

(2012) 01 KAR CK 0144

In the Karnataka High Court

Case No : Regular First Appeal No. 193 of 2004 (PAR)

G.H. Premakumari

APPELLANT

Vs

Swarna Gowramma @ Swarnamma and Others

RESPONDENT

Date of Decision : 02-01-2012

Acts Referred:

Citation : (2012) 01 KAR CK 0144

Hon'ble Judges : L. Narayana Swamy, J;K.L. Manjunath, J

Bench : Division Bench

Advocate : M.S. Rajendraprasad Assts, for the Appellant; R. Vijayakumar, Advocate for R-1, 3 and 4 and R-2 - Minor R/by R-1, for the Respondent

Final Decision : Dismissed

Judgement

Manjunath, J.—Appellant who was the 2nd defendant in O.S. No. 116/1939 on the file of Civil Judge (Sr.Dn.) 6 JMFC, Chickballapur is questioning the legality and correctness of the judgment and decree passed therein. Heard the counsel for the parties.

2. The facts leading to this appeal are as hereunder: Plaintiffs filed the suit for partition and separate possession of 14/15th share in all the plaint schedule properties. According to the plaint averments, 1st plaintiff is the widow and plaintiffs 2 to 4 are the children of one G.H.Rajanna. Rajanna was the only son of Nanjamma who was the 1st defendant and died during the pendency of the suit and one late Chikkaveeranna. 2nd defendant Premakumari is the only daughter of Nanjamma and Chikkaveeranna. The suit was filed by the plaintiffs claiming partition and separate possession of their share, on the ground that the plaint schedule properties were acquired by late Chikkaveeranna and some of the properties were also acquired with the aid and assistance of deceased Rajanna. On the ground that after the death of Chikkaveeranna and Rajanna, the properties are not divided, suit was filed. Defendants who are the mother and daughter filed a common written statement contending that they have no objection for partition and separate possession of the properties which are

available for partition. However, it was contended that suit item No. 1 of A--schedule property was acquired by the 1st defendant and her husband under registered sale deed dated 10.3.1940 and that entire consideration was paid by the 1st defendant and Chikksveeranna's name was included in the sale deed to enable him to manage the properties on behalf of the 1st defendant. It was contended by them that suit item No. 1 is the exclusive property of 1st defendant. It is also contended that suit item No. 2 was acquired by deceased Chikkaveeranna by way of gift which was executed in his favour by his maternal aunt and therefore it was contended that it is the self-acquired property. Similarly, it was contended that 2nd defendant acquired suit item Nos. 5 to 7 under registered sale deed dated 20.4.1960 and it her self-acquired property. Similarly, it was contended that 2nd defendant acquired the suit item Nos. 5 to 7 under registered sale deed dated 24.1.1966 and that she is the absolute owner of those properties.

It was further averred that 1st defendant has executed a Will on 21.1.1988 bequeathing suit item No. 1 of A-schedule property in favour of 2nd defendant and similarly 1st defendant has also executed another Will on 2.8.1989 in respect of suit Item No. 4 of plaint A-schedule property and that she has bequeathed the same in favour of one Arundhati who is her stepdaughter. Therefore, it was requested by the defendants to dismiss the suit.

Based on the above pleadings, following issues were framed:

1. Whether the plaintiffs prove that the suit properties are the joint family properties of them and defendant No. 1?
2. Whether the defendants prove that item No. 1 & 4 in "A" schedule were the self-acquired properties of defendant No. 1?
3. Whether the defendants prove that item No. 5 to 7 of "A" schedule were the self acquired properties of defendant No. 2?
4. Whether the defendants prove that defendant No. 1 has willed away item No. 1 in schedule "A" to defendant No. 2 under registered Will dated 21.1.1988?
5. Whether the defendants prove that defendant No. 1 has given item No. 4 in "A" schedule to one Arundathi under Registered Will dated 2.8.1989?
6. Whether the defendants prove that defendant No. 1 gave all other properties in "A" schedule to defendant No. 2 under Regd. Will dated 2.8.1989?
7. Whether the defendants prove that except item No. 7, item No. 55 to 59 scooter No. CKL 9309 and Mopina Avalakki chain, all other items mentioned in inventory list are the self acquired properties of defendant No. 2?
8. Whether the defendants prove that item No. 7 in the inventory list belongs to one Deveeramma and CKL 9309 belongs to the husband of defendant No. 2 and Mopina Avalakki Chain to one Arasappa the brother of defendant No. 1?

9. Whether the defendants prove that, defendant No. 1 has a half share in national saving certificates worth Rs. 75,000/-?
10. Whether the defendants prove that defendant No. 1 has a half share in one lakh rupees deposited in financial firms at Chickballapur?
11. Whether the defendants prove that, defendant No. 2 is entitled to Rs. 10,000/- with interest at 5% p.a. as alleged in para-21 of her written statement?
12. Whether the plaintiffs prove that they together are entitled to 14/15th share in the suit properties?
13. Whether the plaintiffs are entitled to the partition and separate possession of the same?
14. What decree or order?

In order to prove the respective contentions, on behalf of the plaintiffs, 1st plaintiff was examined as PW-1, she relied upon Exs.P1 to 41. On behalf of the defendants, 2nd defendant was got herself examined as DW-1 and she relied upon the evidence of DW-2 to 5 and also Exs.D-1 to 62. Exs.C-1 to 3 were marked through court commissioner.

Trial court after considering the entire evidence let in by the parties, held issues 1 & 2 as partly in the affirmative and partly in the negative, issue No. 3 in the affirmative, issues 4 to 6 & 8 in the negative, issues 9 to 11 as does not arise for consideration, issues 12 & 13 partly in the affirmative and partly in the negative and ultimately suit of the plaintiffs came to be decreed in respect of suit item Nos.1 to 4 & 8 in plaint A-schedule properties and in regard to B-schedule properties as per the inventory list excluding item Nos.55 to 59 and a scooter. It was further decreed that plaintiffs are entitled for partition and separate possession of their 103/128th share in the aforesaid property by judgment and decree dated 19.1.2004. This judgment and decree is called in question by the appellant who was 2nd defendant.

3. Mr. Rajendraprasad, learned Senior Counsel appearing for the appellant contends that the appellant is aggrieved by in granting the decree in favour of the plaintiff in respect of item No. 1 of plaint A-schedule property which has been bequeathed to the appellant under the registered Will dated 21.1.1938. It is also contended by him that trial court has committed an error in granting a decree in respect of item No. 4 when the said property has been bequeathed to one Arundhati under the Will dated 2.8.1989. Even though she is not made as a party to the suit. According to Mr.Rajendraprasad, trial court did not appreciate the evidence of DW-1 to 3 in regard to the Will executed by Nanjamma. According to him, DW-2 is an attesor to the Kill who has attested the Will in respect of item No. 1 which has been bequeathed to the appellant herein and similarly DW-2 is a member of the Bar who is also another attesor to the Will of Nanjamma. Due to non-appreciation of the evidence properly trial court has decreed the suit in respect of suit item No. 1 of plaint A-schedule property.

4. Counsel appearing for the Respondents supporting the judgment of the trial court contends that even though trial court, has not considered the fact that plaint item No. 1 was purchased by late Chikkaveeraiah along with 1st defendant and 1st defendant is only a name-lender and that the suit property could not have been bequeathed by Nanjamma in favour of the appellant herein as it was not her property at all. According to him, plaint item No. 1 of A-schedule property was purchased by Chikkaveeraiah in the year 1940 out of the joint family income and that 1st defendant could not have claim the same as her self-acquired property in order to bequeath the same. In the circumstances, he requests the court to dismiss the appeal.

5. Having heard the counsel for the parties, the only point to be considered by us in this appeal is:

Whether the court below is justified in not believing the Will of Nanjamma dated 21.1.1988 and granting decree in favour of the plaintiffs in respect of the aforesaid property?

6. It is no doubt true that one Arundhati in whose favour item No. 4 of plaint A-schedule property is bequeathed by Nanjamma, but the same cannot be the subject matter of this appeal as the appellant is not aggrieved by the decision of the trial court in regard to item No. 4 of plaint A-schedule property.

7. According to Mr.Rajendraprasad, appellant is aggrieved only in regard to the decree granted in respect of item No. 1 of plaint A-schedule property. In this back-ground we have focussed our attention only in regard to granting of decree by the court below in respect of the Will dated 21.1.1988 under which present appellant has laid the claim as a legatee.

8. As could be seen from the written statement, defendants 1 & 2 have stated that item No. 1 of plaint A-schedule property was purchased on 10.3.1941 which document is marked as Ex.D-34. On perusal of Ex.P-34 it is clear that Chikkaveeranna has purchased item No. 1 of plaint A-schedule property along with his wife Nanjamma. Therefore, it is clear that 1st defendant could not have claim the same as her absolute property in order to bequeath the same in favour of her daughter, the present appellant. On perusal of the Will said to have been executed by Nanjamma as per Ex.D--51, it is not recited in the Will that she is having 50% of share in item No. 1 of plaint schedule property and that she is bequeathing the same in favour of her daughter. But it is recited in the Will as if it is her self-acquired property. In para-10 of the written statement, appellant along with the deceased 1st defendant has only contended that it is the self-acquired property of the 1st defendant. In this back-ground it was for the defendants to prove that item No. 1 of plaint A-schedule property was the self-acquired property, deceased 1st defendant and that she had a right to bequeath the same. Therefore, it is clear by looking into the sale deed under which property is purchased and considering the cumulative effect of the Will and the written statement, no court can say that she was the absolute owner of the

property to bequeath the same.

9. In addition that, we have seen the evidence or PW-1, present appellant who has deposed that when the property was purchased in the year 1941 she had not born. To show that the aforesaid property was the self-acquired property of Nanjamma no other witnesses have been examined. So, in the first instance, defendants have not laid any foundation to show that it was the self-acquired property of the 1st defendant and she had a right to execute the Will. If she was not the owner of the property, she could not have bequeathed the same under a Will. As stated supra, we could have appreciated the stand of the 1st defendant if she has bequeathed her share in the property. But such a contention is not raised and contents of the Will disclose as if the entire property is the self-acquired property of Nanjamma. In the circumstances, we do not see any reasons to interfere with the judgment and decree of the trial court. Be that as it may, the main contention of Mr. Rajendraprasad is that the trial court did not appreciate the evidence of DW-2 & 3.

10. We have seen the evidence of DW-2 & 3. In one breath DW-2 says that the Will was written by one Sheshagiri. But it is attested by DW-2 & 3 and one Ramaswamappa. DW-3 Chandrasekhar has stated that there was already a Will in the hands of Nanjamma. He further asserts that he has seen the documents of title to show that Nanjamma had a right to execute the Will. But there are a lot of discrepancies in the evidence of DW-2 & 3. If such discrepancies are there, trial court is justified in disbelieving the Will prepared by the defendant. Be that as it may, as we have already held that Nanjamma had no absolute right to execute a Will, therefore there is no need for us to go in detail to discuss the evidence of DW-2 & 3. In the result, the appeal is dismissed. Parties to bear their costs.