Supreme Court of India
Kenchegowda (Since Deceased) By ... vs Siddegowda Alias Motegowda on 11 May, 1994
Equivalent citations: JT 1994 (4) SC 125, (1994) 108 PLR 282, 1994 (2) SCALE 959, (1994) 4 SCC 294
Bench: M Venkatachaliah, S Mohan
JUDGMENT

1. Both these appeals can be dealt with under a common judgment since they arise out of a common judgment rendered by High Court of Karnataka at Bangalore in Regular Second Appeal Nos. 768 and 769 of 1979.

2. The following genealogical tree will establish the relationship between the parties:

Dodkullegowda | ---------- | | | Siddegowda Kenchegowda Kalegowda Ninegowda Addegowda (D-1 in OS No. (D- 1 in OS No. 346 of1976) 347 of 1974) | | Siddegowda Boregowda @ Moregowda Kenchegowda (plaintiff)

3. Siddegowda filed two suits bearing O.S. No. 346 and 347 of 1974 before the learned Munsiff at Mandya for declaration of his title and permanent injunction. The suit property consists of 30 guntas of land in Survey No. 214 in each suit.

4. The plaint averments are shortly as under:

5. The plaintiff's father and his brother formed a joint Hindu Family. The father of the plaintiff died about 30 years ago leaving behind him the plaintiff and his brother Boregowda. During the life time of the plaintiff's father there was a division of the properties belonging to joint Hindu Family. After the partition the plaintiff's father purchased the suit Survey No. 214 measuring one acre 20 guntas along with two other properties under a registered sale deed dated 5.7.29. Therefore, the suit land is a self-acquired property of the plaintiff's father which devolved on the plaintiff and his brother. The plaintiff and his brother divided their family properties six years ago and in that partition the suit property was allotted to the share of the plaintiff. As such he became the exclusive owner of the suit land.

6. Notwithstanding this being so the first defendant sold 30 guntas to the second defendant for a sum of Rs, 5,000/- under registered sale deed dated 14.6.73. Similarly, the remaining 30 guntas of land was sold in favour of the second defendant in O.S. No. 347 of 1974 by sale deed dated 27.6.73 without any right whatsoever. Thus, the plaintiff was compelled to file the suits for the relief of declaration of title and permanent injunction.

7. The defendants in both the suits filed separate written statements. However, their defence is common. The relationship between the parties was admitted. The principal stand is that the suit property was purchased by the plaintiff's father as Manager of the joint Hindu Family by himself and his brothers out of the joint family funds. After the death of plaintiff's father, as a member of the joint Hindu Family, the plaintiff represented by the mother and the first defendant, in the two suits

sold some other properties. As regards the suit Survey No. 214, on the division of properties of the joint Hindu Family between the plaintiff and the first defendant, it fell to the share of the first defendant. The plaintiff was in possession of the suit land. On trial, the case of the defendant came to be accepted that the suit land was the joint family property. It had fallen to the share of the defendant. In this view, the suit came to be dismissed.

8. Two appeals were preferred. The first defendant in O.S. No. 347 of 1974 died during the pendency of the appeal. His legal representatives were not brought on record. As a result, the appeal abated. It was held that the cause of action survived against the second defendant in O.S. No. 347 of 1974. Ultimately, it was concluded that the partition was true. But defendants in both cases failed to prove that the suit properties fell to their shares. Further the purchase of the suit land by the father of the plaintiff was out of joint Hindu Family funds. With these observations, the learned Civil Judge, Mandya dismissed both the appeals. Thereupon, two Second Appeals bearing Nos. 768 and 769 of 1979 were preferred. Along with the appeals an application seeking the amendment of plaint was also taken out stating that the plaintiff, in any event, would be entitled to 1/3rd share. Therefore, a decree for partition of the said 1/3rd share be passed. The learned Single Judge allowed, the appeal in modification of the decree of trial court. A preliminary decree for partition of 1/3rd share of the suit property came to be passed. Hence, these SLPs.

9. Originally, when SLPs came before this Court notice was issued on 10.12.90 in the following terms:

Issue notice limited to the question whether all the parties, necessary to be party in a suit of partition were on record in the second appeal. The suit was permitted to be converted in partition particularly in the light of the circumstance that one of the coparceners had died and legal representatives had not been brought on record in the first Appellate Court and at all events, the share would only be 1/4th not 1/3rd. The notice will specify that the matter will be finally disposed of at the SLP stage itself.

10. The above notice is withdrawn. Notice on SLPs is issued.

11. Leave granted. Appeals were heard on merits.

12. It is argued on behalf of the appellant that the learned Single Judge went wrong in converting the suits for declaration and injunction into one for partition when all the joint family properties were not made the subject-matter of the suits nor were all the co-sharers impleaded. It is well-settled in law that a suit for partial partition is not maintainable. Merely because the plaintiff came to file an application under Order 6 Rule 17 C.P.C. it would not mean it could be allowed and a preliminary decree for partition be passed. As a matter of fact, the causes of action are different. Therefore, the High Court went wrong in holding the larger relief of declaration of title and injunction even though not available to the plaintiff the smaller relief for partition could be granted.

13. The Court of First Appeal had, in fact, accepted the partition of the joint family. No doubt, it has observed that the allotment of these specific properties in favour of the first defendant in both the

suits had not been proved. Unfortunately, the High Court had held otherwise and proceeded on a wrong assumption. On the death of Kalegowda, the first defendant in O.S. No. 347 of 1974 during the pendency of the appeal the legal representatives ought to have been brought on record. Therefore, as far as the first defendant in that suit was concerned the suit had abated. The findings of the trial court- had become final and conclusive. This means the finding of fact regarding the partition set up by the first defendant could no longer be interfered with. Further, the name of the first defendant had been deleted from the array of parties. Therefore, the passing of the preliminary decree for partition overlooking this important aspect is unsustainable in law.

14. In opposition to this, the learned Counsel for the respondent would submit that once the property was held to be joint family property the relationship between the parties having been admitted there could be no impediment in passing the preliminary decree for partition. No doubt, what was sought for was exclusive title but that does not prevent the court from granting a smaller relief. Such relief could not be denied on mere technicality. Hence, where justice has been done there is no scope for interference.

15. Having regard to the above contentions we will now proceed to consider whether the High Court was justified in passing the preliminary decree for partition of 1/3rd of plaintiff's share. During the pendency of the first appeal Kalegowda, the first defendant in O.S No. 347 of 1974 died. The finding of the trial court was clearly in his favour and it is to the following effect:

Issue No. 3:- The evidence on record especially the evidence of P.W.I and the averments in Ex.D-1 clearly establish that the suit schedule property was the joint family property of the father of the plaintiff and his brothers. The evidence of the defendants disclose that in a partition which took place subsequently the suit land was allotted to the shares of the first defendants in both the suits. Apart from the oral evidence, the Revenue records at Ex. P-1 to P-3, Kandayam receipts at Ex.D-4 and D-5, certified copies of the pahani extracts at Ex.D-6 to D-17, R.T.C. extract at Ex. D-18, another Kandayam receipt dt. Ex.D-20 and Ex.D-21 the certified copy of the order passed by the Tahsildar clearly prove that the suit schedule properties are owned by the first defendants in these suits. If actually this was allotted to the shares neither of plaintiff or of P.W.I, necessarily they would not have kept quiet in spite of coming to know that this land was entered in the katha of the first defendant in both the suits. These documents therefore prove the claim of the defts. to the effect that these properties were allotted to the shares of 1st defts. in both the suits in a partition that took place subsequently. Therefore, this issue is answered accordingly in the affirmative.

16. The death of Kalegowda and his legal representatives not having been brought on record and the deletion of his name from the array of parties would result in the abatement of that suit. The finding extracted above became final and conclusive and binding between the parties. Therefore, to hold, as the High Court has done, that the cause of action will survive as against second defendant, is incorrect.

17. Equally incorrect is the assumption made by the High Court that the Court of First Appeal had not accepted the case of partition. On the contrary, what the appellate court has found is as follows:

With regard to the partition alleged by the defendants even though the plaintiff's own witness P.W.I has admitted that there was a partition amongst the plaintiff's mother Ningamma, himself and the 1st defendant in the two suits. There is no satisfactory evidence to prove that in that partition the suit property was allotted to the share of the 1st defendant in the two suits jointly.

18. Therefore, what has been held is that the property had not been allotted in favour of the first defendant in the partition. That is very different from holding that the case of partition had not been accepted by the first appellate court. This being so, a decree for partition could not have been passed on a mere application for amendment. In fact, as rightly urged by the learned Counsel for the appellant that the causes of action are different and the reliefs are also different. To hold that the relief of declaration and injunction are larger reliefs and smaller relief for partition could be granted is incorrect. Even otherwise, a suit for partial partition in the absence of the inclusion of other joint family properties and the impleadment of the other co-sharers was not warranted in law. Thus, we find no difficult in allowing these appeals which are accordingly allowed. The judgment and decree of the trial court as affirmed by the first appellate court are restored. However, there shall be no order as to costs.