendants 5 to 7 further proves that, the suit of the plaintiff is bad for; non-joinder necessary parties?

4. Whether defendants 5 to 7 prove that without including the properties standing in the name plaintiff acquired from the joint family income, the present suit is not tenable as contended in the written statement?

5. Whether defendant 5 to 7 prove that in case of partition they are also entitle for their legitimate share as claimed? ?

4. In support of his case, the plaintiff examined himself at P.W.1 and exhibited 47 documents. 5 witnesses were examined on behalf of defendants and 7 documents were marked on their behalf. Issues 1, 2, 3, 6, 8, 10, 13, 14 and 15 and additional issue 1 (framed on 11-3-2008) in affirmative and issues 5,7, 11 and 12, additional issue 1 (framed on 30-10-2006) and additional issues (framed on 11-3-2008) 1, 2, 3 and 4 in negative. By the impugned judgment, the suit of the plaintiff was partly decreed. It was held that the plaintiff was entitled for 1/5th share + 1/40th share in suit items 22, 24, 28 to 36. Defendants 1 to 3 were entitled for 1/5th + 1/40th share in the said properties. Defendants 4 to 7 were entitled for 1/40th share in the said properties. Claim of the plaintiff in respect of other properties were dismissed. Aggrieved by the same, defendants 3 and 8 have filed this appeal.

5. Learned Counsel for the appellants contends that the impugned judgment and decree is bad in law and liable to be set aside. That the Trial Court failed to consider the material evidence on record while wrongly decreeing the suit. That the earlier partition affecting between parties, would clearly indicate the possession of each one of the parties. Therefore, the earlier partition having been

given effect to the properties are in the respective share of the plaintiff as well as the defendants. That but for the partitions, there was no occasion for the parties to remain in separate possession of different properties. It is under circumstances, that the Trial Court committed an error in disbelieving the same while decreeing the suit of the plaintiff.

6. It is further contended that the Trial Court has recorded a finding that defendant 3 in the cross-examination has admitted that the suit items 28 and 33 are self-acquired properties of defendant 3. Therefore, having admitted the same, the suit schedule items 28 and 33 have to be held as self-acquired properties of the appellants herein. Hence, it is pleaded that the appeal be allowed and the suit be dismissed.

7. On the other hand, Sri M.G. Naganuri, learned Counsel appearing for the respondent 1 defend the impugned judgment and decree. He contends that the Trial Court has rightly considered the evidence and material on record. Having considered the same, the Trial Court has rightly decreed the suit. So far as the contention with regard to the admission made by P.W.1 is concerned, the same is incorrect. Records would show that the P.W.1 has specifically denied the suggestion that the properties were the self-acquired properties of the defendant. Hence, it is pleaded that the appeal be dismissed. The remaining respondents are served and unrepresented.

8. Heard learned Counsels and examined the records. On considering the contentions, we are of the view that the following issues arise for our consideration:

(i) Whether the Trial Court was right in law and facts is decreeing the suit of the plaintiffs based on the evidence and material lead in?

(ii) Whether the judgment and decree of the Trial Court is perverse and interference is called for?

9. Learned Counsel for the appellants contends that the only grievance in the present appeal is with reference to items 28 and 33 of the suit schedule properties.

It is contended that based on the cross-examination of P.W.1, there is a categorical admission that there two schedule properties are self-acquired properties of defendant 3. That the Trial Court in para 22 of its judgment has also narrated the same. That he has no grievance with regard to partition of the remaining properties, except items 28 and 33. That the rest of the order may be sustained. Items 28 and 33 be declared as the self-acquired properties of the defendant 3. Therefore, he contends that the appeal be allowed.

10. We have considered the lengthy contentions and have also examined the evidence on record. The Trial Court in considering the said evidence held in para 22 that P.W.1 in the course of cross-examination has admitted that the suit items 28 and 33 are the self-acquired properties of the defendant 3. We are unable to accept the finding recorded by Trial Court in para 22. There is no admission made by P.W.1 that the said properties are the self-acquired properties. In fact that was the suggestion made to P.W.1 which he has categorically denied. He has stated that items 28 and 33 cannot be said to be self-acquired properties. Therefore, the finding recorded by the Trial Court in holding that P.W.1 has admitted to the same is incorrect. The evidence is clear and cogent and does not call for any interpretation. Therefore, the finding of the Trial Court on this issue is perverse.

11. Even otherwise, if according to the view of the Trial Court if two suits schedule properties are self-acquired properties of defendant 3, in that event it should have allotted the said properties to the defendant 3, which has not been done. On the contrary, those properties were also been divided amongst the other defendants and the plaintiff. Therefore, it cannot be seen that the finding recorded by the Trial Court is erroneous. Therefore, we are of the considered view that the sole contention of the appellants would have to fail. The records would clearly show that there is no admission made by defendant 3 with regard to these two items of properties. Consequently, both the issues are accordingly answered. The judgment and decree of the Trial Court is based on a proper appreciation of the evidence and material on record.

For the aforesaid reasons, we do not find any grounds to interfere in the well-considered order. Consequently, appeal being devoid of merit, dismissed.