

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 4th DAY OF AUGUST 2003

BEFORE

THE HON'BLE MR. JUSTICE V.G.SABHAHIT

C.R.P. NO.1839/2001

Between :

- 1 SUKRI KOM DODTAMMA PATGAR
68 YRS, R/O KODKANI, KUMTA
UTTARA KANNADA
- 2 REVATI KOM TIMMAPPA PATGAR
41 YRS, R/O KODKANI, KUMTA
UTTARA KANNADA.PETITIONERS

(By Sri: GANAPATI S SHASTRI)

AND :

- 1 RAMA JATTI PATGAR
MAJOR, R/O ALGALAKURVE
KUMTA, U.K
- 2 SHIVAPPA @ BERAPPA JATTI PATGAR
MAJOR, R/O ALGALAKURVE
KUMTA, U.K
- 3 SUMITRA KOM KAMU PATGAR
MAJOR, R/O ALGALAKURVE
KUMTA, U.K
- 4 LAXMI JATTI PATGAR
MAJOR, R/O ALGALAKURVE
KUMTA, U.K
- 5 MAHADEVI KOM JATTI PATGAR
MAJOR, R/O ALGALAKURVE
KUMTA, U.K.,RESPONDENTS

This CRP is filed under Section 115 of CPC., praying against the order dated 24.1.2001 passed on FDP.No.10/98 on the file of the Civil Judge (Jr.Dn.) Kumta, dismissing the petition filed under Order 20 Rule 18(2) r/w. Section 151 CPC.,

This CRP coming on for hearing this day, the Court made the following:-

ORDER

This revision by the petitioners in FDP.No.10/98 on the file of the Civil Judge (Jr.Dn.) Kumta, is directed against the order dated 24.1.2001 wherein the petition filed under Order 20 Rule 18(2) r/w. Section 151 of CPC., for mesne profits has been dismissed.

2. The essential facts of the case leading upto this revision with reference to the rank of the parties before the trial Court are as follows:

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The suit of the plaintiff O.S.No.83/84 seeking for partition and separate possession of her share was decreed on 10.10.1992. Thereafter, they filed FDP.No.2/93 and matter was referred to the Deputy Commissioner and possession of the property has been handed over to her on 25.10.1993 and wherefore, in view of the decree that she is entitled to mesne profits as per the decree passed in O.S.83/84 application was filed for determination of mesne profits from 22.9.1984 date of suit to the date of handing over possession 25.9.1988.

3. No objections were filed as submitted by the learned counsel appearing for the petitioners. On behalf of the petitioners, PW.1 was examined and Exs.P1 to P12 were got marked. The trial Court after hearing the arguments of the learned counsel appearing for the parties dismissed the petition by order dated 24.1.2001 and wherefore, the petitioners

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in FDP proceeding are before this Court in revision. The respondents though served with notice have not chosen to appear before this Court.

4. I have heard the learned counsel appearing for the petitioners and perused the report of the Commissioner and the evidence of the petitioner in FDP proceedings which are made available to me by the learned counsel appearing for the petitioners and also the order passed by the trial Court.

5. The trial Court has proceeded on the basis that petitioner has failed to prove that she was excluded from the possession of the properties and that the petitioner has not stated in her evidence that she has been excluded from the possession and apart from her self-serving statement as PW.1 there is no other evidence in support of the said evidence of PW.1. It is not disputed that as per the

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judgment and decree passed in O.S.No.83/84 the plaintiff is entitled to mesne profits. The reasoning upon which the trial court has proceeded to give a finding that the petitioners have failed to prove that they have been excluded from possession of the property is not correct and is erroneous and contrary to the material on record as the evidence of PW.1 would clearly show that the property was in possession of the respondents and that she was residing in Kodakani village and she was only visiting the suit schedule property and she was doing coolie work at Kodakani village and the said fact is elicited in the cross examination by the counsel appearing for the respondents. Further, facts elicited in the cross examination would also show that the finding of the trial Court that plaintiff has failed to show that she was excluded from the possession of the property is not correct and in view of the finding that the petitioners are entitled to mesne profits the application would lie

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under Order 20 Rule 1⁸ and not under any other provisions and the trial Court was not justified in holding that Order 20 Rule 1⁸ does not deal with the determination of mesne profits. The trial Court is under the impression that the application for determination of mesne profits has to be filed under Order 20 Rule 1² 1⁷. It is well settled that the suit is partitioned and ^{separate} put in possession with the property what is sought for is the accounts and the profits in respect of the share that is allotted to the plaintiff in the suit and not the mesne profit under Order 20 Rule 1² 1¹ and the appropriate application would be under Order 20 Rule 1⁸ 1⁷ which has been rightly cited by the petitioners. Further, the trial Court has also ^{failed to} take into account the report of the Commissioner about the number of trees that are situated in the schedule property and also has failed to consider and determine the mesne profits as sought in the petition though there are material on record

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especially, when the respondents have not filed any objections to the application and wherefore, it is clear that the order passed by the trial Court is clearly erroneous and illegal affecting the jurisdiction and accordingly the dismissal of the petition cannot be sustained and the same is liable to be set aside and remanded for the trial Court for fresh determination of the FDP proceedings in accordance with law after affording opportunity to the parties to adduce additional evidence if they so desire. Accordingly, I pass the following order:

The revision is allowed. Order dated 24.1.2001 dismissing FDP.No.10/98 on the file of the Civil Judge (Jr.Dn.) Kumta, is set aside and FDP.No.10/98 is restored to file of Civil Judge (Jr.Dn.), Kumta, with a direction to dispose of the same afresh in accordance with

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law after affording opportunity to the parties to adduce additional evidence, if they so desire.

Sd/-
Judge

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