



IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 13TH DAY OF DECEMBER, 2024

PRESENT

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

REGULAR FIRST APPEAL NO. 100062 OF 2018 (PAR/POS)

BETWEEN:

CHANDRAKANT SIDDARAYA GODASHE
SINCE DECEASED BY IS LRS,

1. SMT. RANJANA
W/O. CHANDRAKANT GODASHE,
AGE: 56 YEARS, OCC: HOUSEHOLD WORK,
R/O: H.NO.352/2, 3RD CROSS,
MAHADWAR ROAD, BELAGAVI-590001.
2. SHRI. SHEKHAR
S/O. CHANDRAKANT GODASHE,
AGE: 27 YEARS, OCC: AGRICULTURE,
R/O: H.NO.352/2, 3RD CROSS,
MAHADWAR ROAD, BELAGAVI-590001.
3. SHRI. SANJU
S/O. SIDDARAYA GODASHE,
AGE: 54 YEARS, OCC: AGRICULTURE,
R/O: H.NO.352/2, 3RD CROSS,
MAHADWAR ROAD, BELAGAVI-590001.
4. SMT. VANITA W/O. UTTAM GODASHE,
AGE: 45 YEARS, OCC: HOUSEHOLD WORK,
R/O: H.NO.352/2, 3RD CROSS,
MAHADWAR ROAD, BELAGAVI-590001.
5. SHRI. VIGNESH S/O. UTTAM GODASHE,
AGE: 22 YEARS, OCC: STUDENT,
R/O: III CROSS, PLOT NO.352/2,
MAHADWAR ROAD, BELAGAVI-590001.





6. SHRI. VAIBHAV S/O. UTTAM GODASHE,
AGE: 20 YEARS, OCC: STUDENT,
R/O: III CROSS, PLOT NO.352/2,
MAHADWAR ROAD, BELAGAVI-590001.

...APPELLANTS

(BY SRI B.S. KAMATE, ADVOCATE)

AND:

FAKIRA S/O. DEVAPPA GODASHE
SINCE DECEASED BY HIS LR.

1. VIMAL W/O. FAKIRA GODHASE,
DECEASED LEAVING BEHIND WITHOUT
ANY LEGAL REPRESENTATIVES.
2. SHRI LAXMAN S/O. DEVAPPA GODASHE,
SINCE DECEASED BY HIS LRS.
- 2(A) KAMAL W/O. LAXMAN DEVAPPA GODASHE
AGE: 75 YEARS, OCC: HOUSEHOLD WORK,
R/O: CCB NO.17 MAHADWAR ROAD CROSS NO.3,
BELAGAVI, DIST: BELAGAVI.
- 2(B) REKHA W/O. PARASHARAM PASAVE
AGE: 55 YEARS, OCC: HOUSEHOLD WORK,
R/O: GANESHPUR LAXMI NAGAR,
BELAGAVI.
- 2(C) SUNITA W/O. SUNDAR JAMBOTAKAR
AGE: 54 YEARS, OCC: HOUSEHOLD WORK,
R/O: GANESHPUR LAXMI NAGAR,
BELAGAVI.
- 2(D) LATHA SANJAY CHAVAN
AGE: 50 YEARS, OCC: HOUSEHOLD WORK,
R/O: NANDNAGAR, VADAGAON,
BELAGAVI.
3. SMT. RENUKA W/O. ANANTH GODASHE,
AGE: 63 YEARS, OCC: HOUSEWIFE,
R/O: HOUSE NO.211, TAHASILDAR GALLI,
BELAGAVI-590001.



4. SMT. ANITA W/O. PARUSHARAM YALLURKAR,
AGE: 45 YEARS, OCC: HOUSEWIFE,
R/O: HOUSE NO.211, TAHASILDAR GALLI,
BELAGAVI-590001.
5. SMT. GEETA W/O. SUDESH GUJJAR,
AGE: 42 YEARS, OCC: HOUSEWIFE,
R/O: HOUSE NO.211, TAHASILDAR GALLI,
BELAGAVI-590001.
6. SHRI. AMRUT S/O. ANANTH GODASHE
AGE: 40 YEARS, OCC: BUSINESS,
R/O: HOUSE NO.211, TAHASILDAR GALLI,
BELAGAVI-590001.
7. SHRI. ARUN S/O. ANANTH GODASHE,
AGE: 37 YEARS, OCC: BUSINESS,
R/O: HOUSE NO.211, TAHASILDAR GALLI,
BELAGAVI-590001.

...RESPONDENTS

(BY SRI SHREEVATSA S. HEDGE, ADVOCATE FOR R3 TO R7;
NOTICE TO R2 (A) TO R2 (D) SERVED;
R1 DECEASED (WITHOUT LEAVING BEHIND ANY LEGAL
REPRESENTATIVES))

THIS REGULAR FIRST APPEAL IS FILED UNDER SECTION 96 OF C.P.C., PRAYING TO SET ASIDE THE IMPUGNED JUDGMENT AND DECREE DATED 29.11.2017 PASSED BY THE II ADDITIONAL SENIOR CIVIL JUDGE AND C.J.M. BELAGAVI, IN O.S.NO.19/2012 AND THE SUIT O.S.NO.19/2012 FILED BY THE RESPONDENTS/PLAINTIFFS MAY KINDLY BE DISMISSED ALLOWING THIS R.F.A. WITH COSTS IN THE INTEREST OF JUSTICE,

THIS APPEAL HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 04.12.2024 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **SREENIVAS HARISH KUMAR J.,** DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
AND
THE HON'BLE MR. JUSTICE T. G. SHIVASHANKARE GOWDA

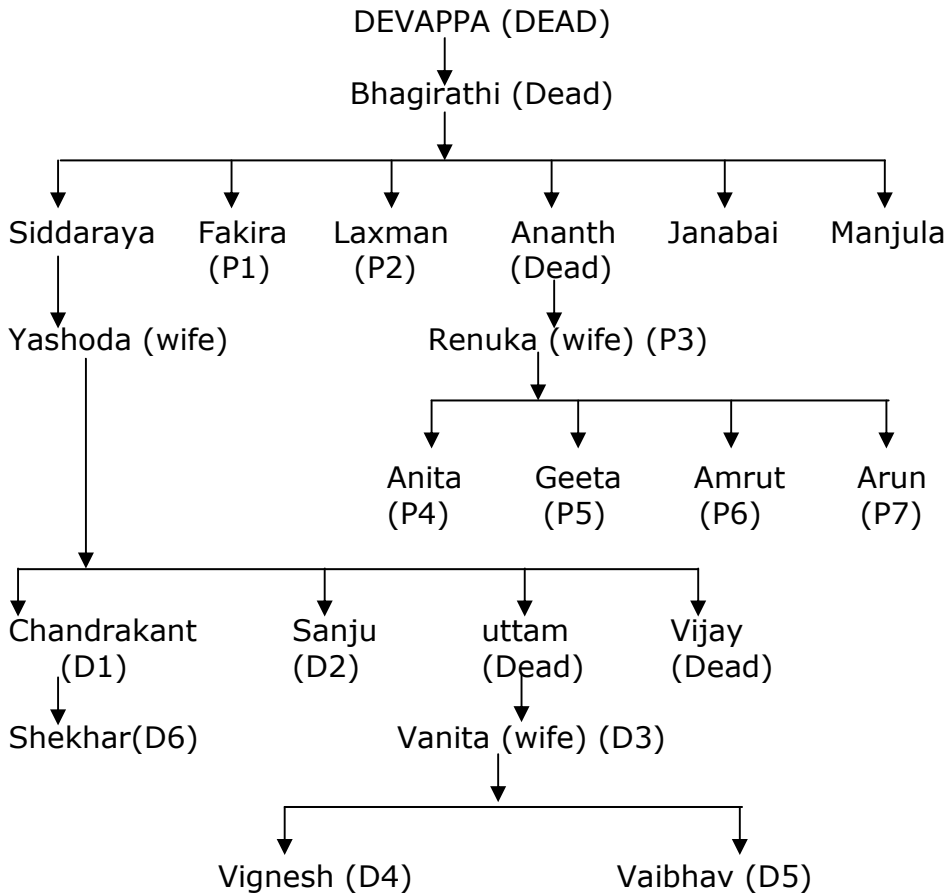


CAV JUDGMENT

(PER: THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR)

The Judgment and decree dated 29.11.2017 in O.S.No.19.2012 on the file of II Additional Senior Civil Judge, Belagavi is challenged in this appeal. The appellants are the legal representatives of the first defendant, and defendants 2, 3, 4 and 5.

2. The relationship between the plaintiffs and the defendants is represented in the following pedigree.





3. The plaintiffs claimed to 2/3rd share in 11 guntas of land in Sy.No.125/2 situate at Chougule Wadi, Mandoli Road, Tilakwadi, Belagavi (suit property). They stated that besides the suit property, the joint family of the children of Devappa Balappa Ghodashe owned and possessed the landed property in Sy.No.451 and two houses bearing No.211 and 352/2 at New Gandhinagar and Mahadwar Road at Belagavi. In the year 1982 there was a partition among the four sons of the propositus in respect of property bearing R.S.No.451 and two house properties 211 and 352/2, but the suit property was not divided and it was kept in common possession and cultivation of plaintiffs and defendants. The plaintiffs requested the defendants to effect partition of the suit property in order to avoid complications in future. The defendants agreed in the beginning, but having noticed sudden change in the behavior of the defendants, they verified the revenue records and came to know that their names had been deleted from the revenue records by retaining the names of the defendants. So this made them to approach the Court seeking for partition in the suit property.



4. The main contention of defendants 1 to 3 and 6 in the written statement was that the plaintiffs themselves executed an affidavit admitting that the suit property had fallen to the share of the defendants 1 to 3 and 6 and therefore the plaintiffs cannot claim partition much less common possession over and cultivation of the suit property.

5. The Trial Court framed the following issues and additional issues:

1. Do the plaintiffs prove that in the partial partition of the year 1982 the suit property bearing CTS No.125/2 was not included and it was kept in the common possession & enjoyment of all the parties?
2. Do the plaintiffs prove that the suit property is joint family property and plaintiffs are in the joint possession and enjoyment of the suit property along with the defendants?
3. Do the defendants prove that the plaintiffs were fully aware of the entries in revenue records showing that the defendants are owners?
4. Is the suit barred by limitation?
5. Are the plaintiffs entitled to any share in the suit schedule property and if so, to what extent?



6. What order or decree?

Additional issue:

1. Do the defendants prove that plaintiffs have executed consent affidavit and admitted that the property has fallen to share of Defendants No.1 to 3 and defendant no.6, as contended in Para no.4 of written statement?

6. Answering issues 1 and 2 in affirmative and issue no.3 in negative, the Trial Court decreed the suit declaring that the plaintiffs 1 and 2 were each entitled to 1/4th share; the plaintiffs 3 to 7 were together entitled to 1/4th share and the defendants were together entitled to 1/4th share in the suit property.

7. Based on the evidence placed by the parties, the Trial Court drew up conclusions that when all the joint family properties were subjected to partition in the year 1982, the suit property was not divided and remained in the joint names of the sons of the propositus till 2008 and 2009. Referring to Ex.D.1, the consent affidavit which the defendants relied on, it was stated by the Trial Court that it did not amount to transfer. It was an unregistered instrument which would carry no value in the eye of law. The defendants contended that the affidavit



was executed in the year 1995, but the revenue records clearly indicated that the affidavit was not acted upon and the suit property remained in the joint names of all the members for a period of 12 to 15 years after execution of the affidavit. Therefore, the suit property belonged to the joint family and the parties would be entitled to their respective shares.

8. Sri B.S.Kamate leaned counsel for the appellant/defendants argued that when there was a partition in the year 1982, the suit property was actually allotted to the share of Siddaraya (Siddappa) the first son of the propositus. The partition was oral and therefore Ex.D.1 was obtained in order to confirm the allotment of suit property to Siddaraya. After his demise, the members of this branch continued to hold possession. The Trial Court failed to raise proper issues. If an issue had been framed throwing burden on the defendants, it would have enabled them to prove their possession over suit property. Therefore the defendants were deprived of an opportunity. In the evidence it has come that the defendants are in possession. Plaintiff no.2 filed an affidavit in lieu of examination-in-chief. Thereafter he did not appear for cross examination. Later on plaintiff no.7, son of Anant Ghodashe



adduced evidence as PW.2. He has clearly admitted in the cross examination that if PW.1 had appeared for cross examination, the truth would have come out. Intentionally PW.1 did not enter the witness box at a later stage. The Trial Court should have drawn adverse inference against the plaintiffs for this reason. In this view the findings of the Trial Court are not sustainable and hence appeal deserves to be allowed.

9. Sri Shreevatsa S. Hegde, leaned counsel for the respondents argued that suit property was not subject matter of oral partition of the year 1982, it was kept jointly in the names of the members of the family. It was never divided thereafter. The affidavit as per Ex.D.1 is a created instrument. Even otherwise the specific contention of the defendants that the plaintiffs relinquished their rights over the suit property does not legally stand because it was an unregistered instrument. The defendants cannot claim any right by making use of Ex.D.1. PW.1 did not appear for cross examination because of his old age and ill health. The trial Court did not refer to the affidavit of PW.1. Only the evidence of PW.2 and DW.1 was considered. The Trial Court has given proper reasons



to decree the suit and therefore appeal deserves to be dismissed.

10. The above argument gives rise to the following points to be answered:

- i) *Has the Trial Court committed an error in not raising the proper issue with regard to possession of defendants?*
- ii) *Has the Trial Court rightly discarded Ex.D.1 to decree the suit for partition?*

11. **POINT NO.(i) :** The argument of Sri B.S.Kamate was that the Trial Court should have raised an issue with regard to possession of the defendants over the suit property with reference to Ex.D.1. This argument cannot be accepted. It is the fundamental principle that the controversy between parties to the suit as can be deciphered from the pleadings gives rise to issues. If the entire written statement is read, nowhere there is a statement that the defendants were put in possession of the suit property. All that they contend is that the plaintiffs themselves gave consent in affidavit and thus the suit property fell to their share. The Trial Court raised issues 1 and 2 as referred to above, based on the assertions in the plaint that the



suit property had not been included in the partial partition of the year 1982. The specific contention taken by defendants referring to affidavit was an answer to the plaintiffs' plea. Therefore the initial burden is on the plaintiffs to prove that suit property was not subject matter of the oral partition. Additional issue no.1 casts burden on the defendants to prove the execution of consent affidavit. Therefore proper issues were raised by the Trial Court. It was not necessary to frame an issue with regard to possession being with defendants as the defendants stated nothing about their possession. Even otherwise, if such an issue was really required for proper determination of the suit, nothing prevented the defendants from making an application under Order 14 Rule 5 of CPC for framing an issue in that regard. Having not availed this opportunity, if argument is advanced in the appeal that non framing a required issue led to erroneous decision in the suit, such kind of argument cannot be entertained. We also do not find it expedient to exercise power under Order XLI Rule 25 of CPC to frame such an issue as argued by Sri B.S.Kamate, Therefore, point no.(i) is answered in negative.



12. **POINT NO.(ii):** The evidence shows that the suit property was identified by a name as property situate near Golibar Maidhan. From the pleadings it is evident that the joint family owned other three properties in addition to the suit property and there was an oral partition in the year 1982. Finding of the Trial Court to this effect is not incorrect.

13. So far as the suit property is concerned, the defendants rely upon Ex.D.1, a consent affidavit said to have been executed by the brothers namely 1) Fakira, 2) Laxman and 3) Ananth in favour of his eldest brother Siddaraya (Siddappa). In para 2 of the affidavit it is stated that the said three brothers were desirous of transferring their share in Sy.No.125/2 in favour of another brother Siddaraya (Siddappa). The recitals of the affidavit make it clear that they wanted to transfer their shares. Ex.P.1, the Hakkupatra shows that after the demise of the propositus on 10.09.1959, the suit property and another land in bearing no.451 were made out in the names of the brothers namely Siddaraya, Fakira, Laxman and Ananth. Ex.P.2, the RTC for the year 2004-05 also indicates names of all the four brothers in columns 9 and 12. Ex.D.2, the mutation register extract shows 11 guntas of land



in suit property being held jointly by Siddaraya and his brothers and later on there was a mutation in the names of defendants 1, 2, 3, 4 and 5. This was the origin for dispute. Since the defendants contend vehemently that their names were made out in the revenue records on the strength of affidavit, the begging question is whether Ex.D.1 could be considered as a valid transfer.

14. As the partition of the year 1982 is not disputed, obviously if there were to be transfer of the shares of three brothers in the name of another brother, it should be either in the form of sale, or relinquishment of rights and any such transaction must be in writing and registered. The consent affidavit upon which defendants rely upon does not amount to any kind of transfer recognizable under law. PW.2 may have admitted the signature of his father on Ex.D.1, but as it is the clear case of the defendants that there was transfer of right in favour of Siddaraya, the first son of the propositus, unless there was valid transfer, the defendants cannot make use of that document to contend that the suit property belongs to them. This is the way the Trial Court has appreciated the



evidence. We do not find any infirmity in the findings recorded by the Trial Court.

15. In regard to argument of Sri B.S.Kamate that PW.1 did not enter the witness box purposefully, it is to be stated that the Trial Court did not rely upon the evidence of PW.1 and it was ignored. Since inferences can be drawn on the documentary evidence, the oral evidence of the witnesses does not matter much. Therefore Ex.D.1 has been rightly discarded. Point no.(ii) is therefore answered in affirmative.

16. From the above discussion we come to the conclusion that the appeal is devoid of merits. Though the plaintiffs claimed $2/3^{\text{rd}}$ share in the suit property, the Trial Court has arrived at a conclusion to allot $1/4^{\text{th}}$ share in the facts and circumstances. There is no infirmity in the judgment of the Trial court. Hence appeal is dismissed.

Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE

Sd/-
(T. G. SHIVASHANKARE GOWDA)
JUDGE