Subraya M.N. v. Vittala M.N. & ors. …

CIVIL APPEAL NO. 5805 OF 2016

R. BANUMATHI, J . Leave granted. 2. This appeal is preferred against the judgment dated 20.03.2008 passed by the High Court of Karnataka in R.F.A. No.805 of 1998 dismissing the appeal preferred by the appellant-defendant and thereby confirming the judgment and decree for partition passed by the trial court.

3. Briefly stated the case of respondents-plaintiffs is as follows:-The appellant-defendant and the respondents-plaintiffs are the sons of one late Narayana. The suit scheduled property comprises of item No.1 bearing S.No.69/69 measuring 1.00 acre; item No.2 bearing S.No.69/70 measuring 0.25 acre and item No.3 bearing S.No.69/5C2 measuring 1.00 acre. Items No. 1 and 2 are the joint family property of late Narayana. Narayana died in the year 1962. Plaintiffs No.3 and 4 were working in the army and were sending money to the joint family and the joint family affairs were run by the appellant-defendant. Respondents No. 3 and 4

retired from the army in the years 1988 and 1989 respectively. House in item No.2 was constructed in the year 1980 from out of the joint family income and the contribution made by respondents No.3 and 4. Late Narayana was in possession of suit property item No.3 and had converted the same from forest land to a wetland and the same was further developed from out of the joint family income and the contribution made by respondents No.3 and 4. Respondents-plaintiffs averred that taking advantage of absence of the plaintiffs, appellant filed an application to the Tehsildar for grant of *patta* for item No.3-S.No.69/5C2 which was opposed by the respondents. Alleging that the appellant is attempting to grab the suit properties, respondents-plaintiffs filed the suit for partition

claiming 1/5th share to each of them.

4. In the written statement, appellant-defendant claimed that so far as items No.1 and 2 are concerned, plaintiffs No.1 and 2 have sold their shares-0.50 acre of land to the defendant and the third plaintiff as per sale deed dated 28.04.1976 and plaintiffs have no right to claim partition in items No.1 and 2. It is further averred that there was a *panchayat* in the village on 18.03.1995 wherein plaintiffs No.3 and 4 and defendant participated and it was agreed between the parties that the defendant will give Rs.50,000/- to plaintiffs No. 3 and 4 and defendant will have all rights over items No.1 and 2. So far as suit property in item No.3 is concerned, appellant-defendant claimed that he had encroached the said area of 1.25 acre in S.No.69/5C2 in the year 1962 and converted the same into wetland and applied to the Government to regularize his encroachment. After enquiry, the revenue authorities have granted *patta* to the defendant and hence item No.3 is the self-acquired property of the defendant and the plaintiffs have no right to claim any share.

5. On the above pleadings, trial court framed five issues. Plaintiffs No. 3 and 4 were examined as PWs 1 and 2 and two more witnesses were examined as PWs 3 and 4. Defendant examined himself as DW-1 and examined four other witnesses. During the course of trial, respondents No.1 and 2-plaintiffs No.1 and 2 were examined as CWs 1 and 2 and they have stated that they have no claim or right in items No.1 and 2.

6. Upon consideration of evidence, trial court held that sale deed (Ex.D13) dated 28.04.1976 is proved and the said sale is only by plaintiffs No. 1 and 2 and not by plaintiffs No. 3 and 4 and they cannot be said to have relinquished their right by virtue of resolution of *panchayat* or receipts produced as Exs. D14 and D23 as there can be no relinquishment without any registered documents and on those findings held that plaintiffs No.3 and 4 are entitled to 1/3rd share each in items No.1 and 2. So far as item No.3 is concerned, trial court held that the defendant has failed to prove that the sum of Rs.3489/- paid by him towards the T.T. fine was from out of his own income and held that the plaintiffs No.3 and 4 are entitled to 1/3rd share each in item No.3 also.

7. Being aggrieved, the defendant preferred appeal before the High Court in R.F.A. No.805 of 1998. Affirming the judgment of the trial court, High Court held that in the absence of any conveyance deed, on the basis of Exs. D14 and D23, it cannot be held that the share of plaintiffs No.3 and 4 is transferred to the defendant. So far as item No.3 is concerned, High Court held that the *patta* was granted in favour of the defendant after filing of the suit and the defendant has failed to prove his independent income to pay the amount for grant of land and on those findings dismissed the appeal filed by the appellant. Being aggrieved, the appellant is before us.

8. Learned counsel for the appellant submitted that so far as items No.1 and 2 are concerned, plaintiffs have forfeited their right after receiving the money paid by the defendant and the courts below have failed to appreciate the oral and documentary evidence. It was submitted that courts below failed to appreciate that the item No.3 was developed and cultivated by the defendant, in recognition of which *patta* was granted by the Government to the defendant on 19.06.1997 and courts below erred in treating item No.3 of the suit scheduled property as a joint family property. It was submitted that item no.3 was never in the possession of late Narayana and that *patta* had been granted to the defendant after rejecting the objections made by plaintiffs No.3 and 4, which was not properly appreciated by the High Court.

9. Per contra, learned counsel for the plaintiffs No. 3 and 4 contended that the appellant-defendant failed to discharge his burden of proving that the plaintiffs have forfeited their shares in items No.1 and 2 of the suit scheduled property. It was further contended that it is brought on evidence that item No.3 of suit scheduled property was in the possession of late Narayana who had developed the same and the defendant cannot regard item No.3 as his self-acquired property. Onbehalf of the plaintiffs, it was urged that the courts below have recorded concurrent findings that plaintiffs No.3 and 4 are entitled to 1/3rd share in each of the suit scheduled property and the said concurrent findings cannot be

interfered with.

10. We have carefully considered the rival contentions and perused the impugned judgment and material on record.

11. So far as the relationship between the parties is concerned, it is not in dispute that the defendant and the plaintiffs are sons of late Narayana. It is also available on record that Narayana had two daughters who are married and have not claimed any right with regard to the suit scheduled property. The mother of the plaintiffs died in the year 1987. Plaintiffs No.1

and 2 examined in the trial court as CWs 1 and 2 have stated that they do not claim share in the suit properties. Consequently, the dispute pertaining to partition of the suit scheduled property was limited to plaintiffs No.3 and 4 and the appellant-defendant.

12. So far as item No.1 in S.No.69/69 measuring 1.00 acre; item No.2 in S.No.69/70 measuring 0.25 acre are concerned, plaintiffs No.1 and 2 have executed a registered sale deed (Ex.D13) dated 28.04.1976 in favour of plaintiff No. 3 and the defendant and under the sale deed they have sold their shares of 50 cents each (25 cents + 25 cents). So far as plaintiffs No.3 and 4 are concerned, case of the defendant is that plaintiffs No.3 and 4 agreed to receive a sum of Rs.50,000/- in lieu of their shares in items No.1 and 2 of the suit scheduled property. Defendant had produced Ex.D14 (dated 19.05.1995) executed by plaintiff No.3 for Rs.20,000/- in favour of the defendant and Ex.D23 (dated 12.12.1994) said to have been executed by plaintiff No.4 in favour of the defendant in lieu of his share in the property items No.1 and 2. In his evidence, defendant-DW-1 stated that a *panchayat* was held in the village on 18.03.1995 in which plaintiffs No. 3 and 4 and defendant participated and a resolution (Ex.D22) was passed in the *panchayat.* Ex.D22 is the resolution of the village *panchayat* which is signed by *panchayatdars,* defendant and plaintiffs No.3 and 4 in the presence of *panchayatdars.* The said resolution reads as under:-

"…….

It has been decided that Subraya will be given the residential house and 40 cents of coffee estate being the shares of Gopal and Lingappa agreed to be sold absolutely to Subraya at Rs.50,000/- each. Out of the amount of Rs.20,000/- has already been paid by Subraya to Gopal and Lingappa and remaining amount of Rs.30,000/- is agreed to be paid by Subraya in two installments i.e. at Rs.15,000/- each and the 1st instalment of Rs.15,000/- will be paid before 30.4.1996 to the said Gopal and Lingappa and can obtain receipt therefor and the balance of Rs.15,000/- is agreed to be paid by Subraya on 15.04.1997 along with the bank rate of interest that is to say, effective from 18.03.1996 to be discharged through the *panchayat* and obtain necessary receipt for the same. Gopal and Lingappa have relinquished their rights over the property and handed over the same to Subraya today itself. If the parties to this proceedings do not perform their part of contract and fail to act, they will held liable and responsible for the consequences. Subraya will have all the rights over the property and the house henceforth and enjoy the same and the Gopal and Lingappa agree to cooperate with Subraya in perfecting

his title."

Case of the defendant is that the *panchayat* resolution has been acted upon and that the defendant has paid a sum of Rs.15,000/- each to plaintiffs No.3 and 4.

13. To substantiate his plea that there was a *panchayat* in which plaintiffs No.3 and 4 have relinquished their rights in items No.1 and 2 of the suit properties, defendant has examined C.D. Annaiah (DW-2) who deposed that the plaintiffs No.3 and 4 have received money from the defendant in respect of items No.1 and 2. He further stated that as per the *panchayat* resolution Ex. D22, defendant had also paid a sum of Rs.15,000/- to each of the plaintiffs.

DW-3-Belliyappa who is the brother-in-law of the plaintiffs and defendant i.e. husband of their sister by name Poovamma has stated about the *panchayat* and that money was paid by the defendant to plaintiffs No.3 and 4 and third plaintiff signed the receipt (Ex.D14) and Ex.D23 is the receipt pertaining to plaintiff No.4 and he has not signed in the receipt.

14. Defendant has also examined DW-4-C.B. Muthappa who is the Chairman of the Kanoor Village Panchayat had deposed that the *panchayat* was held between the parties regarding dispute in respect of the suit property items No.1 and 2. He had produced Ex.D34-resolution book of the *panchayat* containing the original resolution Ex.D22 dated 18.03.1995.

15. Considering the plea of relinquishment of their right by plaintiffs No.3 and 4 in items No.1 and 2, after referring to Ex.D22 resolution and the oral evidence, trial court as well as the High Court held that in the absence of any conveyance deed Exs.D14, D23 and D22, it cannot be established that plaintiffs No. 3 and 4 have forfeited their rights in respect of items No.1 and 2 of the suit scheduled property. Courts below have recorded findings that even though Ex.D14 bears signature of plaintiff No.3, Ex.D23 does not bear the signature of plaintiff No.4. It was further held that those two receipts do not indicate that the amount has been received by

plaintiffs No.3 and 4 in lieu of their shares in items No.1 and 2 of the suit scheduled property and mere production of Ex.D14 and Ex.D23 receipts are not helpful to the appellant-defendant to contend that plaintiffs No.3 and 4 have forfeited their rights in respect of their shares in items No. 1 and 2. Even though Exs. D14 and D23 do not contain the survey number, as noticed earlier, Ex.D22 *panchayat* resolution refers to suit scheduled property items No.1 and 2 in S. No.69/69 measuring 1.00 acre and S.No.69/70 measuring 0.25 acre and that amount of Rs.20,000/- has already been paid by the defendant to plaintiffs No.3 and 4. As pointed out earlier, Ex.D22 resolution is signed by the plaintiffs No.3 and 4 and also by the *panchayatdars*. In our considered view, the trial court as well as the High Court was not right in brushing aside the oral and documentary evidence adduced by the defendant to prove that plaintiffs No.3 and 4 have relinquished their right in items No.1 and 2 of suit scheduled property.

16. Under Section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered. Under Section 49 of the Registration Act no document required by Section 17 or by any

provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting an immovable property. As provided by Section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved under Section 91 of the Evidence Act.

17. Even though recitals in the Ex.D22 is to the effect of relinquishment of right in items No.1 and 2, Ex.D22 could be taken as family arrangements/settlements. There is no provision of law requiring family settlements to be reduced to writing and registered, though when reduced to writing the question of registration may arise. Binding family arrangements dealing with

immovable property worth more than rupees hundred can be made orally and when so made, no question of registration arises. If, however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it required registration and without registration it is inadmissible; but the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduct of the parties. In the present case, Ex.D22 *panchayat* resolution reduced into writing, though not registered can be used as a piece of evidence explaining the settlement arrived at and the conduct of the parties in receiving the money from the defendant in lieu of relinquishing their interest in items No.1 and 2.

18. Plaintiffs have denied the contention of the defendant that plaintiffs No.3 and 4 have received consideration from the defendant in lieu of relinquishing their claim for items No.1 and 2 of the suit scheduled property. Contention of the plaintiffs is that all the brothers have cultivated the suit property and have contributed towards the development of the land belonging to their family and also contributed for the construction of the house in item No.2 of the suit property. Plaintiff No. 3 had produced Ex.P8 to P-29-M.O. receipts and acknowledgment cards showing that the defendant received the amount sent under the money order in the name of the defendant. Fourth plaintiff-Gopal had also deposed to the same effect that he has not forfeited his claim in items No.1 and 2 of the suit scheduled property and he has contributed in the construction of the house in item No.2 of the suit scheduled property. Plaintiff No.4-Gopal has also produced money order receipts Exs.P-33 to P-36 to show that he was sending money to the defendant for cultivation of the land and also produced Ex.P-30 and P-31 regarding purchase of building material. Money order receipts produced by plaintiffs No.3 and 4 show that they have sent money to the defendant. But the fact remains that mother of the plaintiffs and defendant was residing with the defendant and she died in the year 1987. Money order could have been sent by plaintiffs No.3 and 4 for maintenance of the mother. In fact, second plaintiff-Ananthaiah (CW2) has stated that plaintiffs No.3 and 4 used to send small amount of money to their mother when they were in the army. That being so, case of the plaintiffs No.3 and 4 that the amount was sent only for development of land and construction of the house ought not to have been accepted by the trial court and the High Court.

19. As discussed earlier, when the terms of the family settlement/arrangement between the parties have been reduced to writing, it has to be registered. But in the facts and circumstances of this case and the conduct of the parties, Ex.D-22 appears to record the family settlement already arrived at between the parties. That Ex.D22-resolution was acted upon is also supported by the subsequent conduct of the parties. Plaintiffs No.3 and 4 retired from the army in 1988 and 1989 respectively. In his evidence, third plaintiff-Lingappa has stated that after his retirement he had purchased 1.00 acre of land in Thithimathi village and that he had constructed a good house there. Third plaintiff has been working as a watchman in the State Bank of Mysore at Hunsur and his wife was working in the Family Welfare Department as a Warden and third plaintiff was residing separate with his wife and family. Third plaintiff had also admitted that he made an application to the Government for grant of agricultural land to him in his capacity as ex-serviceman. Likewise, fourth plaintiff had also purchased property in Kallubane and has constructed his own house in Kallubane and living separate. Wife of

fourth plaintiff is working in Taluk Office and fourth plaintiff is living with his family members.

20. It is pertinent to note that even though the plaintiffs No.3 and 4 have retired from the army in 1988 and 1989 respectively and were living separate, they have not made any claim for partition. Their mother died in 1987. The defendant has made an application for grant of item No.3 in his name in or about 1991, the tehsildar has issued proceedings for regularization of item No.3 in the name of the defendant by his proceeding dated 08.12.1995. The defendant has paid the T.T. fine of Rs.3489/- on 28.03.1996/31.05.1996. Only thereafter, the plaintiffs appear to have filed the suit for partition. As noticed earlier, during the course of trial, plaintiffs No. 1 and 2 stated that they have no claim or right in the suit scheduled property in items No.1 and 2. The conduct of the parties would also affirm that there was a division in status of the defendant and the plaintiffs in so far as items No. 1 and 2 are concerned which was affirmed in the *panchayat*. All

these material facts and evidence were ignored by the courts below and concurrent findings of courts on items No.1 and 2 is to be set aside.

21. We are conscious that power under Article 136 of the Constitution of India is to be exercised sparingly and only in furtherance of justice. But where both the courts have mis-appreciated the evidence and ignored the weight of evidence on

record and findings suffer from perversity, this Court would certainly examine whether the findings are consistent with facts and evidence on record and interfere with the conclusion. As held in *Gujarat Mineral Development Corporation* vs. *P.H. Brahmbhatt*, (1974) 3 SCC 601:(1974) 2 SCR 128, where there is gross or palpable error, the Supreme Court can also consider whether the finding is wholly inconsistent with the material on record or whether the lower court has dealt with the evidence in a perfunctory manner. In the present case, courts below erred in ignoring the oral and documentary evidence adduced by the defendant regarding items No.1 and 2 and the findings of the courts regarding items No.1 and 2 are palpably erroneous and the same is to be reversed.

22. So far as item No.3 in S.No.69/5C2 measuring 1.00 acre, case of defendant is that Saguvali Chit (*patta)* was granted to him and item No.3 is his self-acquired property. For item No.3, defendant gave application for grant of *patta* on 08.08.1989 and again submitted another application on 28.05.1991. By the proceedings of Tehsildar dated 08.12.1995 under Rule 108 of Karnataka Land Revenue (Amended) Rule of 1991, *patta* of item No.3 was granted in favour of the appellant subject to the conditions thereon and also subject to payment of T.T. fine imposed on the said land. The appellant paid T.T. fine of Rs.3489/- vide

chalan dated 28.03.1996 which was acknowledged by the authorities on 31.05.1996. Thereafter Saguvali Chit (*patta)* was granted to the appellant on 19.06.1997, long after filing of the suit. DW-6-SDA in Taluk Office has produced the records pertaining to the grant of *patta* for item No.3 in favour of the defendant. Defendant has brought on record evidence that villagers have raised objections for grant of *patta* of item No.3 to the defendant and the defendant is said to have paid Rs.1000/- to the villagers. In this regard, defendant has examined DW-4-C.B.Muthappa who is working as a Chairman of the Seva Sahkara Sangha

of Kanoor village who has produced Ex.D33-the resolution book which contains the resolution to the effect that the sum of Rs.1000/- was paid by the defendant as fine. The documents would show that Saguvali Chit (*patta)* for suit item No.3 was granted to the defendant on 19.06.1997 subsequent to the filing of the suit.

23. Case of the defendant is that since Saguvali Chit (*patta*) was granted to him, item No.3 is his self-acquired property. Rejecting the contention, courts below recorded the findings that the defendant had not established that the amount of T.T. fine paid by him was from his earnings and no evidence was adduced to show his source of income. Placing reliance upon *Thimmegowda* vs. *Siddegowda* ILR 1991 Karnataka 4506, trial court held that item No.3 is the joint family property of the plaintiffs and the defendant.

24. Refuting defendant's contention, plaintiffs have stated that even during the lifetime of their father-Narayana, he was in possession of item No.3 and the whole family contributed for the development of item No.3. In his evidence DW-2-C.D.Annaiah has stated that during his lifetime Narayana was cultivating item No.3. Likewise, plaintiff No.1-Vittala had also stated that item No.3 of the suit scheduled property was in the possession of their family during the lifetime of their father-Narayana.

25. In his written statement defendant had averred that "……*he out of his own toil and sustained efforts encroached an area of 1.25 acre bearing S.No.69/5C2 in the year 1962 and converted the same into wetlands and revenue authorities had regularized his encroachment*". Father-Narayana died in or about 1962. After the death of Narayana, admittedly, defendant was running the family affairs. After death of Narayana, family must have continued the cultivation of item No.3. The defendant cannot claim that he had individually encroached upon item No.3 even in the year 1962 and was cultivating the same in his individual capacity by his own exertion. Evidence amply shows that possession and cultivation of item No.3 was by the family and *patta* was granted in the name of the defendant and it is to be held that the *patta* was granted for the benefit of the entire family.

26. As discussed earlier, there was division of status among the brothers, the defendant and plaintiffs No. 3 and 4 during the year 1995 or at the time when the defendant paid Rs.20,000/- to plaintiffs No.3 and 4 for relinquishment of their interest in items No.1 and 2 or on 18.03.1995 when before *panchayat* resolution (Ex.D22) was passed. As noticed earlier, appellant had given the application for grant of *patta* of item No.3 in 1989 and the same was renewed in 1991 during which time there was no division of status among the defendant and plaintiffs No.3 and 4. Since the grant of item No.3 in the name of the defendant is for the benefit of the family, trial court and the High Court rightly recorded the concurrent findings that the plaintiffs are entitled to the share in item No.3.

27. So far as plaintiffs No. 1 and 2 are concerned, on receipt of summons they did not appear before the trial court. They were summoned as court witnesses and examined as CWs 1 and 2. So far as the share of plaintiffs No.1 and 2 in item No.3, by perusal of evidence of CWs 1 and 2, it appears that they have relinquished their interest only in items No. 1 and 2. As the grant of *patta* for item No.3 has been held to be for the benefit of the family, plaintiffs No.1 and 2 are also held entitled for a share in item No.3 and thus the plaintiffs and defendant are entitled

to 1/5th share each in item No.3. First plaintiff-PW-1 in his evidence stated that he is not interested in items No. 1 and 2. So far as item No.3, he has stated that since item No.3 of the suit scheduled property was in possession of their family during the life time of their father, he does not know what to ask. Second plaintiff (CW-2) in his evidence has stated that he is not interested in the share of the suit properties as the extent is very small. When specifically being asked about item No. 3, CW2 has stated that he is not interested in item No. 3 also. Though in their evidence, plaintiffs No.1 and 2 have stated that they are not interested in claiming share, they have not filed anything in writing that their shares in item No.3 may be given to plaintiffs No.3 and 4 and also the defendant. In such facts and circumstances, in our view, plaintiffs No. 1 and 2 are entitled to a share in item No.3. However, at the time of final decree/proceedings, it is open to plaintiffs No.1 and 2 to relinquish their share in favour of either the defendant or plaintiffs No.3 and 4.

28. In the result, the judgment of the High Court of Karnataka dated 20.03.2008 in R.F.A. No.805 of 1998 is set aside so far as suit property items No.1 and 2 is concerned and respondents/plaintiffs' suit for partition of items No.1 and 2 is dismissed. So far as item No.3, impugned judgment is modified and it is held that all the four respondents/plaintiffs and appellant/defendant are entitled to 1/5 share each in item No.3.

Accordingly, the appeal is partly allowed. No order as to costs.