

IN THE COURT OF SENIOR CIVIL JUDGE & JMFC AT HUMNABAD

BEFORE: Sri. Rajesh M.Kamate
B.Com.LL.B.(Spl)
Senior Civil Judge & JMFC Humnabad

Regular Appeal No.1/2018

DATED THIS 28th DAY OF MARCH 2019

1. Smt. Rojamma W/o Sharnappa Kalebag
Age 68 years, Occ: Agriculture.
2. Hamanth S/o Sharnappa Kalebag
Age 45 years, Occ: Agriculture.
3. Bhimanna S/o Sharnappa Kalebag
Age 42 years, Occ: Agriculture.
4. Aruna Devi W/o Vaijinath Kalebag
Age 40 years, Occ: Household.
5. Yeshappa S/o Sharnappa Kalebag
Age 47 years, Occ: Agriculture.
6. Sanjeev Kumar S/o Sharnappa Kalebag
Age 32 years, Occ: Agriculture
All R/o Mudnal village
Tq. Humnabad, Dist. Bidar.

Appellants

Vs-

1. Saidappa S/o late Gundappa Kalebag
Age 65 years, Occ: Agriculture
R/o Mudnal village
Tq. Humnabad, Dist. Bidar.

Respondent

Appellants by Sri. V.K.P. Advocate
Respondent by Sri S.K.R. Advocate.

Appealed against : **Against the Judgment &
Decree passed in O.S.No.98/2014
Dated :15-12-2017 by Addl. Civil
Judge & JMFC Humnabad.**

DATE OF:

- | | | | |
|----|-----------------------|--------------------------------------|------------|
| 1. | Institution of Appeal | : | 16-01-2018 |
| 2. | Date of disposal | : | 28-03-2019 |
| 3. | Total duration | year/s Month/s day/s | |
| | | 01 2 12 | |

: J U D G M E N T :

The present appeal is filed by the Appellant aggrieved by the Judgment and decree passed in O.S.No. 98/2014 dated 15-12-2017 by Addl. Civil Judge and JMFC Humnabad praying this court to set-aside the Judgment and decree, by allowing this Appeal in the interest of justice.

2. The parties to the Appeal are referred to in the same rank as shown in the Trial Court.

3. Now let me understand in a nutshell the pleadings.

4. It is the case of the plaintiff that her husband and the defendant are brothers and the father-in-law of plaintiff no.1 deceased Gundappa Kalebag married Smt. Kashi bai and gave birth to the husband of the plaintiff late Sharnappa out of the said wedlock. However, the said Gundappa contracted 2nd marriage with one Smt. Gangamma and out of their wedlock the defendant was born. Hence, the plaintiffs and defendant constitute undivided Hindu Joint Family and the defendant is the Karta and manager of the suit schedule properties.

5. It is further contended that, previously the suit schedule properties were owned and possessed by father-in-law of the plaintiff no.1 and there was no family partition between the plaintiff and defendant but the said Gundappa (father-in-law of plaintiff no.1) died long back and the husband of plaintiff no.1 has also died 20 years back. Since then the suit schedule properties are ancestral properties of the plaintiffs and defendants who have acquired joint ownership and rights over said properties. Whereas, after the death of husband of plaintiff no.1 the suit properties are nominally standing in the name of the defendant but he turned dishonest and misusing the suit properties with an intention to cause loss to the plaintiff and deprive their share, constrained the plaintiffs to file this suit for the relief of partition and separate possession.

6. In pursuance of summons issued by this court the defendant has not put forth his appearance at first instance the court was please to placed defendant as exparte. Later the defendant has appeared through his counsel and filed written statement.

7. It is admitted in his written statement the relationship between the parties but denied the entire case of plaintiff as false and further contended that after the death of his father there was a partition between him and husband of plaintiff no.1 and the current suit schedule properties was allotted to the share of this defendant also other non suit properties were divided by metes and bounds among them accordingly the Khatas of the said lands was also changed into their names. It is further contended that, the plaintiffs were residing at Indira Nagar Hudgi but alleged that, the plaintiff no.1 has sold land in Sy.No.13/2 to one Shanker after

the demise of husband of plaintiff no.1 around 18 years back. On these grounds he prays before the Hon'ble court to dismiss the suit of the plaintiff as not maintainable in the eye of law.

8. In the basis of above said pleadings Trial Court framed following issues:-

-: I S S U E S :-

- 01.** Whether the Plaintiff proves that, herself and the defendant are the members of joint family and the suit property is the ancestral joint family property?
- 02.** Whether the defendant proves the earlier partition as contended in his written statement?
- 03.** Whether the defendant proves that, the suit is bad for non-joinder of necessary parties ?
- 04.** Whether the plaintiff is entitle to ½ share in the suit property?
- 05.** What order or decree ?

9. The plaintiff in order to prove her case has examined herself as Pw-1 and examined other two witnesses from her side as PW-2, PW-3 and got exhibited the documents as per Ex.P-1 to P.3 and closed her side evidence. The defendant in order to disprove the case has examined himself as DW-1 and got exhibited the documents as per Ex.D-1 to Ex.D-6 and closed his side evidence.

10. Thereafter trial court answered the issue no.1 in the negative, Issue No.2 in the affirmative, Issue No.3 Does not survive for consideration and Issue No.4 in the Negative and Issue no.5 as per the final order and suit of the plaintiff is dismissed.

11. Now the plaintiff being aggrieved by the judgment have filed this appeal challenging it on the several grounds mentioned in

the appeal memo which will be discussed while addressing the points for determination .

12. After service of notice, respondent by Sri S.K.R., Advocate, have appeared before the court.

16. Heard both side. Perused the lower court records and judgment.

13. Counsel for respondent has filed memo along with 1 citation as under;

1. AIR 1982 SUPREME COURT 760
M/s Kalloomal Tapeswari Prasad (HUF), Kanpur -Vs- The C.I.T., Kanpur,

14. Now, the Points that arise for my consideration are as under;

1. Whether lower court has passed impugned Judgment and Decree by overlooking the oral and documentary evidence and legal aspects, which is illegal, capricious and perverse and same is liable to be set-aside thereby interference of this court is necessary?

2. What Order or Decree?

15. My findings to the above referred points are as under;

Point No.1 : **In the Negative**

Point No.2 : As per final order for the following;

: REASONS :

16. **POINT No.1 :-**

The present appeal is filed by the Appellant/Plaintiff to set aside the judgment and decree passed by lower court in O.S.No. 98/2014 dated 15-12-2017 by Addl. Civil Judge and JMFC, Humnabad.

17. During the arguments the learned counsel for appellant has reiterated the grounds of appeal mentioned in the appeal memo and on the other hand learned counsel for the respondent has supported judgment and decree of the lower court.

18. Therefore, considering the arguments of both the counsel and on perusal of judgment and decree passed by the lower court, it goes to show that the lower court has dismissed the suit of the plaintiff by holding that the plaintiff are not owner and in possession of suit property. In this appeal it has been contended that, the lower court has not considered the oral and documentary evidence adduced by the plaintiff but has erroneously on whims and fancies and has wrongly decided issue no.1 to 5 and which are required to be set aside by this appellate court and dismissed the suit of plaintiff.

19. The appellant before this court has argued that, the lower court ought to have framed the issue touching the point of allotment of suit properties to his share as **“Whether the defendant proves that in the earlier partition both the suit properties were the subject matter of said partition and were allotted to his share exclusively”** but the said issue was necessary for adjudicating the matter under controversy which has not been framed by the lower court resulting into miscarriage of justice causing huge loss and injury to the plaintiffs for which the judgment and decree passed by lower court deserves to be set aside and requires interference by this court .

20. It is further argued that, valuation made by the plaintiff on the subject matter of their share at Rs.15,000/- is made in the plaint as per Sec. 35 (2) of K.C.F and S.V. Act, and also paid Rs.30/- as court fee which is sufficient and also relevant documents are

enclosed as per list as such the appeal of the plaintiffs is well within limitation considering the date of judgment and the general holiday on 13 to 15 January 2018.

21. On perusal of the judgment of lower court in O.S.No.98/2014 filed by plaintiff for partition and separate possession is dismissed by holding that already partition has taken place among the family members in the year 1984 by metes and bounds and accordingly are in possession of their respective shares and as such the suit property has fallen to the share of defendant and he has become absolute property over the same. It also goes to show that the lower court has considered that plaintiff has failed to prove there was no partition as PW-1 and 2 in their cross-examination has admitted the said fact and also the documents produced by the plaintiff does not show the flow of title with respect to open plot and as such has held that the plaintiff has nowhere pleaded or whispered about partial partition for which arguments of the plaintiff does not survive.

22. It is also discussed that the plaintiff has concealed the fact previous partition and has not approached the court with clean hands by suppressing material facts for which he has made an attempt to pollute the stream of justice and accordingly has held that plaintiff has failed to prove the jointness of the properties.

23. It is further discussed that, on the basis of documents produced by defendants and the admission given by PW-1 and 2 with respect to partition and thereafter alienation of suit property by plaintiff in favour of Shankar on 12-6-1996 is also admitted by them and as such has held that the said partition has been proved by defendants and also that after partition the plaintiff has sold a land in favour of Shankar and thereafter has filed this suit.

24. Therefore, considering the observation made in the judgment by the lower court clearly shows that after considering all the material aspect and taking into consideration the oral and documentary evidence available before the court the lower court has rightly passed the judgment by dismissing the suit of plaintiff which does not require interference by this court.

25. Apart from it coming to the aspect of framing issue of **"Whether the defendant proves that in the earlier partition both the suit properties were the subject matter of said partition and were allotted to his share exclusively"** as pleaded in appeal memo touching the point of allotment of suit properties to his share is concerned it clearly goes to show that the lower court has already discussed above the earlier partition with respect to suit properties and as such even though the said issue was not framed but the lower court has considered the said aspect and answered accordingly and as such the framing of said issue by the lower court does not arrived for consideration. It is pertinent to note here itself that the counsel for the plaintiff has argued on the basis of issues framed by the lower court and the said aspect with respect to framing of said issue has also not been urged before the lower court inspite of it goes to show that the lower court in its judgment has considered the said aspect and passed the judgment which does not requires interference by this court.

26. The learned counsel for the respondent has relied upon following citation as under;

1. AIR 1982 SUPREME COURT 760

M/s Kallloomal Tapeswari Prasad (HUF), Kanpur -Vs- The C.I.T., Kanpur,

**(A) Income-tax Act (43 of 1961), S. 171 -
Applicability and scope - Section contemplates
both total and partial partition of H.U.F. - S. 25A
of 1922 Act compared - Partial partition -**

Properties capable of division but not actually divided - Mere severance of status - Not sufficient to record finding of partial partition - Income from such properties is liable to be assessed as that of H.U.F. I.T. Ref.No.47 of 1971, D/- 29-9-1972 (All) Partly Reversed. (Hindu Law - Joint family - Partition: Income-tax Act (1922), S. 25A; Hindu undivided family - Partial partition)

27. I have gone through the said citation relied by respondent counsel the Hon'ble Apex Court in has clearly held that partition can be brought by father during his life time between himself and his sons by dividing properties equally among themselves or by agreement or by a suit or Arbitration and declaration of intention of a coparcener to become divided brings about severance of status and Hindu Law does not require the property must in every case be partitioned by metes and bounds or physically into different portion to complete a partition. Disruption of status can be brought about by any of the party and it is open to the parties to enjoy their share of property as tenants in common in any manner known to law according to their desire. Hence, with due respect to the said principle of the Honb'le Apex Court and the same is aptly applicable to the present case in hand.

28. Therefore, in view of discussion, it goes to show that the lower court based on the oral and documentary evidence has rightly dismissed the suit of the plaintiffs which does not require interference by this court and the same is confirmed and accordingly I answer **Point No.1 in the Negative.**

29. POINT No.2:- In view of the discussion made above and findings given on Point No.1, I proceed to pass the following;

: O R D E R :

The Appeal filed by the appellant U/Order 41 RULE 5 R/w. Section 96 of CPC is hereby dismissed.

No order as to costs.

Judgment and Decree passed by learned Prl. Civil Judge & J.M.F.C. Humnabad in O.S.No.98/2014 dated: 15-12-2017 is hereby confirmed.

Draw Decree Accordingly.

Office is directed to return the LCR along with copy of this Judgment forthwith.

(Dictated to Stenographer directly on computer, transcribed and typed by him, script corrected, signed and then pronounced in the open court by me on this the **28th day of March-2019**).

(Rajesh M. Kamate)
Senior Civil Judge & JMFC.,
Humnabad.

