

(2005) 02 KAR CK 0067

In the Karnataka High Court

Case No : Writ Petition No's. 34513 and 34812 of 2004

M.S. Suresh

APPELLANT

Vs

Smt. Parvathi

RESPONDENT

Date of Decision : 17-02-2005

Acts Referred:

Citation : (2005) 2 CivCC 544 : (2005) ILR (Kar) 1274 : (2005) 3 KarLJ 386 :
(2005) 2 KCCR 758 : (2005) 2 RCR(Civil) 520

Hon'ble Judges : K.L. Manjunath, J

Bench : Single Bench

Advocate : V. Lakshminarayana, for the Appellant;

Judgement

K.L. Manjunath, J.—An interesting question that arise for consideration in these Writ Petition is, whether the mother of a deceased child can maintain a suit, claiming partition against her husband and other members of the Joint Family.

2. The marriage of the petitioner and respondent was solemnized on 6.1.1994 at Laxminarayanawamy Temple, Krishnarajapet. Within three months from their marriage, a male child was born to them on 23.3.1994 and the child died on the same day in the evening. When the child was in the womb of the respondent, the petitioner herein had executed a release deed on 19.1.1994 in favour of his father and remaining members of the petitioner's family. Subsequently, the petitioner also filed a divorce petition in M.C. 11/1996 on the file of Principal Civil Judge, (Sr.Divn.) and JMFC, Shirangapatna. The petition filed by the petitioner in M.C. No. 11/ 96 was dismissed on merits on 6.11.2000. The respondent-wife filed a suit for partition and separate possession on the file of the Civil Judge (Sr. Divn.) Srirangapatna in O.S. No. 7/2000 contending that she is entitled to 5763rd share in all the suit schedule properties and she further requested the Court to declare that the release deed executed by the petitioner herein, in favour of his father and other members of the family on 19.1.1994 does not bind her and the same has to be set-aside. The 1st defendant, who is the petitioner before this Court filed a detailed written statement. Based on the pleadings, the

following issues were framed by the Court below:

1. Whether the plaintiff proves that the suit schedule properties are joint family properties of the plaintiff and the defendants as they are in joint possession and enjoyment?
2. Whether the plaintiff proves that the 1st defendant is having income of Rs. 3.00 lakhs per year from the plaint schedule properties?
3. Whether the 1st defendant proves that he had executed the Release deed in favour of the other defendants and Rs. 60,000/- has been paid to the plaintiff through Vijaya Bank?
4. Whether the 1st defendant proves that the plaintiff is not entitled for maintenance as the same is already decided in M.C. 11/96 on the file of this Court?
5. Whether the suit filed by the plaintiff is barred by limitation?
6. Whether the suit is under valued as Court fee paid on plaint is insufficient?
7. What order or decree?

3. Additional issue No. 1 was treated as preliminary issue and after hearing both the parties, the Trial Court held the said additional issue in negative and after holding that the suit filed by the parties claiming share in the properties in person, as maintainable. The legality and correctness of this Order is called in question in this Writ Petition.

4. I have heard Sri Laxminarayana, learned Counsel appearing for the petitioner. According to him the suit filed by the respondent for partition and separate possession against the husband during his life time, as not maintainable. According to him, the wife cannot claim partition through her deceased son who died on the evening of 23.3.1994 and on which date the child was born, since there was no partition between the petitioner and his co-parcener. Therefore, the short-question that arise for consideration in this Court is whether, the mother can claim a share in the properties of her deceased child.

5. It is not in dispute that under the Hindu Law, even a child in the womb of the mother will acquire a right to claim partition. In the instant case, though the petitioner is contending that there is no partition between him and other members of the Joint Family, the same cannot be acceptable to this Court in view of the fact that on 19.1.1994, the petitioner herein has executed a release deed in favour of his father and other brothers by receiving a sum of Rs. 60,000/-. On 19.01.1994, when such release deed was executed, the child was in the womb of the mother. Therefore, the petitioner herein could not have relinquished the right of the minor child who was in the womb of his mother. Considering this aspect of the matter, this Court is of the opinion that the petitioner cannot contend that there was no partition in view of the release deed dated 19.1.1994 and it is also not in dispute that on the date of execution of the release by the petitioner, the

child was in the womb of the mother. While executing the release deed, the share of the child which was in the womb of the mother has not been separately earmarked. Their child has every right to challenge the release deed said to have been executed by the petitioner on 19.01.1994 and even when the child died on 23.3.1994, the respondent being the class-I heir of the deceased child is entitled to claim a share by filing a suit for partition and even she is entitled to re-open the partition if release deed is acted upon. Therefore, I do not see any merit in this petition. Accordingly, these petitions are rejected.

The suit filed by the respondent claiming partition is maintainable.