

(1982) 07 KAR CK 0020
In the Karnataka High Court
Case No : RSA 734/75

Basayya and Others

APPELLANT

Vs

Madolayya and Others

RESPONDENT

Date of Decision : 06-07-1982

Acts Referred:

Evidence Act, 1872 — Section 50

Citation : (1982) 2 KarLJ 485

Hon'ble Judges : N. D. Venkatesh, J

Judgement

1. This second appeal is by the defendants in CS No. 60/1/1964 on the file of the Munsiff, Humnabad. Therein they had succeeded, in the sense that the suit filed against them by the plaintiffs in the said suit (respondents herein) came to be dismissed by the Munsiff by his judgment and decree dt. 27-6-1967. The plaintiffs preferred an appeal before the Civil Judge and succeeded. That judgment and decree of the Civil Judge, Bidar, dt. 31-3-1975 in RA No. 74 of 1967, on his file, is under challenge here.

2. The plaintiffs, of whom the first claims to be the cousin brother of the husband of a certain Shivamma and the second, son of another cousin brother of her husband, filed the suit in question for a declaration that they were entitled to succeed to the estate of that Shivamma and for possession of the plaint schedule property. Their case was that they were the nearest heirs to Shivamma.

3. It is not in dispute that Shivamma was the last holder of this property and that her only daughter, Siddamma, had pre-deceased her. This Siddamma was the wife of the 1st defendant, Basajah. The 2nd defendant is his son and the 3rd his daughter-in-law, being the wife of the 2nd defendant. The 1st and the 2nd defendants hotly contested the claim of the plaintiffs stating that they were the nearest heirs. The case of the defendants is that at the time of Shivamma's death she had expressed a desire that her son-in-law, the 1st defendant, who had served her during her life time and who had looked after her estate should take her properties. They further pleaded that out of love and affection towards

him (the 1st defendant) she had executed a will dt. 28-1-1963 bequeathing the suit land in his favour. It may be noted that the plaintiffs had also set up an oral will stating that at the time of Shivamma's death she had orally stated that they should enjoy the suit land and that accordingly they, having obtained possession of the land, were enjoying the same in their own right. This is denied by the defendants.

4. The Civil Judge upheld the plaintiff's claim only on the ground that they were the nearest heirs to Shivamma.

5. The appellant's counsel, while challenging that finding submitted that in arriving at that finding the Court below had completely ignored the requirements of S. 50 of the Evidence Act, 1872 (the Act) and therefore, that finding is vitiated and is liable to be set aside. In this connection he places strong reliance on a decision of the Supreme Court in *Dalgobinda Paricha v. Nimal Charan Misra*, AIR 1959 SC 914. The counsel for the contesting respondents, on the other hand argued that that finding based on facts was not liable to be disturbed in this second appeal.

6. Now, construing the scope of S. 50 of the Act. this is what the Supreme Court states in *Paricha's* case, (*supra*):

"Under S. 50, when the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The essential requirements of the section are: (1) there must be a case where the Court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. The "belief" or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved.

S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship.

The conduct or outward behaviour must be proved in the manner laid down in S. 60; if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it and so on. The conduct must be of the person

who fulfils the essential conditions of S. 50, and it must be proved in the manner laid down in the provisions relating to proof. That portion of S. 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of S. 50 in the sense that opinion expressed by conduct, as an external perceptible fact, may be proved either by the testimony of the person himself whose opinion is evidence under S. 50 or by some other person acquainted with the facts which express such opinion, and as the testimony must relate to external facts, the testimony is in each case direct within the meaning of S. 60. This is the true inter-relation between S. 50 and S. 60 of the Evidence Act. But while S. 50 affords an exceptional way of proving a relationship and by no means prevents any person from stating a fact of which he or she has special means of knowledge, the section does not imply that the person whose opinion is a relevant fact cannot be called to state his own opinion as expressed by his conduct and that his conduct may be proved by others only when he is dead or cannot be called. S. 50 does not put any such limitation". (Head-Note)

7. The only question that survives for our consideration in this second appeal is as to whether the Courts below, in appreciating the evidence of witnesses touching the alleged relationship of the plaintiffs with the deceased, Shivamma, have not taken into consideration the requirements of S. 50 of the Act and, if not, are the findings of the Courts below on that issue on that account unsustainable?

8. It would facilitate the examination of this question if we know the respective stands taken by the parties on this aspect of the plaintiffs' case. Both sides have furnished their own pedigrees. The pedigree furnished by the plaintiffs is as follows:

The pedigree of the defendants, as set-out in their written statement is: As can be seen from their pedigree the 1st plaintiff and his father's brother's son, the 2nd plaintiff, claim to be the nearest relations of the deceased Shivamma through her husband Madolayya. This Madolayya, according to the plaintiffs, was the son of one Rachayya whose grandfather was one Revansiddayya (common ancestor). Further, it is claimed by the plaintiffs that the 1st plaintiff's father, Rachayya, like the other Rachayya, father of Madolayya, was one of the grandsons of Revansiddayya, being the son of Shankarayya. It is said that Madolayya's father, Rachayya, was the son of the other son of Revansiddayya called Bhadrayya. So, the 1st plaintiff claims that deceased Shivamma was the widow of his cousin (third degree) Madolayya. All these allegations are completely denied by the defendants. No doubt, as already stated, the 1st defendant, Basayya, is none other than the son-in-law of Shivamma. He had married Siddamma, daughter of Shivamma and that Siddamma had pre-deceased her mother and was issueless. According to the contesting defendants, these plaintiffs are in no way connected to the family of deceased Shivamma.

9. Let us see the evidence. On behalf of the plaintiffs the 1st plaintiff got him self

examined as PW1, besides examining four witnesses on their behalf. Of these four, two gave evidence touching the plaintiffs' relationship with deceased Shivamma. On their side the 1st defendant Basayya got himself examined as DW 1, besides examining four witnesses. The evidence of the defendants and their witnesses in this respect, as asserted in their written statement, is one of total denial. And, according to the 1st defendant, he, being the son-in-law, was in the circumstances, the nearest relation of Shivamma and was entitled to succeed to her estate.

10. The plaintiffs cannot succeed on the weakness of the defence. To succeed they have to stand on their own evidence and the burden lies on them to establish the fact alleged by them.

11. Of the plaintiffs four witnesses (PWs 2 to 5), the two, who speak touching the plaintiffs' relationship with deceased Shivamma, are PW 2 Shantappa and PW 5 Mastan Saheb. What Shantappa in his examination-in-chief states is that Shivamma had died four years back; that after her death Madolayya, the 1st plaintiff, became the owner; that Shivamma's husband's name also was Madolayya; and that Madolayya's father Rachayya and the 1st plaintiff's father, Rachayya, called respectively as Sanna Rachayya and Dodda Rachayya, were brothers. But the plaintiffs' pedigree itself shows them, not as brothers, but, as cousin brothers. Besides this, nowhere in his evidence does he claim as having had any relationship with this family, let alone any special relationship. He does not even say of his having visited that family or of his contact with the members of that family. He made an attempt in his examination in chief to state the genealogy. But, in cross examination, he admitted that he spoke about the relationship because some Mahadevappa or Somebody, whom he names in the evidence, used to tell the pedigree and, therefore, has stated that fact. However, he claimed that he was the sarpanch at the time when he gave evidence and the suggestion put to him was that re: possession and enjoyment of the land in question, he had taken sides with the other party. No doubt he denies the suggestion. The evidence of this witness cannot be taken as an opinion expressed by conduct, and, as observed by the Supreme Court in Paricha's case (supra), "opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question". As observed by their Lordships "S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship", and "the conduct must be of the person who fulfils the essential conditions of S. 50". This witness is not a member of that family and nowhere, not even remotely, appears to be connected with that family. PW 5 is a Mohammeden and he mainly deposes denying the assertion of the defendants about Shivamma having executed a will in favour of the 1st defendant. The only sentence he utters in his deposition as to this relationship is that the husband of Shivamma was one Madolayya who was the cousin of the plaintiffs. In the circumstances neither the evidence of Shantappa nor that of Mastan Saheb satisfies the tests laid down in S. 50 of the Act. The evidence of

these two witnesses as to the relationship of the plaintiffs with deceased Shivamma is not entitled to any weight at all.

12. No doubt the 1st plaintiff has asserted that he was the nearest heir to Shivamma and has given his own version as to how he was related to her. Admittedly Shivamma was in exclusive possession of the land in question during her life time. The property had been inherited by her from her husband. In examination in-chief he claims that Shivamma, at the time of her death, had made an oral will stating that her property may be taken over by him and enjoyed. Nowhere, in examination in chief, does he say as to whether he used to visit her during her life time; and whether he had partaken in any festival or such thing etc. If anybody can speak about Shivamma it is her son-in-law, the 1st defendant. But, it may be noted that both the 1st plaintiff and the 1st defendant are interested witnesses. In this connection the evidence of one cannot be preferred to the evidence of the other. To succeed on this issue, the plaintiffs ought to have placed evidence, oral or documentary, admissible under S. 50 of the Act. That has not been done in the instant case. No doubt, the counsel for the contesting respondents, placing reliance on a decision of the Patna High Court in Bhopal Paswan v. Bibi Nabihan, AIR 1963 Pat. 450. submitted that the evidence of these witnesses cannot be completely brushed aside and what they say was entitled to some weight. There is no force in this submission. It has to be stated that the plaintiffs have miserably failed in establishing that they were the nearest heirs to Shivamma and therefore are not entitled to succeed to her estate.

13. The first appellate Court has proceeded in this matter on wrong lines. The Civil Judge states that because the land of Shivamma and the land of the plaintiffs are adjoining each other and are called by a common name they must have been cousins and, therefore, the plaintiffs' tension was entitled for acceptance. Even if they are distant cousins, 3rd or 4th degree cousins of Shivamma's husband, they cannot succeed unless they show they are the nearest heirs to Shivamma. They have failed to show this fact.

14. For the reasons stated above this appeal is allowed. The judgment and decree of the Civil Judge is set aside, and the judgment and decree of the Munsiff dismissing the suit is hereby confirmed.

15. However, parties are directed to bear their own costs.