

Bapu Vs. Kallappa and Others

Bapu Vs. Kallappa and Others

SooperKanoon Citation : sooperkanoon.com/1185557

Court : Karnataka

Decided On : Nov-03-2016

Judge : Ravi Malimath

Appeal No. : Regular First Appeal No. 1292 of 2004

Appellant : Bapu

Respondent : Kallappa and Others

Judgement :

(Prayer: This appeal is filed under Section 96 of Civil Procedure Code against the judgment and decree dated 18.08.2004 passed in O.S. No.156 of 1989, on the file of the II Additional Civil Judge (Sr. Dn.), Belgaum, dismissing the suit for partition and separate possession.)

1. The case of the plaintiff is that he and defendants 1 to 12 are the members of a joint undivided Hindu family. Defendant No.1 is the father and Karta of the family. The family owns agricultural as well as business properties. In 1959-60, defendant No.1 and his two brothers orally partitioned the family s moveable and immoveable properties. In the year 1969, a registered partition deed was brought about. In terms of the same, the properties were allotted to the defendant No.1. Later on, the defendant No.1 purchased various properties, agricultural as well as business properties, out of the income of the joint family. Some of the properties have been sold by the defendant No.1. The plaintiff married in the year 1972 and has two

daughters. He has no male issues. Since, he did not have son, there was a bickering in the family. He left the family home in the year 1982 and shifted to a rented premises. The plaintiff issued a public notice in the daily newspaper opposing the move of the defendants for sale of certain properties. It was then that the defendant No.1 denied the right of the plaintiff over the suit schedule properties. In view of the said denial, the instant suit was filed seeking for partition and separate possession of his 1/7th share in all the suit schedule properties.

2. On service of suit summons, defendants 1 and 2 entered appearance and filed their written statement. They denied the plaint averments. They admitted the partition between defendant No.1 and his brothers. That there were only three landed properties which fell to the share of the defendant No.1. That a prior partition was effected in the year 1978 between the plaintiff and defendants. It is stated in their evidence that in terms of the said partition, property bearing Survey No.528/13 measuring 1 acre 6 guntas was allotted to the share of the plaintiff. Since the plaintiff did not want a share in the plots, including the house, a sum of Rs.21,000/- in cash in lieu of his share therein was given to him.

3. The other defendants who have filed their written statement supported the plea of the defendants 1 and 2. They contended that the properties that are sought to be partitioned by the plaintiff are not liable for partition. Since a prior partition has been effected, some of the properties have been purchased subsequent to the partition. Therefore, the claim of the plaintiff for partition cannot be accepted.

4. Defendant Nos.3 to 6 and 13 have adopted the written statement of defendant Nos.1 and 2.

5. Based on the pleadings, the trial court framed the following issues:

(1) Whether the plaintiff proves that he along with defendants 1 to 12 constitute joint Hindu family?

(2) Whether the plaintiff proves that the suit schedule properties A to D acquired out of joint family funds?

(3) Whether the plaintiff proves that the sale of land bearing RS No.439 to the 14th defendant does not bind upon him?

(4) Whether the plaintiff is entitled for partition and separate possession of his 1/7th share in the suit schedule properties?

(5) Whether the defendants 1 to 12 prove that there was partition between the plaintiff and themselves in the month of September, 1978 and that sum of Rs.21,000/has been given to the plaintiff in lieu of his share?

(6) Whether the defendants 1 to 12 prove that the plaintiff purchased the land bearing Sy.No.528/13 measuring 1 acre 6 guntas after partition as alleged?

(7) Whether the defendants prove that plot in Sy.No.14/2/11 of Angol, Chidambar Nagar, Belgaum is the self acquired property of defendant No.10 Rekha W/o. Ashok Bhendigeri and defendant No.12 Rajashree W/o. Rajashekhar Bhendigeri?

(8) Whether defendants 1 to 12 prove that the property item No.4 in B schedule is self acquired property of defendant No.8 Shanta W/o. Manik Bhendigeri?

(9) Whether the defendants 1 to 12 prove that the property item No.5 in B schedule is the self acquired property of defendant No.9 and 11?

(10) Whether defendant No.14 proves that the sale in respect of land Sy.No.439 in his favour is for legal and family necessity and that he is the bona fide purchaser?

(11) To what decree or order the parties are entitled?

6. Issue Nos.1 and 5 to 10 were held in the affirmative. Issue Nos.2 to 4 were held in the negative. The suit of the plaintiff was dismissed. Aggrieved by the same, the present appeal is filed.

7. The learned counsel for the appellant contends that the trial court committed an error in misreading the evidence and material on record. That the suit schedule properties are properties belonging to the plaintiff. Therefore, he is entitled for a share in each one of the properties. The prior partition set up by the defendants has not been proved. There is no sufficient evidence let-in by the defendants to

show that in terms of a prior partition, some property has been allotted to the plaintiff and they have also not let-in any evidence to show that the plaintiff gave up his share in the sites in lieu of receiving a sum of Rs.21,000/- in cash. That all the properties belong to the family. Hence, the plaintiff is entitled for partition in all the suit schedule properties.

8. On the other hand, the learned counsel for the respondents disputes the same. He contends that the evidence having been let-in, the prior partition has been proved. Therefore, once the partition has been proved, the plaintiff cannot maintain the suit seeking partition of the suit schedule properties.

9. Heard learned counsels and examined the material on record.

10. The following points arise for consideration in this appeal:

(i) Whether the judgment and decree of the trial court is perverse in misreading the evidence on record while holding that the prior partition has been proved by the defendants?

(ii) As a consequence whereof, whether the B schedule properties were wrongly considered by the trial court as self-acquired properties of the concerned defendants?

11. The defendants set up a plea of prior partition. They have pleaded that the partition has been effected in the year 1978. They have stated that in terms of the partition, the plaintiff has received Sy.No.528/13 measuring 1 acre 6 guntas of agricultural land. In addition, since, the plaintiff did not want a share in the house properties, in lieu whereof, a sum of Rs.21,000/- was given to him. The said amount was in lieu of his share in the house properties.

12. In order to prove their case, DW-2 i.e., defendant No.7 in his evidence has stated that after the marriage of all the three brothers, there was a quarrel among the ladies in the family. Therefore, his father effected a partition among all the three brothers in the year 1978. The landed property bearing Sy.No.528/13 measuring 1 acre 6 guntas was allotted to the plaintiff and Rs.21,000/- in cash was given to him in lieu of his share in the house property. Even in the cross-

examination, he has stated that the plaintiff expressed his desire not to have any share in the house properties and demanded cash and hence, cash was given to him.

13. DW-3 namely defendant No.9 has also narrated that the plaintiff's wife quarreled with the wives of other brothers. Therefore, there was an intervention of the elders. A partition was effected and in the said partition, the plaintiff was given Sy.No.528/13 and Rs.21,000/- cash in lieu of house property.

14. DW-4 namely defendant No.11 has stated that their father, namely original defendant No.1, purchased Sy.No.528 in the name of the plaintiff and paid Rs.21,000/- in cash towards his share.

15. DW-5 is a Pancha to the partition. He has stated that in the year 1978, there was a partition among the plaintiff and defendants. He along with other Panchas namely Sri.Paris Bharmha Patil, Sri.Chandrakant Ankle (DW-6) and Sri.Suresh Patnakar were present when the oral partition took place. Sy.No.528/13 and Rs.21,000/- cash was given to the share of the plaintiff. DW-6 is also another Pancha. He has also reiterated what is stated by DW-5. Nothing worthwhile has been elicited in their cross-examination.

16. From the evidence of DWs-2 to 6, it is clear that there was a partition between the plaintiff and defendants. In terms of the partition, Sy.No.528/13 was allotted to the share of the plaintiff. Since the plaintiff did not want a share in the house properties, a sum of Rs.21,000/- was given to him in lieu whereof. Nothing worthwhile has been elicited in the cross-examination of either one of these witnesses to disbelieve their statements. Hence, the trial court was justified in accepting the evidence and holding that the prior partition has been effected between the parties.

17. Furthermore, the evidence of the plaintiff would indicate that ever since the plaintiff was put in possession of the land bearing Sy.No.528/13, he has been in uninterrupted possession and cultivation of the same. He has specifically narrated that there was no interference by any of the defendants over his possession of the said survey number. Even though he has specifically denied that a prior partition

has taken place and that he has received cash, his evidence would clearly narrate that he has been in exclusive possession of the said survey number. Coupled with the evidence of DWs-2 to 6, wherein it is narrated that the prior partition having been taken place and land and cash has been given to the plaintiff, I am of the considered view that the trial court was justified in accepting the plea of the defendants, since the defendants have proved the prior partition. In view of the accepting the findings recorded by the trial court with regard to the prior partition, the plaintiff could not have maintained the suit seeking a subsequent partition of all the properties in question.

18. So far as the second point is concerned, with regard to the B schedule properties, the same consists of four open plots as well as an agricultural land standing in the name of the plaintiff. We are presently concerned with the open plots, namely Sl.Nos.1, 3, 4 and 5 of B Schedule. Item No.1 in B Schedule was purchased in the year 1973 i.e., much prior to the partition effected in the year 1978. Even though it was purchased prior to the partition, when the partition took place, the properties having been given to the share of the plaintiff in Sy.No.528/13 along with cash, the plaintiff cannot seek partition of the properties that is not given to him. He having received a share in the properties that belonged to the family cannot thereafter claim any share in the properties that has been allotted to the share of the other parties.

19. So far as item Nos.3, 4 and 5 are concerned, the same were purchased in the years 1985, 1986 and 1988 respectively. All the three properties have been purchased subsequent to the partition effected in the year 1978. Once a partition has been effected in the year 1978, necessarily all the properties which have been purchased thereafter cannot form part and parcel of the properties that belong to the family. The family having been disrupted in terms of the partition, these properties cannot be considered as properties belonging to the family and therefore, liable for partition. Therefore, the trial court was justified in holding that the B Schedule properties, excluding item No.2, are not available for partition.

20. Under these circumstances, on answering the aforesaid points, I am of the considered view that there is no error in appreciating the evidence and material on

record while dismissing the suit of the plaintiff.

21. Even otherwise, on considering the landed properties held by the family, it can be seen that the family owned in all an extent of 10 acres 25 guntas of land. There are six sharers. Therefore, each would be entitled to around 1 acre 30 guntas. What has been allotted to the plaintiff is an extent of 1 acre 6 guntas, namely a shortfall of about 24 guntas. When a partition is effected, it cannot be said that the partition is to be effected in exact mathematical perfection among the parties. There is bound to be little difference in the shares of the parties. It is not that the mathematical division of the properties cannot take place. Even otherwise, the value of each agricultural land varies with one another. Under these circumstances, it cannot be said that injustice has occurred to the plaintiff with regard to the division of family properties, particularly when the plaintiff has already received an extent of 1 acre 6 guntas of land and cash. Hence, I find no good ground to interfere with the well-considered judgment of the trial court.

22. Consequently, the appeal being devoid of merit is dismissed. The judgment and decree dated 18 th August 2004 passed in OS No.156 of 1989 by the II Additional Civil Judge (Sr.Dn.), Belagavi, is confirmed. No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com