IN THE HIGH COURT OF KARNATAKA KALABURAGI BENCH

DATED THIS THE 17TH DAY OF DECEMBER, 2019

PRESENT

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR.JUSTICE HEMANT CHANDANGOUDAR

REGULAR FIRST APPEAL No.6041/2013

Venkat

v/s.

Anitha

JUDGMENT

The second defendant in O.S.No. 13/2011, on the file of Senior Civil Judge, Bhalki has filed this appeal challenging the judgment in the said suit for partition.

2. The plaintiffs 1 to 4 are the daughters of defendants 1 and 4. The second and third defendants are the sons of defendants 1 and 4. The plaintiffs ' case is that 21 acres of land in Sy.No.44 and two houses bearing Nos.4-130 and 4-131 situated at Mehkar village, Bhalki taluk, Bidar district is their ancestral property and that each of them is entitled to a legitimate share.The defendants 1 to 3 3 created a partition deed dated 29.06.2000 among themselves.The plaintiffs were not parities to the said partition deed. Thereafter the second defendant, based on the said partition deed, filed a suit, O.S.54/2004 in the court of Senior Civil Judge at Bhalki for the reliefs of declaration of title and injunction.The said suit was decreed on 26.11.2009, but liberty was given to the plaintiffs to claim their shares in a proper manner by reopening the partition.Therefore they instituted the suit for partition.

3. The second defendant contended in his written statement that the plaintiffs have no right to seek partition as they themselves admitted about the partition in their former suits, O.S.No.39/2003 to O.S.No.43/2003. The decrees in the said suits were all collusive.They cannot take undue advantage of the judgment and decree in O.S.No.54/2004.He further stated that at the time of partition on 29.06.2000, defendants 1 to 3 undertook the responsibility of performing the marriages of the plaintiffs and therefore the plaintiffs relinquished their shares in the property in their (defendants 1 to 3) favour.In fact the marriages were performed by him. The partition deed was executed in the presence of respectable persons of their village.The plaintiffs colluded with first defendant after the said partition and then filed suits O.S.No.39/2003 to O.S.No.43/2003.The judgments in the said suits did not bind him and in fact, in the judgment in O.S.No.54/2004 it has been observed that the judgments in the said suits do not bind his interest.Therefore the plaintiffs cannot claim partition and the suit has to be dismissed.

4. The trial court assessed the oral and documentary evidence and decreed the suit declaring that the each of the plaintiffs is entitled to 1/8th share in the suit properties and hence this appeal by the second defendant.

5. The learned counsel for the appellant-second defendant argued that the trial court has grossly erred in decreeing the suit in utter disregard of the findings given in O.S.No.54/2004 with regard to title of the second defendant. He argued that the said suit was for declaration of title, the first issue in the said suit with regard to

title of the second defendant, who was plaintiff therein, has been answered in the affirmative upholding the partition dated 29.06.2000.This judgment was not challenged by the plaintiffs.As it attained finality, the court below should not have reopened the partition.Though it is a fact that the court court while while deciding O.S.No.54/2004 held that the plaintiffs could institute a suit for reopening of the partition, that observation was against the finding on issue no.1 and for this reason alone the court below should have dismissed the suit.

6. The learned counsel for the appellant submitted that reopening of partition is possible and permitted only when there was reunion of all the properties.Since in this case, after the partition dated 29.06.2000 and judgment in O.S.54/2004, there was no reunion of properties, plaintiffs could not have instituted the suit. They could have sought counter claim for partition in O.S.54/2004; but they did not and hence they lost their right to file a separate suit.When they filed written statement in O.S.54/2004, they did not seek leave of the court to file a separate suit for partition and therefore their suit is hit by Order 2 Rule 2 of CPC. He further argued that in view of finding on issue no.1 in O.S.54/2004, section 11 of CPC bars the plaintiffs from claiming partition.

7. Referring to to the operative portion of the judgment in O.S.54/2004, he argued that the portion of the order " It is declared that the plaintiff is continuing the owner of suit land in sy.no.44 measuring to extent of 7 acres till reopening (aliving) of partition deed marked Ex.P-22 " can be ignored as it is not in conformity with finding on issue no.1 in O.S.54/2004.In this regard it is his argument that it is to be understood in such a way that the appellant-defendant no.2 herein was declared as the owner of 7 acres of land in sy.no.44. Therefore he submitted that this appeal deserves to be allowed and impugned judgment set aside.

8. The learned counsel for the respondents 1 to 5 (plaintiffs 1 to 5) argued that the partition deed dated 29.06.2000 that the appellant refers to, was written on a piece of paper; it was unregistered and that the plaintiffs were not parties to that partition deed.It was a created document.The judgment and decree in O.S.No.54/2004 is very clear that the plaintiffs could reopen the partition and this was the reason as to why they filed a separate suit.It may be true that in O.S.54/2004, the court which decided that suit might have declared the title of the appellant based on the partition deed.But there cannot be any declaration of title based on partition deed as the partition does not amount to transfer within the meaning of Section 5 of the Transfer of Property Act and in this regard he referred to a judgment in the case of Sri Aralappa Vs. Sri Jagannath and others (ILR 2007 KAR 339). It was his further argument that the court below clearly noticed the fact that the plaintiffs were also entitled to equal share as they were coparceners and that the decree in O.S.54/2004 did not take away their right to claim partition.The appellant did not challenge the decree in O.S.54/2004 and he therefore cannot say that his sisters i.e., plaintiffs are not entitled to seek partition in the ancestral property.He also argued that the appellant contended that the plaintiffs relinquished their right in the suit property but there is no document in proof of the same.If really there were to be be a relinquishment, there should have been a document duly registered.The appellant very clearly admits that there is no document of relinquishment.For all these reasons, the appellant cannot deny the right of the plaintiffs to seek partition in the ancestral joint family property, this appeal is devoid of merits and it is to be dismissed.

9. We have perused the records and considered the points of arguments.The following points are formulated for discussion:

(i) Whether declaration of title cannot be sought on the basis of partition?

(ii) Whether the second defendant, without challenging the judgment and decree in O.S.54/2004, can contend that he is the absolute owner of the share allotted to him in the partition dated 29.06.2000?

(iii) Whether Order 2 Rule 2 of Civil Procedure Code can be invoked to hold that the suit is barred as the plaintiffs did not not seek for counter claim in O.S.54/2004?

(iv) Whether section 11 of the Civil Procedure Code is applicable as argued by the appellant's counsel?

(v) Has the trial court rightly held that the plaintiffs are entitled to claim partition in the suit properties?

(vi) What order?

10. Before discussing the above points, it is necessary to mention briefly the findings recorded by the trial court.Referring to the evidence given by PW- 1, it is held that her oral testimony has not been impeached.With regard to the documentary evidence, what is held is that Exs.P1 and P2, the certified copies of the judgment and decree in O.S.54/2004 would clearly show that defendant no.2, who was plaintiff in the said suit, was declared as owner of 7 acres of land till his sisters would seek reopening of partition; that means in O.S.54/2004 their right to seek partition was recognized and they filed the suit accordingly.

11. In regard to the specific defence taken up by the second defendant, the oral evidence of DW1 to DW5 does not in any way establish that the plaintiffs had relinquished their rights in the properties at the time of partition that took place on 29.06.2000. If really they had relinquished their rights, that should have been made through a registered instrument, but no such document was executed; hence hence mere oral testimonies of the witnesses would serve no purpose and could not even be considered also.And Exs.D1 to D8 do not prove relinquishment of plaintiffs ' rights, thus the plaintiffs would become entitled to 1/8th share each in the suit properties.

12. Since this is first appeal, we have reassessed the evidence.What we also notice is that PW- 1 i.e., plaintiff no.1 has stated in her affidavit filed in the form of examination-in-chief that she and her sisters were not parties to the partition dated 29.06.2000 and that it does not bind them.The judgment in O.S.54/2004 has upheld their right to reopen the partition.She has also stated that second defendant did not perform her marriage, rather her father i.e., first defendant performed her marriage. She has been subjected to a lengthy cross examination, but it is found that she has not been discredited; and many questions are in the form of suggestions, which are denied by her and as such they are of no use.The main documents that the plaintiffs have relied upon are Exs.P1 and P2, the certified copies of judgment and decree in O.S.54/2004, which need not be discussed in detail as the contesting defendant no.2 also relies upon the same judgment to assert his right.

13. From the defendants ' side, totally five witnesses, DW1 to DW5 have adduced evidence.DW1 is second defendant, who in examination-in-chief asserts his possession over 7 acres of land on the basis of partition dated 25.06.2000 and his title over the same being declared in O.S.54/2004.But his cross-examination discloses that he has given evasive answers, he feigns ignorance about the decision in O.S.54/2004 and that his sisters were given liberty to file a suit for reopening of partition. Having admitted that his sisters have not signed the partition deed dated 29.06.2000, he also states that his sisters had consented for the partition.

DW- 2 speaks that there was a partition in the family of the plaintiffs and the defendants and in the said partition, defendant no.2 was allotted 7 acres of land, that the plaintiffs relinquished their rights over their shares in the property and in turn defendant no.2 agreed to bear the expenses of the marriage of his sisters.He also states that defendant obtained loan from him towards marriage expenses.In the cross-examination he admits that the plaintiffs have not signed the partition deed, that he has no document in proof of having lent money to second defendant and also that plaintiffs did not execute any document for having relinquished their rights.

14. DW- 2 to DW- 4 are independent witnesses.

15. DW- 3 and DW- 4 speak in tandem that the plaintiffs do not have share in the suit property as they relinquished their rights in the property because defendant no.2 undertook to meet the marriage expenses of

the plaintiffs. DW- 4, in addition has stated that partition deed was was written by DW- 3. Their cross examination shows that they too admit that the plaintiffs ' signatures are not there in the partition deed and that they did not execute any document for having relinquished their shares.

16. DW- 5 is defendant no.3 and states that suit properties belong to joint family and that he and the plaintiffs are entitled to equal share in the properties.He also states that defendant no.2 did not perform the marriages of the plaintiffs.The answers given by him in the cross-examination show his vacillatory stand, he asserts joint possession, but also admits separate residence of every brother and partition of house properties like partition of agricultural lands.But his overall oral evidence appears to be that there was no partition earlier.

17. On assessing the evidence, the inferences that can be drawn are that there might have taken place a partition on 29.06.2000, but the plaintiffs being parties to it appears to be improbable.The said partition does not bind the plaintiffs.The judgment in O.S.54/2004 shows that the plaintiffs could claim partition despite title of second defendant being held to be proved on the basis of partition dated 29.06.2000; and the title of second defendant being held valid to be in force till the plaintiffs would reopen the partition.The evidence on record also shows that properties are ancestral and that plaintiffs are the sharers in the natural course.The findings of the trial court to this extent are acceptable.With these findings on material facts, the points formulated as mentioned above are taken up for discussion.

Point NO. (i):

18. This question has arisen incidentally as the learned counsel for plaintiffs argued by referring to partition deed dated 29.06.2000.He raised two points, firstly that partition is not a transfer and therefore there cannot be declaration of title based on partition.He has relied upon a decision in the case of Aralappa (supra).It is amply clear that he raised this point to contend that the finding given on issue no.1 in O.S.54/2004 is not correct.It is fact that the plaintiffs who were defendants in the said suit did not file appeal questioning the decree therein, but they contend in this regard that they were not required to appeal as they were given liberty to file a separate suit seeking reopening of partition.Secondly as the said partition was not registered, and in view of central amendment to section 6 of the Hindu Succession Act, unregistered partition cannot be recognized and shares to the daughters of a coparcener cannot be denied.

19. In the case of Aralappa (supra), learned Single Judge of this High Court has held that since partition does not amount to transfer of property, and that no title is conveyed, declaration of title cannot be sought on the basis of partition.We find it difficult to accept the view of the learned Single Judge that one cannot seek declaration of title based on partition.The proposition that partition does not amount to transfer within the meaning of section 5 of the Transfer of Property Act is well accepted.Partition is only adjustment of shares between or among persons who are entitled to shares in the property.A share, which was undefined and indistinct, becomes definite partition takes place.

20. Also when a partition takes place, one sharer relinquishes the interest of another, thereby definite interest of each sharer is created.The shares get defined and for this reason registration of partition deed according to section 17 of the Indian Registration Act is compulsory. Whenever partition of self acquired or separate property of a Hindu takes place, absolute interest is created in each sharer and one can deal with the property in the way one likes, and when there is a threat to one's title, there is no bar for seeking declaration of title.

21. When a partition of ancestral property of Hindu Joint Family takes place, a member of a joint family entitled to a share takes it absolutely if on the date of partition, he has no son or daughter, and he continues to hold it absolutely till a son or daughter is born.But when there is threat to his title or to the branch he represents, he can either individually if he alone is the absolute owner, or representing his branch, bring a suit

for declaration of title or for any other relief depending upon the circumstances.There is no any such prohibition.

22. The next aspect is about oral partition which is a special feature of Hindu Law. There is no impediment for seeking declaration of title based on oral partition, but what is required is strict proof. If memorandum of partition is available, it must be produced and proved.Besides it must be proved that oral partition has been acted upon.It must be a time tested one.

23. Since the learned counsel referred to section 6 of the Hindu Succession Act, that aspect must now be dealt with.The Central amendment brought to section 6 of the Hindu Succession Act with effect from 09.09.2005, has recognized a daughter to be coparcener, giving her equal right in Joint Hindu Family governed by Mithakshara Law. But proviso to sub-section (1) of section 6 does not invalidate any disposition including partition taken place before 20.12.2004.Sub-section (5) also states that nothing contained in section 6 shall apply to partition which has been effected before 20.12.2004.Explanation to sub-section (5) states that partition deed must be duly registered under the Registration Act or partition should have been effected a by decree of a court. The explanation part, if given literal construction, invalidates all genuine oral partitions taken place before 20.12.2004, and such a situation may lead to reopening of partitions and there are many such instances also.The Hon'ble Supreme Court, in the case of Prakash and others Vs. Phulavati and others [(2016) 2 SCC 36], has held as below:

" 22. In this background, we find that the proviso to Section 6 (1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced.Explanation cannot permit reopening of partitions which were valid when effected.Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner.The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced.Main provision of the Amendment in Sections 6 (1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20th December, 2004.In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation the proviso in question.

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born.Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected.Any transaction of partition effected thereafter will be governed by the Explanation. "

(Emphasis supplied)

24. What can be deciphered from the above is that although explanation to sub-section (5) of section 6 requires partition effected before 20.12.2004 to be registered, all valid oral partitions effected before the said date remain unaffected, but such oral partitions cannot be simply considered, the party relying upon oral partition must strictly prove it. The court must scrutinize the evidence with regard to oral partition with great circumspection in order to rule out the possibility of forgery and bogus transactions of partition.

25. Another aspect is that the date 20.12.2004 assumes importance only in the matter of succession to ancestral Hindu Joint Family property, when the interest of a daughter being a coparcener arises for consideration.It may be possible to recognize a daughter as a coparcener by virtue of amendment to section 6 of Hindu Succession Act, but it may not be possible for her to claim partition in the property in view of its

disposition or partition before 20.12.2004.But where a question as to succession to property is not involved, or does not arise, and only question is with regard to title to a property based on partition either oral or registered, the cut of date prescribed in section 6 of Hindu Succession Act has no role to play. Therefore we do not uphold the argument of counsel for second defendant-respondents 1 to 5.

Point NO. (ii):

26. O.S.54/2004 was filed by defendant no.2, i.e., the appellant herein against his father, mother, brother and sisters.In this suit, of the six issues framed, it is necessary to extract issues (1) and (5) here:

" 1. Whether the plaintiff proves that in a partition effected between himself and defendant NO. 1, suit property is allotted to him, he is the absolute owner in possession of the suit property on the date of the suit?

5. Whether the defendants 7 and 8 prove that they are also entitled for their share in the suit properties? "

27. Defendants 7 and 8 in O.S.54/2004 are two of the sisters of the second defendant. They not only disputed the partition dated 29.06.2000 that the second defendant relied upon for claiming declaration of his title but referred to a still earlier partition of the year 1994 according to which their brother, i.e., second defendant had been allotted only 4 acres 38 guntas of land, and the shares of all the daughters (plaintiffs) was kept intact in the name of their father.They also stated that one of the sisters, namely Sheshabai was a minor at the time of alleged partition dated 29.06.2000.

28. The trial court judge who decided O.S.54/2004 answered issue no.1 in affirmative and issue no.5 in negative, but the discussion on issues contain conflicting findings and the operative portion of the judgment is very ambiguous.We just express our opinion that the judgment in O.S.54/2004 is unconscionable.Having answered issue no.1 in affirmative and issue no.5 in negative, the trial court judge should have declared absolute title of the second defendant; his discussion shows that partition dated 29.06.2000 was proved, but the defendants 7 and 8 (the sisters) were held to be entitled to shares in the properties. Because they did not set up counter claim for partition or for reopening of partition and that they also did not pay court fee so that shares could have been allotted, the trial court took a view that the plaintiff of that suit, (appellant) would continue as absolute owner of his share till his sisters would reopen the partition.The operative portion of the judgment is extracted here:

" The suit of the plaintiff is hereby decreed.No orders as to costs.

It is declared that, the plaintiff is continuing the owner of the suit land Sy.No.44 measuring to the extent of 07-acres 00-guntas, till re-opening (aliving) of partition deed marked at Ex.P-22 by declaring that the collusive decrees obtained by defendants No.3 to 5 and 7 and 8 are not binding upon the plaintiff.

The defendants, their servants, agents, relatives or any persons claiming under them are hereby restrained by means of perpetual injunction from interfering in the peaceful possession and enjoyment of the suit properties of the plaintiff.

Draw decree accordingly. "

29. Thus it is clear that although issues 1 and 5 were answered affirmatively and negatively respectively, the declaratory relief granted to defendant no.2 was for very limited period, till reopening of the partition by the plaintiffs.Howsoever bad the said judgment is, but it stares at defendant no.2; and his interest in 7 acres of land is put into jeopardy.He is the most affected party, and if he did not challenge it by filing an appeal, the result in the said judgment binds him.Defendant no.2 cannot say that he was not required to challenge an illegal judgment.The argument of learned counsel for second defendant that the plaintiffs should have challenged the said judgment cannot be accepted.They are not the affected parties, for they were given liberty

to reopen the partition and therefore they filed another suit, the judgment in which has given rise to this appeal. Therefore the conclusion is that the second defendant cannot contend that he is the absolute owner of the share allotted to him in the partition deed dated 29.06.2000.

Point NOS. (iii) and (iv):

30. The argument of counsel for defendant no.2 was that the suit for partition is hit by section 11 and Order 2 Rule 2 of CPC as the plaintiffs having failed to challenge the finding of the court on issue no.1 in O.S.54/2004, they are bound by that finding and thus section 11 of CPC is attracted.And that in the said suit, neither they set up counter claim for partition, nor sought leave of the court to institute a fresh suit for partition, Order 2 Rule 2 CPC would be applicable.This is just a futile argument.If section 11 of CPC can be invoked, it is against second defendant for having failed to challenge the judgment in his suit.This aspect is already discussed while answering point NO. (ii). The judgment in O.S.54/2004 does not operate as res judicata against the plaintiffs.

31. With regard to applicability of Order 2 Rule 2 of CPC is concerned, what we need to state is that counter claim is a privilege given to defendants to seek for any of the reliefs that he is entitled to in the given set of circumstances.He may set up counter claim or not.He is not bound to plead counter claim, and if he does not ask for counter claim, he is not barred from filing a separate suit for whatever the relief he is entitled to.But if counter claim is once sought by the defendants and if he omits to seek for any relief that he is entitled to against the plaintiff in the suit, he cannot bring a fresh suit for the relief omitted by him without seeking leave of the court.The principle enunciated in Order 2 Rule 2 of CPC is as much applicable to defendant as to the plaintiff.If the defendant does not plead counter claim even though he could have, and instead files a separate suit, Order 2 Rule 2 of CPC does not come into picture. This being the position of law, in the case on hand, the suit of the plaintiffs is not hit by Order 2 Rule 2 of CPC for not setting up counter claim in O.S.54/2004.These two points are answered in negative.

Point no.v:

32. The discussion on issues in the case on hand shows that the plaintiffs are held to be entitled to claim their legitimate share in view of judgment in O.S.54/2004.We concur with the findings recorded by the trial court.It has been argued by counsel for defendant no.2 that reopening of partition is permitted only when there is reunion of shares.This may be one of the reasons for reopening of partition, but at the same time if any of the members of the joint family is denied of a share without a valid reason or where there is inequitable partition, certainly in such circumstances, partition can be reopened. Here the plaintiffs were denied of their shares as according to defendant no.2, they had relinquished right over their shares in the property, for which there is no proof.Another reason given by defendant no.2 is that he took over the responsibility of performing the marriage of the plaintiffs, which too has not been proved.More than all, defendant no.3 namely Govind, brother of defendant no.2 does not support partition having taken place on 29.06.2000.Therefore we hold that the trial court has rightly come to conclusion that the plaintiffs are entitled to claim partition, and decreed the suit.We do not find any reason to interfere with impugned judgment.Accordingly appeal is dismissed with costs.