

(2000) 09 KAR CK 0071

In the Karnataka High Court

Case No : Regular First Appeal No. 373 of 1993

Modinsaheb Peersaheb Peerzade and Others

APPELLANT

Vs

Smt. Meerabi and Others

RESPONDENT

Date of Decision : 05-09-2000

Acts Referred:

Registration Act, 1908 — Section 17 (1), 17 (2)

Citation : (2000) ILR (Kar) 3716 : (2000) 6 KarLJ 616 : (2000) 4 KCCR 323 SN

Hon'ble Judges : Tirath Singh Thakur, J;K. Sreedhar Rao, J

Bench : Division Bench

Advocate : Sri D.S. Ramachandra Reddy, for the Appellant; Sri K. Giridhar for Sri M.B. Prabhakar, for the Respondent

Judgement

K. Sreedhar Rao, J.—This appeal is filed against the judgment and decree passed in O.S. No. 100 of 1989 on the file of the learned Civil Judge, Jamakhandi.

2. Defendants 1 to 5 and 8 to 10 in the suit are the appellants. The plaintiff and defendants 6 and 7 are respondents in the appeal. Appellants 1 to 3 are the brothers of the first and fourth respondents. The 5th appellant is the aunt of the first respondent and appellants 1 to 3. Respondents 2 and 3 are the alienees of the 5th appellant. Appellants 6 to 8 are the alienees of the second appellant.

3. One Kasimsaheb and Peersaheb are the full brothers. Kasimsaheb died on 13-11-1968 leaving behind his widow-the 5th appellant. Peersaheb died on 25-9-1987 leaving behind appellants 1 to 4 and the first respondent who are his children. "A" schedule properties are agricultural lands situated at Kokatanur Village in Athani Taluk, "B" schedule properties are agricultural lands situated at Tungal Village in Jamkhandi Taluk, "C" schedule properties are the house properties situated at Tungal Village in Jamkhandi Taluk and "D" schedule properties are the movable like tractor, pumpset, gold and silver ornaments and agriculture implements. The plaintiff in the suit submits that the suit schedule properties belong to her father and after his demise, she is entitled to 1/3rd share in all the properties.

4. The first defendant has filed his written statement contending that the lands bearing Sy. Nos. 1264, 1265 and 1266 of Kokatanur Village are the self-acquired properties of defendants 1 to 3 and that "C" schedule house sites do not belong to their father Peersaheb and "D" schedule properties also do not belong to Peersaheb. It is also stated that the plaintiff, in respect of her share, has taken gold ornaments worth about Rs. 20,000/- and cash of Rs. 20,000/- for purchase of land to an extent of 25 acres in Tungal Village and has relinquished her share and therefore, not entitled to claim any share in the partition.

5. Defendants 2 to 4 have filed a memo adopting the written statement of the first defendant.

6. Defendant 5 makes a contradictory claim against defendants 1 to 3 stating that the alleged relinquishment deed said to have been executed in the year 1976 in favour of Peersaheb is not binding and invalid. There was neither any necessity nor occasion to execute the same. Notwithstanding the alleged relinquishment deed she claims to be in actual possession of the suit lands of her deceased husband including VPC No. 42 of Tungal Village without interruption. During the lifetime of Kasimsaheb the husband of this defendant 5, the suit schedule "D" property VPC No. 58 of Tungal Village was given to possession of defendant 6 by an agreement and thus states that, the plaintiff cannot levy any claim over the suit schedule properties.

7. Defendant 6 has filed his written statement contending that, he is the bona fide purchaser of the house site bearing VPC No. 58 which belong to Kasimsaheb and further submits that he is not a party in O.S. No. 220 of 1969 on the file of the learned Munsiff, Jamkhandi, between the 5th defendant and Peersaheb and as such, any decree passed in the said proceedings would not bind him. The 7th defendant has filed a memo adopting the written statement of 6th defendant.

8. The Trial Court formulated as many as 10 issues broadly reflecting the controversial facts relating to the claim of the plaintiff to have 1/3rd share in the suit schedule properties. The plea set up by defendants 1 to 4 is that the plaintiff has relinquished her right in the properties by accepting gold worth Rs. 20,000/- and the claim of defendants 6 and 7 as bona fide purchase of VPC No. 58 of Tungal Village. The other issues relating to maintainability and Court fee are also framed.

9. The Trial Court upheld the right of the plaintiff to seek for partition to an extent of 1/12th share in the lands bearing Sy. Nos. 1264 and 1265 of Kokatanur Village and 1/6th share in the suit lands shown in Schedule "B" of Tungal Village and house sites bearing VPC Nos. 55 and 42 of Tungal Village and 1/6th share in Sy. No. 1266 of Kokatanur Village shown in Schedule "C" and movable properties like tractor and pumpset shown in Schedule "B". However, in respect of VPC No. 58, the right of the plaintiff is declared subject to the result of the proceedings in R.A. No. 58 of 1988 pending on the file of the learned Civil Judge, Jamkhandi. The claim of her share in gold and silver is dismissed. The Trial Court also

allowed mesne profits. Being aggrieved by the judgment and decree, this appeal is filed.

10. The Trial Court rejected the defence version of the plaintiff relinquishing her share in the suit properties by taking gold and silver ornaments worth Rs. 20,000/- from Peersaheb and cash of Rs. 20,000/- from defendants 1 to 3 for purchase of land in Tungal Village.

11. The Trial Court finds from the material that the lands shown in Schedule "A" situated at Kokatanur Village in Athani Taluk, were in the joint names of Kasimsaheb and Peersaheb. In Sy. Nos. 1264 and 1265, defendants 1 to 3 purchased half share of Kasimsaheb under a Sale Deed, Ex. D. 1. The remaining half portion of the land in the said Sy. No. said to be owned by Peersaheb. Similarly, in the land bearing Sy. No. 1266 of Kokatanur Village in Athani Taluk, measuring 2 acres and 6 guntas, half of the portion of the land belongs to Kasimsaheb and half portion of the land belongs to Peersaheb.

12. It was contended before the Trial Court by defendants 1 to 3 that their father Peersaheb has settled his share in "A" schedule and the entire "B" schedule lands in their favour and submitted a wardi (report) to the Revenue Authorities and valid and due mutations have been carried out in pursuance of the said wardi and that they are absolute owners of the property. The Trial Court has rejected the said contention.

13. The Counsel for the appellants fairly conceded to the proposition of law, that, after the death of Kasimsaheb, his wife Sharifabi, the 5th appellant, would be entitled to 1/4th share in the property belonging to him and 3/4th share in the properties would devolve on Peersaheb, his brother, by way of inheritance as he being a residuary. Under the circumstances, to the extent of properties not alienated by Kasimsaheb in Sy. No. 1266 of Athani Village belonging to Kasimsaheb, the 5th defendant would be entitled to 1/4th share and 3/4th share would devolve on Peersaheb. Admittedly, the entire "B" schedule properties belonged to Peersaheb. All the "C" schedule properties stand in the name of Kasimsaheb and 1/4th share would go to the 5th appellant and 3/4th share would go to the share of Peersaheb.

14. The correct extent of share of devolution of the properties of Kasimsaheb in favour of his brother Peersaheb and his widow, the 5th appellant, the Trial Court has failed to appreciate the legal position of devolution of interest as per the tenets of Muslim Law in proper manner.

15. It is well-recognized right in Muslim Law that an heir apparent can relinquish the right of chance of succession in an oral family settlement or family arrangement. The Supreme Court in Gulam Abbas Vs. Haji Kayyum Ali and Others, , has held thus:

"Para 11.--It may be mentioned here that muslim jurisprudence, where theology and moral concepts are found sometimes mingled with secular utilitarian legal

principles, contains a very elaborate theory of acts which are good (because they proceed from "hanna"), those which are bad (because they exhibit "qubuh"), and those which are neutral per se. It classifies them according to varying degrees of approval or disapproval attached to them (See: Abdur Rahim's "Muhammadan Jurisprudence", p. 106). The renunciation of a supposed right, based upon an expectancy, could not, by any test found there, be considered "Prohibited". The binding force in future of such a renunciation would, even according to strict Muslim Jurisprudence, depend upon the attendant circumstances and the whole course of conduct of which it forms a part. In other words, the principle of an equitable estoppel, far from being opposed to any principle of Muslim Law will be found, on investigation, to be completely in consonance with it.

Para 12.--As already indicated, while the Madras view is based upon the erroneous assumption that a renunciation of a claim to inherit in future is in itself illegal or prohibited by Muslim Law, the view of the Allahabad High Court, expressed by Suleman, C.J., in *Latafat Husain and Others Vs. Hidayat Husain and Others*, , while fully recognising that "under the Mohammadan Law relinquishment by an heir who has no interest in the lifetime of his ancestor is invalid and void", correctly lays down that such an abandonment may, nevertheless, be part of a course of conduct which may create an estoppel against claiming the right at a time when the right of inheritance has accrued".

It has been further held that, such a relinquishment of the chance of an heir apparent succeeding to the estate can be relinquished by family arrangement in order to avoid future disputes in the family, even though it may not technically be a settlement of actually disputed claims.

16. In the instant case, the plea of relinquishment by the plaintiff is set up in the course of argument. The pleadings in the written statement disclose that, during the lifetime of the father, the plaintiff relinquished her share in the properties by taking jewellery worth Rs. 20,000/-. However, the pleadings are vague. The requisite factual details of the transaction is not pleaded. The position in the evidence is still worse. D.W. 1 gives go-by to the theory pleaded in the written statement and testify to the fact that, when their mother was ill and bedridden before her death, the plaintiff was given 10 tolas of gold. Nothing is said about the theory of relinquishment as pleaded in the written statement, made during the lifetime of their father. Therefore, on facts, the defendants 1 to 3 miserably failed to prove the oral relinquishment of right in the suit properties by the plaintiff.

17. The mutation entries at Exs. P. 28 and 29 disclose that, Peersaheb, during his lifetime has partitioned the properties in favour of the appellants 1 to 3. The transaction in the said document is described as a partition. In law, it is permissible that a family partition or family settlement could be done by an oral agreement, even if it is evidenced by any memorandum only as a record of past event, it would not require registration. However, for a legal valid allotment of properties either in a partition or family settlement, the parties to the transaction

should have pre-existing rights in the said properties and should have antecedent title. In family settlement, it is also possible to allot the property to a person who may not have a clear pre-existing right or antecedent title, but, however, if there is bona fide disputed claim for the purpose of bringing about harmonious settlement in the family, there can be a valid allotment by settlement. Otherwise, in case of a self-acquired property, there cannot be an allotment of the property by family partition or family settlement amongst others who have no joint title or pre-existing right and also when there is no bona fide disputed claim.

18. In *Kale and Others Vs. Deputy Director of Consolidation and Others*, , the law relating to family settlement has been laid down in lucid and comprehensive manner by reference to catena of decisions of the Supreme Court, Privy Council and other High Court in para 9 of the judgment, wherein, it has been held thus:

"Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all. By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and receive their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. In this connection, Kerr in his valuable treatise "Kerr on Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus:

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to what their rights actually are, or of the points on which their rights actually depend".

Further, in para 10, it is held thus:

"In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:

- (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
- (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be even oral in which case no registration is necessary;

(4) It is well-settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Section 17(1)(b)?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement".

19. If the transaction cannot fit into legal requisites of family settlement or family partition, necessarily any relinquishment or transfer had to be done in accordance with the provisions of the Transfer of Property Act and the Registration Act by a registered document. In the instant case, Exs. P. 28 and 29 describes the transaction as a partition. There is no requisite pleadings and evidence to make out a case for family settlement as contended by the Counsel for the appellant in the course of arguments. The mere entries in the Mutation Register, does not invest or divest title.

20. In *Jattu Ram Vs. Hakam Singh and others*, , in para 3, it is held thus:

"The sole entry on which the Appellate Court placed implicit reliance is by the Patwari in Jamabandi. It is settled law that the Jamabandi entries are only for fiscal purpose and they create no title".

21. Learned Counsel for the appellant alternatively contended to construe the transaction in Exs. P. 28 and 29 as a Gift, but the contents of Ex. P. 28 disclose that the transaction is a partition. The legal concept of partition and the gift are totally different and their legal incidences are dissimilar.

22. In Mohammadan Law, the necessary requisites of the valid oral gift pre-supposes the following ingredients:

- (i) a declaration of gift by the donor;
- (ii) acceptance of the gift, express or implied, by or on behalf of the donee; and
- (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150".

Therefore, the contents of Exs. P. 28 and 29, the mutation entries cannot lend any assistance to the Counsel for the appellant to construe the transaction as a gift.

23. Regarding the sale of VPC No. 58 of Tungal Village in favour of 6th and 7th defendants, it is already a subject-matter of judicial proceedings and prior to that, there was a suit filed by Peersaheb against the 5th defendant, wherein, relinquishment of the share by the 5th appellant is upheld. However, there is no material produced with regard to the proceeding in O.S. No. 220 of 1969 and in FDP No. 1 of 1980, however, it is the contention that VPC No. 58 is allotted to the share of Peersaheb which is alleged to have been sold by the 5th appellant in favour of 6th and 7th defendants, in respect of which also, the appeal proceedings is pending. In this proceedings, the judgment and decree in O.S. No. 22 of 1969 and FDP No. 1 of 1980 is not produced to appreciate what exactly the declaration of rights made by the Court in respect of the 5th appellant and late Peersaheb, through whom, the appellants 1 to 4 are the first respondent claim their share. However, subject to the declaration whatever made in the said proceedings, academically analysing the rights of the 5th appellant, she would be entitled to a share to an extent of 1/4th share in the properties of Kasimsaheb and 3/4th of the share would devolve on Peersaheb. Insofar as VPC No. 58 is concerned, which is alienated to 1st and 3rd respondents, the Trial Court held that, subject to appeal proceedings and to the extent of share to which the 5th appellant is entitled to, the 6th and 7th defendants would be accordingly entitled.

24. In respect of other properties in "C" schedule and Sy. No. 1266, the 5th appellant would be entitled to 1/4th share and 3/4th share would devolve on Peersaheb. In Sy. No. 1266 in "A" schedule which measures 2 acres and 6 guntas, half of the land is shown to be owned by Kasimsaheb and half of the land is shown to be owned by Peersaheb and in half share of Kasimsaheb, the 5th appellant would be entitled to 1/4th share and 3/4th share of the share would devolve on Peersaheb. Therefore, in "A" schedule properties and "C" schedule properties, Peersaheb would be entitled to 3/4th share which is again available for inheritance among the appellants 1 to 4 and the first respondent. In respect of "B" schedule properties, the total extent of properties belonging to Peersaheb and the appellants 1 to 3 being the sons, appellant 4 and the first respondent being the daughters, they have to share the properties in such a manner where the sons take double that of the daughters. Similarly, in the 3/4th share of Peersaheb in Item 4 of "A" schedule and the house property in "C" schedule in a similar proportion, the appellants 1 to 3 should take double that of their two sisters.

25. Therefore, in "B" schedule properties, the plaintiff would be entitled to 1/8th share and in Sy. No. 1226 of "A" schedule properties and in "C" schedule properties where Peersaheb has 3/4th share, the plaintiff would be entitled to 1/8th share in 3/4th share. However, in respect of the site bearing VPC No. 58, one of the items in "C" schedule, the right of the plaintiff to have 1/8th share of 3/4th share is subject to the result of the appeal proceedings in R.A. No. 58 of 1988 pending on the file of the learned Civil Judge (Sr. Dn.), Jamkhandi.

26. In respect of "D" schedule properties, the tractor and pumpset, the burden would be heavy on the plaintiff to establish that they were acquired by her father during his lifetime. The properties are of such a nature, their existence would be borne out by documentary evidence like R.C. Book, in respect of tractor and pumpset would be borne out by power connection obtained from the KEB. In this regard, the plaintiff has not produced any material to establish that, they were acquired by her father, so also, the existence of gold ornaments mentioned, have not been established and no evidence has been placed in that regard. To the extent of decree granted by the Trial Court in granting share to the plaintiff in tractor and pumpset requires to be set aside.

Accordingly, the decree of the Trial Court is modified. The first respondent/plaintiff is entitled to 1/8th share in "B" schedule properties and 1/8th share in 3/4th share of Peersaheb in Sy. No. 1226 mentioned in "A" schedule properties and 1/8th share in 3/4th share of VPC Nos. 55 and 42 of Tungal Village. However, in respect of VPC No. 58, the plaintiff is entitled to have 1/8th of 3/4th share of Peersaheb subject to the result of the proceedings in R.A. No. 58 of 1988 pending on the file of the learned Civil Judge (Sr. Dn.), Jamkhandi.

The declaration of plaintiff's right of 1/8th share in the 3/4th share of Peersaheb in Sy. No. 1226 of "A" schedule and in VPC Nos. 55 and 42 of "C" schedule of Tungal Village is made subject to the declaration of right of share of Peersaheb made, if any, in O.S. No. 220 of 1969 and in FDP No. 1 of 1980.

In the result, the appeal is partly allowed to the extent, indicated above.