

Sri Appajigowda vs Sri Doreswamy Gowda on 20 August, 2024

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NC: 2024:KHC:33471

RSA No. 29 of 2014

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF AUGUST, 2024

BEFORE

THE HON'BLE MR JUSTICE ASHOK S.KINAGI

REGULAR SECOND APPEAL NO. 29 OF 2014 (PAR)

BETWEEN:

SRI APPAJIGOWDA
S/O PATEL KARIGOWDA,
AGED ABOUT 70 YEARS,
R/AT SUKADHARE VILLAGE,
HONAKERE HOBLI,
NAGAMANGALA TALUK - 571 433

...APPELLANT

(BY SRI. T SESHAGIRI RAO, ADVOCATE)

AND:

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signed by R
DEEPA
Location:
HIGH COURT
OF
KARNATAKA

- SRI DORESWAMY GOWDA
S/O PATEL KARIGOWDA,
SINCE DEAD BY HIS LRS.
1. SMT. LAKSHMAMMA,
W/O LATE DORESWAMY GOWDA,

AGED ABOUT 69 YEARS,
R/AT SUKADHARE VILLAGE,
HONAKERE HOBLI,
NAGAMANGALA TALUK - 571 433
 2. SMT. NAGAMMA
W/O LATE KRISHNEGOWDA,
D/O LATE DORESWAMY GOWDA,
AGED ABOUT 50 YEARS,
R/AT SRIRAMANAGARA,
BHADRA COLONEY & POST,

BHADRAVATHI TALUK,
SHIMOGA DISTRICT - 577 301

3. SMT. PADMAMMA
W/O BOREGOWDA,
D/O LATE DORESWAMYGOWDA,
AGED ABOUT 48 YEARS,
R/AT OLAGEREMENASA VILLAGE & POST,
K.R.PET TALUK, MANDYA DISTRICT - 571 426
4. SRI. JAYARAMA. S.D.
S/O LATE DORESWAMYGOWDA,
AGED ABOUT 44 YEARS,
R/AT SUKADHARE VILLAGE,
HONAKERE HOBLI,
NAGAMANGALA TALUK. - 571 433
5. SMT. SARASWATHI
W/O KUMARA,
D/O LATE DORESWAMYGOWDA,
AGED ABOUT 42 YEARS,
R/AT SANTHEBACHAHALLI VILLAGE & POST,
K.R.PET TALUK, MANDYA DISTRICT - 571 426
6. SRI. MUKTHESHA
S/O LATE DORESWAMYGOWDA,
AGED ABOUT 40 YEARS,
R/AT SUKADHARE VILLAGE,
HONAKERE HOBLI,
NAGAMANGALA TALUK - 571 433
7. SRI. HANUMANTHA
S/O LATE DORESWAMYGOWDA,
AGED ABOUT 38 YEARS,
R/AT SUKADHARE VILLAGE,
HONAKERE HOBLI,
NAGAMANGALA TALUK - 571 433
8. SMT. INDRAMMA
W/O RAMEGOWDA,
AGED ABOUT 31 YEARS,
R/AT BANAGERE VILLAGE,

BINDIGANAVILE HOBILI,
NAGAMANGALA TALUK - 571 802

...RESPONDENTS

(BY SRI. L RAJA FOR R1 TO R8, ADVOCATE)

THIS RSA IS FILED U/S.100 OF CPC., AGAINST THE
JUDGEMENT & DECREE DTD 20.9.2013 PASSED IN
R.A.NO.9/2008 ON THE FILE OF THE SENIOR CIVIL JUDGE &
JMFC., NAGAMANGALA, ALLOWING THE APPEAL AND SETTING
ASIDE THE JUDGEMENT AND DECREE DTD 31.10.2007 PASSED
IN OS.NO.6/2005 ON THE FILE OF THE CIVIL JUDGE (JR.DN) &
JMFC., NAGAMANGALA.

THIS APPEAL, COMING ON FOR ADMISSION, THIS DAY,
JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE ASHOK S.KINAGI

ORAL JUDGMENT

This regular second appeal is filed by the appellant challenging the judgment and decree dated 20.09.2013, passed in R.A.No.9/2008 by the learned Senior Civil Judge & JMFC, Nagamangala, setting aside the judgment and decree dated 31.10.2007, passed in O.S.No.6/2005 by the learned Civil Judge (Jr.Dn.) & JMFC, Nagamangala.

2. For the sake of convenience, parties are referred to as per their ranking before the trial Court. The NC: 2024:KHC:33471 appellant is the plaintiff and respondents are the legal representatives of original defendant.

3. The brief facts leading rise to filing of this appeal are as under:

Plaintiff filed a suit for partition and separate possession against the defendant in respect of the suit schedule properties. It is the case of the plaintiff that the plaintiff and defendant are brothers and they are members of Hindu joint family and it is contended that the suit schedule properties are the joint family properties and they are in joint possession and enjoyment of the suit schedule properties. The plaintiff demanded for partition and separate possession, but the defendant refused to effect partition. Hence, cause of action arose for the plaintiff to file the suit for partition and separate possession.

4. Defendant filed written statement admitting the relationship between the plaintiff and defendant and also the suit schedule properties were ancestral properties. It NC: 2024:KHC:33471 is contended that during the lifetime of their father Sri. Patel Karigowda, the plaintiff took his share in

the ancestral property and separated from the joint family. The oral partition was made by father of plaintiff and defendant and the same was reduced into writing on 28.02.1987. In the said partition, the lands in Sy.Nos. 49/3, 19/10 and 14/7 of Sukhadare Village were allotted to the share of the plaintiff and khatha of the said properties were changed in the name of the plaintiff. It is contended that the plaintiff was separated from the joint family and residing in his mother-in-law's house. It is contended that partition was already effected between the plaintiff and defendant by their father. Hence, the suit of the plaintiff for partition and separate possession is not maintainable. On these grounds, sought for dismissal of the suit.

5. The Trial Court, on the basis of the above said pleadings, framed the following issues:

NC: 2024:KHC:33471 (1) Whether the plaintiff prove that the suit properties are the joint family properties of plaintiff and defendant and are in joint possession of the same and there is no partition by metes and bounds? (2) Whether the defendant proves that there is a partition in respect of suit properties as per partition chit dated 28.02.1987 and the plaintiff and defendant are in possession of their respective shares?

(3) Whether the suit is properly valued for the purpose of Court fee and jurisdiction?
(4) Whether the plaintiff is entitled for 1/2 share in the suit properties and for other reliefs as claimed in the plaint?

(5) What order or decree?

6. In order to prove the case of the plaintiff, the plaintiff examined himself as PW-1 and got examined one witness as PW-2 and got marked 18 documents as Exs.P1 to P18. In rebuttal, defendant examined himself as DW-1 and got examined two witnesses as DW-2 & DW-3 and got marked 10 documents as Exs.D1 to D10. The trial Court on assessing the oral and documentary evidence of the parties, answered issue Nos.1 to 4 in affirmative and issue No.5 as per the final order. The suit of the plaintiff was NC: 2024:KHC:33471 decreed and it is declared that the plaintiff is entitled for 1/2 share in the suit properties.

7. The legal representatives of the defendant aggrieved by the judgment and preliminary decree passed in the above said suit, filed an appeal in R.A.No.9/2008. The First Appellate Court, after hearing the parties, has framed the following points for consideration:

(1) Whether the plaintiff proves that the suit properties are the joint family properties of himself and defendant?

(2) Whether the defendant proves that partition was already effected in the family and plaintiff has taken his share in the family properties?

(3) Whether the trial Court is justified in decreeing the plaintiff's suit? (4) What order?

8. The First Appellate Court, after hearing the learned counsel for the parties and on re-assessing the oral and documentary evidence, answered point Nos.1 and 3 in negative; point No.2 in affirmative; and point No.4 as per the final order. The first Appellate Court allowed the NC: 2024:KHC:33471 appeal filed by the legal representatives of the defendant, consequently, dismissed the suit filed by the plaintiff. The plaintiff, aggrieved by the judgment and decree passed by the first Appellate Court, has filed this regular second appeal.

9. This court admitted the appeal on 18.06.2021, to consider the following substantial questions of law :

(1) Whether the Appellate Court is justified in reversing the judgment and decree of the trial Court?

(2) Whether the first Appellate Court is justified in placing reliance upon Exs.D5 and D6 without following the procedure as contemplated under Section 66 of the Evidence Act?

10. Heard learned counsel for the parties.

11. Learned counsel for the plaintiff submits that the defendant got created Exs.D5 and D6. He submits that there is no partition effected between the plaintiff and defendant as alleged by the defendant in the written statement. He submits that the plaintiff has not admitted NC: 2024:KHC:33471 in the course of cross-examination regarding alleged partition. Hence, prays to allow the appeal.

12. Per contra, learned counsel for the legal representatives of the defendant submits that during the lifetime of the father of plaintiff and defendant i.e., Patel Karigowda, partition was effected between the plaintiff and defendant and the same was reduced into writing and the defendant has produced copy of memorandum of partition marked as Exs.D5 and D6 and he also submits that PW-1 admitted in the course of cross-examination that partition was effected in the family and after partition, he is not a member of the joint family. The trial Court has ignored the admission of PW-1 in regard to partition and committed an error in decreeing the suit of the plaintiff. He submits that the first Appellate Court, considering the admission of PW-1 in regard to prior partition, has rightly passed the impugned judgment. Hence, prays to dismiss the appeal.

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13. Perused the records and considered the submissions of learned counsel for the parties.

14. SUBSTANTIAL QUESTION OF LAW NO.1: The plaintiff in order to substantiate his case, examined himself as PW-1. He has reiterated the plaint averments in his examination-in-chief. He has deposed that the suit schedule properties are the ancestral properties of plaintiff and defendant.

The plaintiff and defendant are brothers of Hindu joint family and there is no partition effected between them. The plaintiff demanded for partition and separate possession, but the defendant refused to effect partition. In order to establish that the suit schedule properties are the ancestral properties of the parties, plaintiff has produced documents. Exs.P1 to P16 are the RTC extracts; Exs.P17 and P18 are the House List Registers. During the course of cross-examination, PW-1 has admitted that partition was effected in the family and after partition he is not a member of the joint family and he has been enjoying the properties allotted to his share

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NC: 2024:KHC:33471 and defendant has been enjoying the properties allotted to his share. He also admitted that he has given a statement before the Deputy Tahsildar, Nada Kacheri of Honakere stating that in the partition, 22 guntas of paddy field was allotted to his share. Accordingly, mahazar was drawn and as per the said mahazar, mutation was effected and his name was entered in the revenue records of said 22 guntas paddy field.

15. In rebuttal, the defendant was examined as DW-1. He has reiterated the written statement averments in the examination-in-chief and contended that during the lifetime of Patel Karigowda, partition was effected between Patel Karigowda, plaintiff and defendant and same was reduced into writing on 28.02.1987. In the said partition, land bearing Sy.Nos.49/3, 18/10 and 14/7 were allotted to the share of the plaintiff and khatha of the said properties were effected in the name of plaintiff and the plaintiff was separated from the joint family and residing separately. In order to establish that there was prior partition,

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NC: 2024:KHC:33471 defendant has produced Ex.D4 which discloses that partition was effected between plaintiff and defendant. Further, the defendant has also produced the statement of the plaintiff before the Deputy Tahsildar admitting about the partition effected between the plaintiff and defendant and that he has got 22 guntas of land in the partition and on the basis of the said statement made by the plaintiff, the revenue authorities passed an order for change of entries in the revenue records in the name of the plaintiff as per Exs.D6 and D7. On the basis of the said partition, the names of plaintiff and defendant are entered in the revenue records. The defendant has produced Exs.D8 to D10, RTC extracts which discloses that the properties were allotted to the respective parties in the partition effected on 28.02.1987. The plaintiff himself has admitted in the course of cross-examination in regard to the prior partition. Section 58 of the Indian Evidence Act, 1872, the fact admitted need not be proved. PW-1 has admitted regarding prior partition and that he is residing separately, for more than 2 to 3 times. When the plaintiff is not a

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NC: 2024:KHC:33471 member of the joint family, the question of filing a suit for partition and separate possession would not arise. Further, as on the date of filing the suit for partition and separate possession, the suit schedule properties were not the ancestral properties of the plaintiff

and defendant. The first Appellate Court was justified in dismissing the suit holding that the defendant has proved that there was prior partition between the plaintiff and defendant and that Sy.Nos.49/3, 18/10 and 14/7 were allotted to the share of the plaintiff. The trial Court failed to consider the admission of PW-1 in regard to prior partition and committed an error in decreeing the suit of the plaintiff. The first Appellate Court considering the admission of PW- 1, has rightly reversed the judgment and preliminary decree passed by the trial Court and consequently dismissed the suit of the plaintiff. In view of the above discussion, I answer substantial question of law No.1 in the affirmative.

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16. SUBSTANTIAL QUESTION OF LAW NO.2: Ex.D5 is the certified copy of the statement made by the plaintiff before the Deputy Tahsildar wherein he has admitted regarding the partition effected between the plaintiff and defendant. The said statement was made before a public officer. Ex.D6 is the coy of mutation order. The said document is public document and falls within the definition of public document as per Section 74 of the Bharatiya Sakshya Adhiniyam, 2023, the question of forming a procedure as contemplated under Section 66 of the Indian Evidence Act, 1872, would not arise. Section 66 of the Indian Evidence Act provides to issue notice to produce secondary evidence. Even if Exs.D5 and D6 are ignored, PW-1 has clearly admitted in the course of cross- examination that prior partition took place between the plaintiff and defendant. The said admission itself is sufficient to dismiss the suit of the plaintiff. Accordingly, I answer substantial question of law No.2 in the negative.

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17. In view of the above discussion, I proceed to pass the following:

ORDER The appeal is dismissed.

The judgment and decree passed by the first Appellate Court is hereby confirmed.

No order as to the costs.

SD/-

(ASHOK S. KINAGI) JUDGE RD