

SUPREME COURT OF INDIA

K.G. Shivalingappa (Dead) By Lrs.

Vs.

G.S. Eswarappa

C.A.No.1363 of 1999

(Ashok Bhan and S.H.Kapadia JJ.)

23.07.2004

JUDGMENT

Ashok Bhan, J.

1. Leave granted in special leave petition (C) No. 1111 of 2000.
2. Bare essential facts, set out hereinafter, would in our opinion, be sufficient to appreciate the crux of controversy arising for the decision in these appeals.
3. Genealogy of the members of the family amongst whom the present dispute arises is as under:

GENEALOGY
NANJAPPA

KARIYAPPA (1901)

DYAMAPPA (1910)

SHIVALINGAPPA (1942) (I)

NANJAPPA (1923)

MAHADEVAPPA (1965)

SHIVALINGAPPA (1st Defendant) (II)

RANGAPPA (1916)

MAHESWARAPPA Def. 6

SHIVALINGAPPA Def. 7 (III)

CHANDRAMOHAN & 3 OTHER SONS (Defts. 2 to 5)

KALIVEERAPPA Plaintiff 2

ESWARAPPA Plaintiff No. 1

NEELAM Wife & 5 other sons Plaintiffs 3 to 8

4. Plaintiffs-respondents (hereinafter referred to as the 'respondents') belonging to the branch of Rangappa son of Nanjappa filed suit O.S. No. 3 of 1972 in the court of the Civil Judge, Shimoga for partition and separate possession of half a share of the suit schedule properties, on the ground that properties belong to the Joint Hindu Family of two branches of Shivalingappa and Rangappa. The branch of Mahadevappa son of Dyamma was not made party in the original suit initially, even though the properties in their hands were also included in the schedule of properties. Maheswarappa and Shivalingappa (III), sons of Mahadevappa from the other branch were later on added as defendant Nos. 6 and 7. Since name Shivalingappa appears at three places they would be referred to as Shivalingappa-I, Shivalingappa-II and Shivalingappa-III for the sake of clarity.

5. Appellants herein belonging to the branches of Shivalingappa-III represented by defendant Nos. 1 to 5 and Maheswarappa, i.e. defendant Nos. 6 & 7 contested the suit and filed the written statements. Defendant Nos. 1 to 5, the appellants herein, pleaded that the partition of the properties had already been effected of the Joint Hindu Family properties under the partition deed dated 15.11.1916. It was averred that there was a partition of properties in the family of Nanjappa recorded on 15.6.1916 between the two branches of Kariyappa and Dyamma as represented by Shivalingappa-I and Nanjappa sons of Kariyappa on the one hand and Mahadevappa representing the branch of Dyamma on the other hand. The Joint Family properties were located in villages Arasinagatta and Kabbala. Shivalingappa II's branch got the properties at Kabbala and the other two branches shared the properties at Arasinagatta. Shivalingappa's branch shifted to Kabbala Village which is at a distance of about 10 kilometers from Arasinagatta. Nanjappa's and Dyamma's families continued to live at village Arasinagatta.

6. Trial court by its judgment and decree dated 22.9.1979 dismissed the suit and accepted the case of the defendants-appellants, to the effect that there was a partition in the year 1916 and as such the plaintiffs-respondents were not entitled to seek division of the properties.

7. The regular appeal, RA No. 22 of 1989, filed before the Court of Additional District Judge, Shimoga by the plaintiff-respondents was dismissed on 12.8.1992. The first appellate-court rejected the appeal, inter alia, on the findings that: there was a prior partition in the joint family of Nanjappa amongst the three branches of Shivalingappa- II, Rangappa and

Mahadevappa. The document of 1916 itself shows that there was already a division of properties and severance of status in the joint family of the three branches. Partition amongst Hindus can be oral but if the partition is recorded by instrument in writing it is required to be registered under Section 17(1)(b) of the Indian Registration Act though unregistered document could be relied upon to establish the severance of status in the joint family. That the oral and documentary evidence on record established separate possession and enjoyment of the properties that had fallen to the shares of three branches by the irrespective owners. That Rangappa and Mahadevappa had divided the original house which had fallen to their shares at Arasinagatta and were living in the two portions separately. Similarly in respect of the agricultural lands also the branches of Mahadevappa and Rangappa were cultivating equal portions by paying Kandayam (taxes) separately. The Appellate Court also found, on a detailed examination of the evidence that the parties to the suit, namely, the plaintiffs as well as the branches of defendants had purchased and disposed of several properties independently. That the parties had been paying assessment separately and the Khata entries also indicated that the properties stood in their names separately. The compensation amount received for acquisition of lands had been distributed amongst the two branches i.e., plaintiff and defendant Nos. 6 & 7.

8. Aggrieved against the judgments and decrees passed by the courts below, plaintiffs-respondents filed second appeal in the High Court which was numbered as R.S.A. No. 918 of 1992. The second appeal was admitted on the following substantial question of law:

"Whether the Courts below were justified in holding that Exh. D-101 is admissible as a deed of partition, without its being registered?"

9. The High Court observed that if the answer to this question is in negative then the suit has to be decreed as prayed for granting a decree for partition and if the answer to the question is in affirmative then the dismissal of the suit by the court below has to be confirmed. Learned Single Judge also recorded in his order that there was no request made before the Court either to reframe the question or to frame any other question as contemplated under Section 100, CPC.

10. After recording the submissions of the counsel for the parties and noting the judgments cited by the counsel for the parties at the Bar, learned Single Judge set aside the judgments and decrees of the courts below by observing:

"After hearing the arguments, I am convinced that the legal position is settled that Exhibit D 101 cannot be received in evidence to evidence the partition and consequently no partition can be said to have been taken place in 1916."

"Once it is found that the document is inadmissible in evidence, and the following the views expressed in the two dictums of the Supreme Court relied upon by the appellants it has to be held that the property that is acquired by the manager of the family shall be held to be for the benefit of entire family until it is proved by the manager himself that he has other source of income to acquire those properties.

Therefore, it has to be held that all the properties mentioned in the schedule are available for the partition."

11. The other findings recorded by the first Appellate Court were neither adverted to nor set aside. The least what can be said about the judgment under appeal is that it cryptic and bereft of any reason whatsoever. It is abrupt in the sense that after noting the contentions raised by the learned counsel appearing for the parties the learned Judge hearing the second appeal has set aside the judgments and decrees of the courts below only because in his opinion Ex. D-101 (Partition Deed) required to be registered. While setting aside the judgment in second appeal of the courts below which is limited to substantial questions of law, the High Court should have recorded proper reasons. Plaintiffs-respondents, as noted in the judgment under appeal, did not claim that any other question of law arises from the findings recorded by the first appellate court. Without setting aside the other findings the High Court could not reverse the judgment and the decree of the courts below.

12. In regular second appeal the High Court can interfere with the concurrent findings recorded by the Courts below only on the substantial question of law either framed at the time of admission of appeal or re-framed or substituted later on at the time of arguments. Learned Single Judge without adverting to the other findings recorded by the first Appellate Court (to which a reference has been made) has set aside the entire judgment and decree of the wrong presumption and premise that the fate of the appeal was dependent only on the fact as to whether the partition deed of 1916 was required to be registered or not.

13. In *Nandi Bai vs. Gita Bai Kom Rama Gunge* , it has been held by this Court that though partition amongst the Hindus may be effected orally but if the parties reduce it in writing to a formal document which is intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted in partition and thus the document would be required to be compulsorily registered under Section 17(1)(b) of the Registration Act. However, if the document did not evidence any partition by metes and bounds, it would be outside the purview of Section 17(1)(b) of the Indian Registration Act. This decision was followed in *Shiromani and others vs. Hem Kumar and others*, and *Roshan Singh vs. Zile Singh*, . In *Sk. Sattar Sk., Mohd. Choudhari vs. Gundappa Amabadas Bukate*, 9, after analysing the judgments, referred to above, this Court observed:

"Partition, specially among the coparceners, would be a 'Transfer' for purposes of *Registration Act, 1908* or not has been considered in *Nani Bai vs. Gita Bai Kom Rama Gunge*¹ and it has been held that though a partition may be effected orally, if the parties reduce the transaction to a formal document which was intended to be evidence of partition, it would have the effect of declaring the exclusive title of the coparcener to whom a particular property was allotted (by partition) and thus the document would all within the mischief of Section 17(1)(b) of the Registration Act under which the document is compulsorily registerable. If, however, that document did not evidence any partition by metes and bounds, it would be outside the purview

of that section. This decision has since been followed in *Siromani vs. Hemkumar*² and *Roshan Singh vs. Zile Singh*³." *

14. We have gone through the judgment of the first Appellate Court with the help of the learned counsel for the parties. The first Appellate Court came to the firm finding of fact that there was a prior partition of the joint family property amongst the three branches of Shivalingappa-III, Rangappa and Mahadevappa. The document Exh. D-101 though unregistered could be relied upon to establish the severance of status in the joint family. The parties were having separate possession of the properties over several decades and were enjoyment of the properties that had fallen to the shares of three branches by their respective owners. The branches of Mahadevappa and Rangappa were cultivating equal portions by paying taxes and they had also divided the house which had come to their shares and were living in two portions separately. For the lands acquired the branches of Rangappa and Mahadevappa had received compensation which was distributed by them amongst themselves to the exclusion of the branch of Shivalingappa-II, thus, evidencing the fact that the properties were partitioned and the respective branches were enjoying the properties and its usufruct separately. The three branches had been disposing of the properties which had fallen to their shares and had purchased separate properties. The khata entries also indicated that the properties were standing in their names separately. The learned Single Judge has not adverted to or set aside any of the findings recorded by the first Appellate Court. The learned Single Judge has clearly fell in error in reversing the judgment without disturbing any of the findings referred to above.

15. For the reasons stated above, these appeals are accepted. Judgment and decree passed by the High Court is set aside and that of courts below are restored. Suit filed by the plaintiffs-respondents is dismissed with costs throughout.

¹*AIR 1958 SC 706*

²*AIR 1968 SC 1299*

³*AIR 1988 SC 881*