

(2001) 01 KAR CK 0067
In the Karnataka High Court
Case No : C.R.P. No. 3717 of 1997

K. Shankarappa

APPELLANT

Vs

K.G. Gangadharaiah (deceased by L. Rs.) and Others

RESPONDENT

Date of Decision : 02-01-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 9, 115, 2 (11)

Citation : AIR 2001 Kar 203 : (2001) ILR (Kar) 2292 : (2001) 2 KCCR 777

Hon'ble Judges : T.N. Vallinayagam, J

Bench : Single Bench

Advocate : V. Tarakaram and T.H. Narayan, for the Appellant; M.S. Purshothama Rao and S.S. Jagadeesh Acharya, for the Respondent

Final Decision : Dismissed

Judgement

T.N. Vallinayagam, J.—This Civil Revision Petition is preferred against I. A. Nos. 25 and 26 in O. S. No. 189/85 as suit for partition.

2. I. A. No. 25 is filed under Order 22 Rule 10 of CPC to bring on record the respondents- 1 (a to h) and I. A. No. 26 is filed under Order 22 Rule 9 of CPC to set aside the abatement of the suit. The Trial Court has allowed both the applications and aggrieved by the same, the first defendant is before this Court in the above Civil Revision Petition.

3. It is stated that one Gangadharaiah was a philanthropist and he died leaving a will on 23-6-1984 in which he directed that a Trust to be constituted with respondents 1(a to h) as the trustees and the Trust shall take over his estate. It is further claimed that the Trust has come into being on 6-10-1995 and the respondents mentioned above have become its trustees. Consequently, they sought the permission of the Court to come on report to contest the case and for setting aside the abatement. The Trial Court on the recitals of the Will decided that it is the plaintiffs desire to create a Trust for the Management of his estate for proper utilisation of his properties. The copy of the Trust deed was also relied

upon by the Trial Court and, ultimately both the applications were allowed.

4. Sri Tarakaram, Senior Advocate appearing for the petitioner's counsel Sri Narayan submitted that in the absence of proof of will and without any probate being granted, the respondents cannot be allowed to be brought on record. The will is executed in favour of the strangers and the will itself is a mystery. Consequently, they cannot be brought on record. He relied upon the dictum of this Court in ILR (1973) Kar 851, Mohd. Kasim Ali v. Smt. Iyder Zohrabi for the proposition that refusal to add the persons claiming under the Will in a suit for partition is the valid order and by such addition the whole character of the suit cannot be altered. Thus, he prayed for dismissal of both the I.As.

5. Sri M.S. Purushothama Rao learned counsel for the respondents submitted that the provisions of Order 22 Rule 5 will come into operation and this provision is made for the purpose of defending the suit otherwise the suit will be dismissed for want of persons to prosecute.

6. Having considered the submissions made by the counsel, I find that the order of the Trial Court is not liable to be interfered with.

7. The definition of legal representative u/s 2(11) of CPC reads as follows;

"Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

Therefore any intermeddler can be the legal representative. Consequently, the contention that a stranger come on record through the Will cannot be sustained. Order 22 Rule 5 contemplates the decision for such question by the Court below which is to the following effect;

"Determination of question as to legal representative :-- Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court;

Provided that where such question arises before an appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefore, and the appellate Court may take the same into consideration in determining the question."

8. It is also seen that the order if passed after enquiry under Order 22 Rule 5 is not liable to be interfered with in revision u/s 115 of CPC has been considered by this Court in CRP No. 602/74 disposed of on 1-7-1974 and reported in Short Notes in (1975) 1 Kant. LJ 39.

In that case, it is held that any decision given under Order 22 Rule 5 does not operate res judicata or conclusive. Such a decision is only for the purpose of

continuing the suit. The High Court can interfere in revision against the order under Order 22 Rules 4 and 5 only when the Court does not hold enquiry. When the enquiry is held and order is made such an order cannot be questioned u/s 115 CPC. In this case enquiry has been held and a detailed order has been passed by the Trial Court. In such an event, the Civil Revision Petition is not maintainable.

9. In *Mrs. Mary Joyce Poonacha Vs. K.T. Plantations Private Limited*, this Court had an occasion to consider the enquiry under Order 22 Rule. 5. This Court has held that such an enquiry and the result thereof does not conclusively establish the right or title to property or decide such a person as an heir of the deceased or not.

10. The Trial Court has taken for the purpose of further prosecution of the case the respondents-1 (a to h) as LRs and there has been no decision under Will and validity thereof. It is always open to the petitioner to question the will or the right of the respondent to claim under the will. Making that position clear this Civil Revision Petition is dismissed confirming the order of the trial Court.