

(2015) 09 KAR CK 0372

In the Karnataka High Court

Case No : Regular Second Appeal No. 7201 of 2010

Mallamma and Others

APPELLANT

Vs

Nagamma

RESPONDENT

Date of Decision : 21-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100, 96
Hindu Succession Act, 1956 — Section 12

Citation : (2015) 09 KAR CK 0372

Hon'ble Judges : A.V. Chandrashekara, J

Bench : Single Bench

Advocate : Vinayak Apte, for the Appellant

Final Decision : Dismissed

Judgement

A.V. Chandrashekara, J—The matter is at the stage of admission. Heard the learned counsel appearing for the appellants. Concurrent findings are called in question before this Court by filing an appeal under Section 100 of CPC.

2. Appellants were defendant Nos. 1 to 4 in O.S. No. 47/2006, which was pending on the file of Civil Judge (Sr. Dn.), Shorapur. Respondent was the sole plaintiff in the said suit. The said suit was filed for the relief of partition and separate possession, relating to one house bearing Municipal No. 10-1-14/A of Madargalli village, Shorapur taluk. The said suit came to be decreed after contest on 05.11.2007. Against the said judgment and decree, an appeal was filed in R.A. No. 148/2007 in terms of Section 96 of CPC before the Court of First Additional District Judge, Gulbarga. The said appeal also came to be dismissed after contest. Hence, the present appeal is filed under Section 100 of CPC.

3. The facts leading to filing of the present appeal are as follows:

One person by name Irappa was the father of appellants No. 1 to 3 and respondent herein. Appellant No. 4 i.e., defendant No. 4 is the son of the brother of the said Irappa. According to the plaintiff, the schedule house was the

ancestral property of her father Irappa and after his death, it was being looked after by Mallamma who was her mother. In spite of several requests, she did not give her 1/4th share and therefore, she was constrained to file a suit for partition and separate possession.

4. All the defendants have filed common written statement. They have denied all the material averments as found in the plaint. According to them, the entire property absolutely belonged to Mallamma the mother of appellant Nos. 1 to 3 and she has bequeathed his property in question in favour of defendant No. 4 under a registered sale deed dated 27.07.2004. Hence, defendant No. 4 is in possession of the suit property. With these pleadings, they requests the Court to dismiss the suit.

5. The trial Court has framed the following issues on the basis of the pleadings of the parties:

1. Does plaintiff prove that, suit house is ancestral property and she is having 1/4th share in it?

2. Whether defendants prove that, Mallamma had beluithed the suit house by way of executing Registered will, dated 27.07.2004 in favour of defendant No. 4, when she was in sound disposing state of mind and defendant No. 4 absolute owner of suit house?

3. Whether plaintiff is entitled for share in the suit schedule property?

4. What order or decree?

6. Plaintiff herself is examined as PW. 1 and four exhibits have been got marked on her behalf. Defendant No. 4 is examined as DW. 1 and other two witnesses have been examined as PWs. 2 and 3. Ultimately, the trial Court has answered issues No. 1 and 3 in the affirmative and issue No. 2 in the negative and suit came to be decreed, granting 1/4th share to the plaintiff.

7. Against the said judgment and decree, an appeal in terms of Section 96 of C.P.C. was filed by the defendants before the First Appellate Court in R.A. No. 148/2007 and the same was dismissed after contest. An application had been filed under Order 41 Rule 27 of CPC during the pendency of the said appeal. The said application came to be dismissed and the appeal was also dismissed.

8. Plaintiff was examined as PW. 1 has asserted in her examination-in-chief that the property in question was the ancestral property. She has further deposed that her mother Mallamma was in possession of the suit property and had rented the property to one Reddy, on a monthly rent of Rs. 850/-. The rent was being distributed amongst herself and defendant Nos. 1 to 3. This assertion has not at all been challenged while cross-examining her. The entire focuses of the cross-examination is about the status of her mother Mallamma and advise that was being respected by the villagers. She has admitted that defendant No. 4 was using the suit property even when her mother was alive.

9. The Will relied upon by defendant No. 4 has not been proved. It is understandable as to how the mother would exclude her own daughters and bequeath the entire property in favour of the son of her brother-in-law. There must be strong ground to exclude the legal heirs in the very Will. Principles to this effect has been succinctly explained by the Hon"ble Apex Court in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, AIR 1959 SC 443 : (1959) 1 SCR 426 Supp . When the Will is not proved, even if the property absolutely belonged to Mallamma, plaintiff will have 1/4th share as per Section 12 of Hindu Succession Act.

10. The Will relied upon by defendant No. 4 is not placed on record before the trial Court. Therefore, the trial Court has answered issue No. 2 in the negative. Both the Courts have appreciated the evidence in right prospective. No illegality or perversity is found in the approach adopted by the Courts below.

11. In this view of the matter, no grounds are made out to admit this appeal and no substantial question of law arises in this appeal. Accordingly, the appeal is dismissed as unfit for admission.

It is made clear that all questions are kept open to be urged in the FDP Court since plaintiff has only 1/4th share. Nothing comes in the way of the appellants relying upon the relevant provisions of the Partition Act.