

Kalsegowda and Others Vs. Mrs. K.S. Jayamma and Others

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Court : Karnataka

Decided On : Sep-14-2012

Judge : K. Sreedhar Rao & V. Suri Appa Rao

Appeal No. : RFA No.1521 of 2003 C/W RFA No.27 of 2004

Appellant : Kalsegowda and Others

Respondent : Mrs. K.S. Jayamma and Others

Judgement :

(Prayer: This RFA is filed under Section 96 of CPC against the Judgment and Decree dated 05.09.2003 passed in O.S.No.55/96 on the file of the Civil Judge (Sr.Dn.), Chikmagalore, decreeing the suit for partition and separate possession by holding that the respondents 1 and 2 are having 8/42 share each and the respondents 3 and 4 are having 1/42 share each in the suit schedule property and ordering for an equity regarding mesne profits under Section 20 Rule 12 of CPC.)

1. These appeals are filed against the judgment and decree dated 05.09.2003 passed in O.S.No.55/1996 on the file of Civil Judge (Sr.Dn.) at Chikmagalur.

2. The plaintiffs filed the said suit for partition and separate possession of 'A' and 'B' schedule properties. The Trial Court decreed the suit for partition of the schedule properties, but the claim of the plaintiffs to allot the share in 'A' schedule property in item Nos.2 to 4, 14, 21, 40 and 41 was rejected.

3. Aggrieved by the judgment and decree passed by the learned Civil Judge (hereinafter referred to as the 'Trial Court' for brevity), the second defendant in the suit has filed RFA No.1521/2003 and defendant No.1 has filed RFA NO.27/2004.

For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

4. The brief facts of the case as averred in the plaint are as follows:

Late Siddanna Gowda, father of plaintiff Nos.1 to 4 and defendant Nos.1 to 3 acquired the properties described in schedule 'A' and 'B' of the suit schedule properties. During the lifetime of Siddanna Gowda, plaintiff Nos.1 to 4 and defendant Nos.1 to 3 were in possession and enjoyment of the said properties. After the death of Siddanna Gowda, plaintiffs and defendants were in joint possession and enjoyment of the schedule properties. The defendant Nos.1 to 3 who are the brothers of plaintiff Nos.1 to 4 have not taken any interest in maintaining and performing the marriages of plaintiff nos.1 and 2. Though they are having sufficient income and properties, they have neglected the maintenance and interest of plaintiff Nos.1 and 2 who are unmarried. Plaintiff Nos.1 to 2 have also assisted defendant Nos.1 to 3 in the cultivation of the schedule properties and attended the household work and they are also responsible for improvement of the schedule properties and the financial position of defendant Nos.1 to 3. The plaintiffs requested defendants 1 to 3 several times for their share and to help them, but inspite of repeated requests and demands, defendants have not made any arrangement to allot share to the plaintiffs and they also did not agree to give any amount in settlement to the plaintiffs. Therefore, the plaintiffs got issued a legal notice to the defendants demanding their legitimate share, for which, the defendants have not given any reply. The plaintiff Nos.1 and 2 have no source of income for their livelihood and with great difficulty they are spending the days. Therefore, the plaintiffs filed the suit for partition and separate possession of their share in the plaint schedule properties.

The defendant No.1 filed separate written statement, resisting the suit filed by the plaintiffs for partition of the schedule properties and contended that he is the son of first wife of late Siddanna Gowda. Plaintiff Nos.1 to 4, defendant Nos.2 and 3

are the children of second wife of late Siddanna Gowda. As there were differences between defendant No.1 and Siddanna Gowda, family partition took place on 09.02.1964. The same is registered as document No. 346/63-64. The said partitioned properties detailed in the first schedule were jointly allotted to the shares of Siddanna Gowda and his wife Puttamma. The properties detailed in the second schedule were allotted to the share of first defendant. The third schedule properties were jointly allotted to defendant Nos.2 and 3 and the properties detailed in fourth schedule were allotted to the share of Gangamma, W/o Chinnanagowda, brother of Siddanna Gowda. It was further stipulated and agreed that Siddanna Gowda and his wife Puttamma should enjoy the properties allotted to their shares during their lifetime. Subsequent to their demise, the properties measuring 7 guntas of wet lands in Sy.No.36/3, 27 guntas of wet land in Sy.No.36/P should go to defendant Nos.2 and 3 and the remaining properties in Sy.Nos.45/5, 54/1p, 5/p, 56/p, 56/1p and 56/4p should be divided between the first defendant and defendant Nos.2 and 3 in equal shares. Insofar as the properties allotted to the share of Gangamma, it was agreed that she should enjoy the properties during her lifetime and subsequent to her demise. Properties that fell to her share should be equally divided by defendant Nos.1 to 3. It is further contended that plaintiff Nos.1 and 2 were not born at the time of the partition. The third plaintiff was already married and fourth plaintiff was only two years old as on the date of partition and it was orally agreed that her marriage should be performed by Siddanna Gowda and defendant Nos.2 and 3 who were allotted valuable properties.

The defendants further contended that after the demise of Siddanna Gowda, Puttamma and Gangamma, subsequent to the partition and by virtue of partition deed dated 09.02.1964, the first defendant and defendant Nos.2 and 3 are cultivating the properties allotted to them as per the partition deed. Therefore, the defendants contended that the plaintiffs are not entitled to any share in the partition schedule properties.

5. On the basis of the above pleadings, the Trial Court framed the following issues:

ISSUES

1. Whether the plaintiffs prove that A and B plaintiff schedule properties are the joint and ancestral properties of plaintiff and defendants and the plaintiffs and defendants are cultivating the properties jointly?
2. Whether the plaintiffs prove that they are entitled for 4/7th share in the plaintiff A and B schedule properties?
3. Whether the defendants prove that the plaintiff schedule properties are already partitioned and they are in possession respectively?
4. Whether the defendant No.1 proves that after the demise of Siddanna Gowda and Smt. Puttamma, the properties allotted to their share should be divided between the first defendant and defendants 2 and 3 in equal share as contended in para 4 of his written statement, further the properties of Smt. Gangamma after her demise should be divided equally among defendants 1 to 3?
5. Whether defendant No.1 proves his contention made in para No.5 of his written statement?
6. Whether defendant No.2 proves that he has purchased the properties mentioned in para No.7 of his written statement and of his personal earnings?
7. Whether defendant No.2 proves his contention made in para-13 of his written statement?
8. Whether defendant No.3 proves that properties mentioned in para-3 of his written statement was acquired by him as per partition?
9. Whether the defendant proves that suit is barred by limitation?
10. What order or decree?

6. On behalf of the plaintiffs, the second plaintiff was examined as PW1 and the documents at Exs.P1 to P8 were marked. On behalf of the defendant DWs.1 to 3 were examined and Exs.D1 to D27 were marked.

7. Considering the oral and documentary evidence adduced by both the parties, the Trial Court decreed the suit granting 8/42 share each to plaintiff Nos.1 and 2 and 1/42 share each to plaintiff Nos.3 and 4.

8. Aggrieved by the judgment and decree passed by the Trial Court, second defendant filed RFA No.1521/2003 and the legal representatives of defendant No.1-Thimmaiah Gowda have filed RFA No.27/2004. Since both the appeals are against the judgment and decree in O.S.No.55/1996, they are heard together and a common judgment is passed.

9. The learned Counsel for the appellants in RFA No.1521/2003 submitted that there was already a registered partition deed dated 09.02.1964. The same is admitted by all the parties and the parties to the partition deed are holding respective shares by exercise of lawful rights and invested huge amounts towards the properties fallen to their share since more than three decades. He further submits that the Trial Court was not justified in decreeing the suit holding that it was a family arrangement, by observing that there was no total partition.

10. The learned Counsel for the appellants in RFA No.27/2004 submitted that once the properties are partitioned by a registered partition deed, the Court cannot revoke the same, particularly when the parties have acted upon the same and enjoying the properties since long time. It is further submitted that the appellant and his legal representatives have been in enjoyment and possession of the properties ever since the date of partition and cultivating the same separately and the plaintiffs cannot revoke the prior partition and joint share in the properties.

11. The learned Counsel for the appellants further submitted that the respondents-plaintiffs cannot question the earlier partition effected between the parties by the date of partition. Plaintiff Nos.1 and 2 were not yet born as on the date of partition and therefore, they cannot challenge the partition effected between the parties prior to their birth.

12. In support of their contention, the learned Counsel for the appellants placed reliance in the case of G.Sekar Vs. Geetha and Others reported in 2009 AIR SCW 4075, wherein the Hon'ble Supreme Court has held as under:

“The Parliament intended to achieve the goal of removal of discrimination not only as contained in S.6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23. S.23 has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, one fails to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of S.8 read with the Schedule appended thereto. Restrictions imposed on a right must be constructed strictly. In the context of the restrictive right as contained in S.23 it must be held that such restriction was to be put in operation only at the time of partition of the property by metes and bounds, as grant of a preliminary decree would be dependant on the right of a co-sharer in the joint property. Concededly a preliminary decree could be passed declaring each co-sharer to be entitled to 1/5th share therein in terms of the provisions contained in S.8. 1/5th share in each co-sharer upon death of the predecessor-in-interest of the parties is absolute. They cannot be divested of the said right as the restriction in enjoyment of right by seeking partition by metes and bounds is removed by reason of S.3 of the 2005 Act.

Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature.”

In yet another decision in the case of *Prema Vs. Nanje Gowda and Others* reported in (2011) 6 SCC 462, the Hon’ble Supreme has observed as under:

“The Karnataka Legislature amended the Hindu Succession Act and inserted Sections 6-A to 6-C for ensuring that the unmarried daughters get equal share in the coparcenary property with a view to achieve the goal of equality enshrined in Articles 14 and 15(1) of the Constitution and to eliminate discrimination against daughters, who were deprived of their right to participate in the coparcenary

property. Similar provisions were inserted in the Act by the legislatures of the States of Andhra Pradesh, Maharashtra and Tamil Nadu. Section 29-A inserted in the Act by the Andhra Pradesh Act 13 of 1986 is in pari materia with section 6-A introduced by the Karnataka Amendment Act. In the context of the said Section 29-A, the Supreme Court in Sai Reddy case, (1991) 3 SCC 647 observed: “Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete..... A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence,... unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment.”

13. Per contra, the learned Counsel for the respondents-plaintiffs submitted that the plaintiffs and defendants jointly enjoyed the properties of their father late Siddanna Gowda. The plaintiffs also assisted the defendants in their agricultural operations and household work and are responsible for improvement of the schedule properties as they are also in joint possession and enjoyment of the properties of their father late Siddanna Gowda and therefore, they are entitled for partition of the schedule properties. The learned Counsel for the respondents supported the judgment and decree of the Trial Court in decreeing the suit for partition.

14. In support of their contention, the learned Counsel for the respondents placed reliance in the case of Ganduri Koteswaramma and Another Vs. Chakiri Yanadi and Another reported in 2011 AIR SCW 6163. The Hon'ble Supreme Court held as under:

“A preliminary decree determines the right and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e., after passing of the preliminary decree and before the final decree is passed, the events and

supervening circumstances occur necessitating change in shares, there is no impediment for the Court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation....”

15. The point that arises for our consideration in both the appeals is:

“Whether the respondents-plaintiffs are entitled for partition of the schedule properties by re-opening the earlier partition effected between Siddanna Gowda, Gangamma, W/o Chinnanagowda and defendant Nos.1 to 3?”

16. The defendants mainly contended that the plaintiffs were not born by the date of partition effected in the year 1964 and therefore, they are not entitled to any share in the joint family properties and they cannot revoke the partition already effected. Though no specific issue is framed by the trial Court as to whether the plaintiffs who were born by the date of partition in the year 1964, the learned trial Judge at para-25 of the judgment has clearly discussed that though the defendants have taken the contention, have pleaded that the plaintiffs 1 and 2 were not born by the date of partition in the year 1964. The defendants failed to produce any documentary evidence. On the other hand, PW1-second plaintiff in her evidence has clearly stated that she was born at the time of partition. According to her, her date of birth is 21.06.1961. She has produced School Leaving Certificate Ex.P8 in support of her contention that she was born in the year 1961. Therefore, it is clear that by the date of partition in the year 1964, the second plaintiff was aged about three years. Admittedly, the first plaintiff is elder than the second plaintiff. The age of the first plaintiff is shown as 33 years in the plaint and second plaintiff is aged 30 years who was born in the year 1961. Therefore, the first plaintiff is elder than the second plaintiff by three years. Thus, it is clear from the evidence of PW 1 that plaintiffs 1 to 4 are born by the date of partition. Therefore, the contention of defendants that the plaintiffs 1 and 2 were not born by the date of partition and they cannot reopen the partition, cannot be accepted.

17. As can be seen from the partition deed admittedly, no share is allotted to the plaintiffs though they are entitled for a share when their father died even prior to

the partition and after coming into force of the Hindu Succession Act. It is an admitted fact that Siddana Gowda, father of plaintiffs and defendants was having younger brother by name Chinnagowda, who also died even prior to the partition in the year 1964 leaving behind his wife Gangamma and daughter Nagamma who are entitled to succeed to his share in the joint family properties. But as per Ex.D1 Partition Deed, no share is given to them. The learned Trial Judge considering the above facts and circumstances, observed that Ex.D1 partition Deed is only a family arrangement and there was no partition at all between all the sharers.

18. The second defendant contended that he has acquired some properties after the partition in the year 1964 and they are not liable for partition. The learned Trial Judge at para-37 of the judgment has discussed the evidence and documents relied upon by the second defendant in support of the contention that he purchased some properties after partition in the year 1964. Considering the evidence of the second defendant and the documents filed by him, the Trial Court rightly excluded item Nos.2 to 4, 14, 21, 40 and 41 of the schedule properties declaring them as self-acquired properties of the second defendant and decreed the suit for partition in respect of other items of the schedule properties.

19. In the case of Ganduri Koteshwaramma and Another Vs. Chakiri Yanadi and Another reported in 2011 AIR SCW 6163 relied on by the learned Counsel for the respondents-plaintiffs, the sisters of the plaintiffs made an application for passing of preliminary decree in their favour for partition of schedule properties into four equal shares and to allot one share to each of them on par with their brothers who filed suit for partition. In that case, the Hindu Succession (Amendment) Act, 2005, came into force before passing of the final decree. The Trial Court allowed the application filed by the sisters of the plaintiffs and held that they are entitled for re-allotment of shares in the preliminary decree. The plaintiffs therein challenged the order of the Trial Court before the High Court of Andhra Pradesh. The learned Single Judge by his order dated 26.08.2009 allowed the appeal and set aside the order of the Trial Court. The Hon'ble Supreme Court set aside the impugned judgment of the High Court and restored the order of the Trial Court and directed the Trial Court to proceed for preparation of the final decree in terms of its order. No doubt, it is a settled principle of law that when partition is effected between the

members of a Hindu Undivided family by their volition and with their consent cannot be re-opened, unless it is shown that it was obtained by fraud, coercion, misrepresentation and undue influence. If the family consists of minor co-parceners, the said partition is binding on minors also if it is shown in good faith and in a bonafide manner to protect the interest of the minors. But if the partition is proved to be unjust and unfair and is detrimental to the interest of the minors, the partition can be re-opened after any length of time. Therefore, it is the duty of the Court to protect and safeguard the interest of the minor.

20. In view of the above judgment of the Hon'ble Supreme Court in Ganduri Koteshwaramma's case, the respondents i.e., the sisters of second defendant who were born by the date of partition have absolute right to challenge Ex.D1 partition deed when they were not allotted any share in the joint family properties of the family as they are, by birth become the co-parceners in their own right in the same manner as the son and have the same rights and liabilities in respect of the said co-parcenary property as that of a son.

21. The Trial Court after appreciating the entire evidence on record and considering the fact that the respondents-plaintiffs and the fourth defendant, the daughter of Chinnagowda, brother of Siddanna Gowda were not at all given any share in the ancestral properties, has rightly decreed the suit excluding the self-acquired properties of the second defendant.

22. We are, therefore, of the view that there are no valid grounds to interfere with the judgment of the Trial Court. Accordingly, both the appeals are dismissed

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