

(2012) 01 KAR CK 0132
In the Karnataka High Court
Case No : R.F.A.No. 281 of 2005 (PAR)

K M Kariappa (Decd), K M Thimmaiah (Decd) and K Thangamma Monnappa (Decd) APPELLANT

Vs

K M Meena Kumari, K Kusuma and K M Sumangali RESPONDENT

Date of Decision : 11-01-2012

Acts Referred:

Citation : (2012) 01 KAR CK 0132

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

Bench : Division Bench

Advocate : Marun Ponappa, for the Appellant; B.K. Sampath Kumar, For C/R1 to R3, for the Respondent

Final Decision : Dismissed

Judgement

1. Challenging the legality and correctness of the Judgment and decree passed by the Civil Judge, (Sr.Dn.), Madikeri, In O.S.NO.26/1991 dt.2.12.2004 the unsuccessful plaintiffs have preferred this appeal. The plaintiffs filed a suit for partition and separate possession of their share In the plaint B, C and D schedule properties. According to the plaint averments, the plaintiffs and defendants-2 to 4 are the children of one Kembadathanda Monnappa and the 1st defendant Thangamma Monnappa. The plaintiffs and their deceased father were members of Hindu Joint family and they were co-parcenars. According to them, their father by exercising his powers vested in him under the Mithakshara School of Hindu law by virtue of letter dt.1.4.1985 divided certain Joint family properties by metes and bounds and allotted the same to the plaintiffs and he also retained some of the properties to him. By virtue of the letter dt.1.4.1985, the plaintiffs are In possession of the property allotted to them. It is also their case that certain Joint family properties were not included end their father died In-testate and after his death the defendants are in unlawful possession of the same. Therefore, the suit for partition and separate possession was filed by them and they have also in detail have stated how the properties were acquired by their

father to show that they are co-parcenary properties.

2. The 1st defendant - mother of the plaintiffs has supported their case. However, defendants-2 to 4 have filed a detailed written statement admitting their relationship and also admitting the partition between their father and their uncle on 23.11.1973. But they denied that under the partition dt. 1.4.1985 some of the co-parcenary properties were left out and were not included. According to them, the properties mentioned in plaint B to D schedule properties were self-acquired properties of their father and therefore the said properties were not Included under the letter dt. 1.4.1985 and it is also their case that the relationship between the plaintiffs and the father was not cordial and that the defendants-2 to 4 were under the care and custody of their father and one of the sister though married, her marriage was Irretrievably broken and she was under the care and custody of her father. It is also their case that the other defendants are unmarried and there were no chances for marriage in future. Therefore, the father being the absolute owner of plaint B, C and D schedule properties executed a will on 18.3.1986 and he has also executed two Codicils dt. 18.12.1986, 20.12.1993 and 10.4.1989. It is also their case certain properties are also allotted to the share of the 2nd plaintiff out of B to D schedule properties. In the circumstances, they contend that the suit filed by the plaintiffs claiming share in B to D schedule properties is not maintainable. In the circumstances, they requested the court to dismiss the suit.

3. Based en the above pleadings, the following Issues were framed by the court below:

- 1) Whether the Plaintiffs prove that, they are entitled for a share in suit B, C and D schedule properties?
- 2) Whether the Plaintiffs prove that, the Defendants are liable to furnish accounts in respect of C and D schedule properties?
- 3) Whether the Plaintiffs are entitled for mesne profits? If so, for how much?
- 4) Whether the 1st Defendant proves that, she has became absolute owner of A4 schedule properties as stated in para-2 of her written statement?
- 5) Whether the Defendants 2 to 4 prove that, they have succeeded to suit A-4 schedule property held Jointly by Monnappa and his wife under a partition dated 01-04-1985, under the WILL, and codicil executed by late Monnappa?
- 6) Whether the Defendants 2 to 4 proves that there was a partition between late Monnappa and his wife the 1st Defendant in view of deed of partition dated 05-01-1986?
- 7) Whether the Plaintiffs are entitled for the relief sought for?
- 8) What order or decree?

4. In order to prove their respective case, plaintiff-2 was examined as PW1 and

they relied upon Ex.P1 to P11. The mother of the parties was examined as DW1. Defendant-2 was examined as DW2. In addition to that they relied upon the evidence of DW3 to DW6. In order to prove the Will and Codicils, they relied upon Ex.D1 to Ex. D19. The Trial Court after considering the entire evidence let in by the parties, held issues-1 to 4 and 7 in negative, issues-5 and 6 in affirmative and ultimately dismissed the suit Challenging the legality and correctness of the same, the present appeal is filed.

5. The main contention of Mr. Arun Ponappa, the learned counsel for the appellants is that the Trial Court has committed a serious error in dismissing the suit by holding that plaint B to D schedule properties as self-acquired properties of the deceased father. According to him, the father did not possess any Income of his own in order to acquire the schedule properties. He further contends that when the father had acquired the properties mentioned in B to D schedule properties out of the Joint family nucleus, the question of executing a will or codicil does not arise at all. He further contends even If such documents executed and proved, the defendants-2 to 4 will not get any right under the said will because the subject matter of the will were not self-acquired properties of the deceased father. In the circumstances, he requests the court to re-appreciate the entire evidence and allow the appeal.

6. Per contra, Mr.Sampath Kumar, Learned counsel for the respondents contends that the grounds urged by the learned counsel for the appellants are untenable because the properties mentioned in B to D schedule properties were self-acquired properties of the father and he was entitled to bequeath the same in favour of the persons of his choice and the same cannot be questioned by the plaintiffs or any other person. According to him, in the year 1959, the deceased father had purchased certain properties out of his own fund and therefore the plaintiffs cannot be permitted to contend that the properties acquired in the year 1959 were acquired out of the joint family nucleus because the plaintiffs father had not inherited or acquired any property from out of the joint family. According to him, a suit was filed in the year 1971 in O.S.No.237/71 claiming partition and separate possession of the joint family. The said suit was filed by the father of the plaintiffs against his brothers. Therefore, it is clear that when the properties were purchased in the year 1959, the plaintiffs father was not enjoying the joint family properties and he had no income of his own. He further submits that the execution of the will by the father has been proved by defendants-2 to 4 by examining attester-scribe and he further contends that the signature of the father on the will is admitted by plaintiffs as well as 1st defendant, the mother of the parties. He further submits that even the attester has not even cross-examined by the learned counsel for the plaintiffs. Therefore, they cannot be permitted to contend that the will has not been proved.

7. Having heard the counsel for the parties, we have to consider the following points in this appeal:

1) Whether the plaintiffs have proved the schedule B to D properties as joint

family properties?

2) Whether these properties were acquired out of the joint family nucleus of the deceased father?

3) Whether the Trial Court is justified in dismissing the suit by believing the will of the father?

8. Since all these points are Inter-related with each other, we would like to deal with the same as hereunder:

The relationship between the parties are not in dispute. The plaintiffs themselves have relied upon Ex.P1 a fetter dt. 1.4.1985 under which the father exercising his rights under the Hindu Law has partitioned the properties and allotted the same to each of the plaintiffs they are in possession and enjoyment of the same.

9. The dispute is only with regard to the properties which were not included under Ex.P1. According to the plaintiffs, these properties were left out by the father while dividing the properties on 1.4.1985. But the defendants-2 to 4 have contended that the father purposely did not include these properties because they were not Joint family properties and that the plaintiffs did not had any share in those properties. In other words, they contend that they were self-acquired properties of their father. Though the plaintiffs contend that they were acquired out of the joint family nucleus, no worthy evidence is let in by them to show how these properties were acquired and when these properties were acquired by their father.

10. Admittedly, there was no partition among the father of the parties and his brothers in respect of his joint family properties, As a matter of fact, since no share was given, the father had filed a suit in O.S.No.237/71 which ended in compromise, which discloses that the plaintiffs father had no income from out of the joint family properties till he got a share in the aforesaid suit. Therefore, the only inference could be that the properties acquired prior to getting the share in O.S.NO.237/71 ought to be treated as the self-acquired property of their father in addition to that it has come in the evidence that the father was doing independent business and he had independent income. When the father was doing independent business and when he had Independent income and when there was no joint family nucleus either for his maintenance or to invest under such business, the court has to hold that any property acquired by the father out of his business income are to be considered as self-acquired properties.

11. In the circumstances, we are of the opinion that the Trial Court is justified in holding the schedule properties as not the Joint family properties and B to D schedule properties as the self-acquired properties of the deceased Monnappa, the father of the appellants.

12. When we have held that schedule B to D schedule properties are the self-acquired properties of the father, the next question would be whether he died intestate or he died by executing a will.

13. Will is produced as Ex.D1. It is a registered document. The plaintiffs as well as their mother who is the 1st defendant have admitted the signature of the father and Ex.D1. In order to prove the same, the parties have relied upon the evidence of DW-5 Rajendra who is one of the attestors. His evidence is not challenged seriously by the plaintiffs. It is unfortunate that he has not even cross-examined by the appellants. In other words when there is no cross-examination, the court has to hold that the evidence of attesor DW-5 is unchallenged and has to be believed. Accordingly, the court has believed the evidence of DW5. Even in this appeal, no reasons are assigned why DW-5 was not cross-examined, in the absence of cross-examination when the plaintiffs as well as their mother defendant No.1 has admitted the signatures on Ex.D1 and when they have further admitted the hand-writing and signature of their father as per Ex.D3 to D4, namely, the letter which are in the nature of codicils, this court cannot find fault with the findings of the court below. As a matter of fact the defendants have relied upon the evidence of DW6 - Ramakrishna to prove the Codicil dt.20.12.1988 as per Ex.D4. Even DW6 -Ramakrishna who has been examined to prove the codicil as per Ex.D4 has not been cross-examined. In the circumstances, we are of the opinion that the defendants have successfully proved the execution of the Will by their father and the Trial Court is justified in dismissing the suit of the plaintiffs.

14. Accordingly, we answer all the points formulated by us against the appellants and in favour of the defendants-2 to 4 in the result, the appeal is devoid of merits. Accordingly, this appeal is dismissed. Parties to bear their costs.