

(1972) 05 KAR CK 0005
In the Karnataka High Court
Case No : First Appeal No. 2 of 1968

M.V. Shivaji Rao Kore and Others

APPELLANT

Vs

Rukminiyamma and Others

RESPONDENT

Date of Decision : 24-05-1972

Acts Referred:

Hindu Succession Act, 1956 — Section 6

Citation : AIR 1973 Kar 113 : AIR 1972 Kar 113

Hon'ble Judges : M.S. Nesargi, J;E.S. Venkataramiah, J

Bench : Division Bench

Advocate : K.R.D. Karanth, for the Appellant; P.M. Nanaya and B.G. Sridharan, for the Respondent

Judgement

1. This appeal arises out of the decree passed in O. S. No. 35 of 1964 on the file of the Principal Civil Judge. Mysore.

The facts of the case are these: One D. Venketarao Kore (Defendant 1) had two sons M. V. Shivaji Rao and Shankara Rao. Shankara Rao, died in the year 1957 leaving behind him his widow Rukminiyamma. the plaintiff in the above suit and his mother Venkubai as his heirs. After the death of Shankara Rao. Rukminiyamma continued to live with the members of the family of her husband till about 1960. In 1960 she went out of the family of her husband and issued a notice to the 1st defendant calling upon him to divide the properties of the joint family by metes and bounds and to deliver possession of the share to which she was entitled on the death of her husband in the year 1957, Since the demand made in the said notice was, not complied with, she instituted a suit in forma pauperis in Miscellaneous No. 240 of 1960 on the file of the District Judge. Mysore, on 29-10-1960. The said application was registered as a suit in O. S. No. 2/1963 on 11-1-1963 on the file of the District Judge, Mysore. Thereafter on account of the reorganisation of the jurisdiction of the Civil Courts in Mysore State the suit stood transferred to the Court of the Civil Judge, Mysore, and was registered as O. S. No. 35 of 1964. During the pendency of the petition Misc. 240

of 1960. Venkat Rao the 1st defendant died on 22-3-1962. After his death Shivaji Rao, the son of the 1st defendant, Vanku Bai, widow of the 1st defendant. Sushilabal. Nagubai and Kamalabai the daughters of Defendant No. 1 were impleaded as legal representatives of the deceased 1st defendant. The 2nd defendant Savitribai is the sister of Venkat Rao, the 1st defendant.

2. The case of the plaintiff as disclosed in the plaint is that the family of her husband owned considerable properties, movable and Immovable, as set out in the schedule attached to the plaint at the time of death of Shankara Rao, the husband of the plaintiff and that on his death by virtue of the provisions of the proviso to Section 6 of the Hindu Succession Act (hereinafter referred to as the "Act") the plaintiff became entitled to 3/18th share in the family properties. It was also claimed that by the reason of the death of Venkat Rao the 1st defendant during the pendency of the suit the plaintiff became entitled to 1/18th share in the family properties as a heir of Venkat Rao, she being the widow of a pre-deceased son of Venkat Rao. The plaintiff therefore prayed for partition and separate possession of 4/18th share of the family properties. It may be mentioned here that as against defendant 2 the case of the plaintiff was that a certain sum of money which had been deposited in the Bank in her name belonged to the family and that the 2nd defendant was liable to render account to the plaintiff and other members of the family with regard to the said amount.

3. In this case number of written statements have been filed by the legal representatives of the 1st defendant. Although they took a common stand in the 1st written statement filed by them some of them resiled from that stand and tried to support the case of the plaintiff in some respects by the written statements filed by them subsequently. But by the time the case was taken up for trial the relative contentions of the parties became crystallised in the following way. The case of Shivaji Rao, the son of 1st defendant was that the plaintiff was not entitled to a share because she had ceased to be the wife of Shankara Rao by reason of the fact that Shankara Rao himself had divorced her in accordance with the custom prevailing in the community to which they belonged and so the suit was liable to be dismissed. By a memo filed by all the parties before the court below on 19-6-1967 it was agreed that items Nos. 1 to 3, survey Nos. 12 and 12/3 in item No. 4 and item No. 5 in A schedule should be considered as joint family properties for the purpose of the suit. Shivaji Rao, however, maintained even after the said memo was filed that land bearing survey Nos. 14/1 and 14/2 in item No. 4 of plaint A schedule was his separate property as he had purchased the same under a registered deed in the year 1959, with the moneys belonging to him. Defendant No. 2 pleaded in her turn that a sum of Rs. 15,000/- which was utilised by her for the purpose of purchasing certain buildings exclusively belonged to her and that she was not in any way accountable to the plaintiff or to any other member of the family in regard to it. She also pleaded that all other moneys which stood in the joint accounts standing in the name of defendant No. 1 and herself had been drawn end utilised by the members of the family and no other money was available with her

regarding which she could be called upon to render account.

4. On the basis of the pleadings the court below framed among others three issues regarding:

- (1) The right of the plaintiff to maintain the suit;
- (2) The properties available for partition; and
- (3) The liability of the 2nd defendant to render account with regard to the sums utilised by her for her own benefit.

5. After trial the lower Court came to the conclusion:

(1) that the plaintiff was the widow of Shankara Rao and that the case of Shivaji Rao that the plaintiff had been divorced by Shankara Rao before his death was not true;

(2) that all the properties described In schedule A of the plaint and a sum of Rs. 1,07,949-48 ps. and the interest accrued thereon standing in deposit in several Banks and Co-operative Societies were divisible amongst the members of the family;

(3) that Shivaji Rao was liable to render account to the extent of Rs. 800/-which was the value of a Car belonging to the family which he has alleged to have sold; and

(4) that the 2nd defendant was liable to render account to the extent of Rs. 15,000/-.

6. With regard to the actual share to which the plaintiff was entitled, the lower Court was of the opinion that she was entitled to 4/18th share on the ground that she had become entitled to 1/18th share of the family properties on the death of the 1st defendant in addition to 3/18th share claimed earlier.

7. Aggrieved by the judgment and decree of the court below Shivaji Rao, one of the legal representatives of defendant No. 1 and defendant No. 2 have filed this appeal.

8. In the course of the hearing of this appeal Shri K. R. D. Karanth, learned counsel for the appellant filed a memo before the court stating that he would not Press the case of defendant 1 (a) Shivaji Rao, covered by issues 2 and 3 in the suit. Those issues relate to the right of the plaintiff to maintain the suit. In view of the above memo it is unnecessary for us to go into the question whether Rukminiyamma the plaintiff had been divorced by Shankara Rao or not before his death. We proceed on the basis that Rukminiyamma was entitled to a share in the properties of the family. Similarly Shri P. M. Nanaiah, the learned counsel for the plaintiff has filed a memo stating that he would not press his case as against 2nd defendant. All the parties other than defendant 2 in this appeal who are represented by their counsel have stated that they would not claim any amount from defendant 2 and the decree passed against her may, therefore, be set

aside. We therefore set aside the decree passed against defendant 2 and dismiss the suit as against her. Shri Nanaiah also says that he does not press his claim against defendant 1 (a) Shivaji Rao with regard to the value of the Car regarding which a decree has been made by the Court below. He submits that the decree to that extent may be modified.

9. What, however, remains to be considered in this appeal is, about the nature of the properties bearing survey Nos. 14/1 and 14/2 in item No. 4 of plaintiff A Schedule and the extent of the share to which the plaintiff is entitled to. It is no doubt true that the sale deed (Exhibit D-4) under which survey Nos. 14/1 and 14/2 in Item 4 of plaintiff A Schedule were purchased stands in the name of Shivaji Rao, defendant 1 (a). Exhibit D-4 is the original sale deed and Exhibit D-5 is a certified copy thereof. Before the said sale deed was executed by D. W. 1 there was an agreement Exhibit D-6 entered into on 12-2-1958, under which a sum of Rs. 2,000/- was paid as advance and the balance of the sale price had to be paid at the time of the registration of the sale deed. The sale deed was registered on 27-2-1959. The case of Shivaji Rao was that the price paid under the agreement to sell belonged to him and no part of the monies belonging to the family was utilised in that regard.

In support of his case apart from his evidence we do not have any other evidence. It is true that ordinarily when a property stands in the name of a junior member of a family who is not functioning as a manager the property would be considered as belonging to him until it is established by other persons who claim that the said property is joint family property by adducing reliable evidence showing that it is joint family property. If any evidence is forth-coming that the money utilised for buying the property belonged to the family then the said property would be treated as joint family property. In this case we have unimpeachable evidence in the form of entries made in the diaries for the years 1958 and 1959. Exhibits P-9 and P-10 maintained by Venkat Rao, the 1st defendant who was the manager of the family. At page No. 43 in Ex. P-9 relating to 12th February 1958 the 1st defendant Venkat Rao has recorded in his own handwriting that a sum of Rs. 2,000/- had been paid by way of advance under an agreement to buy certain properties. At page No. 57 in the diary of 1959 which is marked as Exhibit P-10 (a) relating to 26th February 1959, it is written by the 1st defendant Venkat Rao that he had advanced a sum of Rs. 5,000/- to Shivaji Rao, defendant 1 (a) for the purpose of getting a document registered. Ex. D-6 the agreement was entered into on 12-2-1958 and the sale deed Ex. D-4 was registered on 27-2-1959. Apparently the two entries referred to above referred to the transactions covered by Ex. D-6 the agreement and Ex. D-4 the sale deed. It is not shown that any other transactions were entered into on those dates. Further the land in question was being managed as part of joint family property. The lower Court was therefore right in not accepting the case of Shivaji Rao, defendant 1 (a) and in holding that survey Nos. 14/1 and 14/2 in Item No. 4 of plaintiff A schedule belonged to the joint family. We therefore reject the case of the defendant 1 (a) in this regard.

10. The next submission made by Shri K. R. D. Karanth is one based on Section 6 of the Act. He depended upon the Explanation 2 to Section 6 of the Act in support of his contention that the plaintiff was not entitled to claim a share in the estate left by the 1st defendant Venkat Rao on his death in the year 1962. He contended that the plaintiff having instituted a suit for partition and separate possession of her share to which she became entitled on the death of Shankara Rao, incurred the disability created by Explanation 2 to Section 6 of the Act, and she being an heir of Shankara Rao, was not entitled to claim a share in the property of Venkata Rao who continued to be Joint with Shivaji Rao until his death. It was urged that the estate of Venkata Rao would devolve on his heirs according to the provisions of the Act other than the plaintiff and Venkubai, defendant 1 (b) both of whom had acquired interest in the share of Shankara Rao on his death.

In order to examine the correctness of the submission made by Shri Karanth it is necessary to set out the provisions of Section 6 of the Act, It reads as follows:--

"6. Devolution of interest in coparcenary property:--

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that if the deceased had left him surviving a female relative specified in Class I of the schedule or a male relative specified in that class who claims through such female relative, the Interest of the deceased in the Mitakshara Coparcenary property shall devolve by testamentary or intestate succession, as the case may be under this Act and not by survivorship.

Explanation: (1) For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation: (2) Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein."

The main part of Section 6 reproduces the law as it stood before the Act was passed and it states that the interest in a joint family property of a deceased coparcener would devolve on the surviving coparceners. The proviso to this section however introduces a departure from the law as it stood then insofar as the interest in the joint family property of a deceased coparcener who has left behind him a female relative specified in Clause (1) of the Schedule to the Act or male relative specified in that clause who claims through such female relative (is

concerned). The proviso read with Expln. 1 to Section 6 provides that on the death of a coparcener leaving behind the female relative or the male relative specified therein his interest in the joint family property would devolve by testamentary or intestate succession as provided in the Act and not by survivorship and that for purposes of quantification of the interest of the deceased coparcener it should be assumed that a notional partition has taken place immediately before his death irrespective of whether he was entitled to claim partition or not. To us it appears to be clear that neither the proviso nor Explanation 1 states that on the death of a coparcener an actual division takes place between the heirs of such deceased coparceners and the other coparceners. They continue to be members of the joint family until such time the property is actually divided from a share claimed by them. Explanation 1 cannot be read as actually bringing out a division. As already stated it only provides for determination of the extent of the share of the deceased coparcener which would devolve by testamentary or intestate succession and not by survivorship and it follows that any other subsequent event would not in any way affect the extent of that share.

11. Explanation 2, only reproduces the law which was already in force before the Act came into force as understood by some High Courts in India. A son who is divided from a family was not entitled to claim a share in the property of the father on his death if there were undivided son or sons living with him at the time of his death. Explanation 2 does no more than incorporating the same principle of law in the Act. It states that the proviso to Section 6 would not enable a person who has separated himself from the coparcenery before the death of the deceased or any of his heirs to claim on intestacy a share in the estate of the deceased. It declares that the disability which a divided member was suffering from continues to be operative even after the Act comes into force. The principle underlying the said view of law is that persons who continue to remain joint with other members of the family should be preferred in the matter of intestate succession to a person who has gone out of the family by taking away his share. Probably that was considered to be in consonance with the notions of the joint family system prevailing in India. The said disability was a consequence of a voluntary act on the part of the separated member. The proviso to Section 6 is an exception to the rule incorporated in the main part of Section 6 and Explanation 2 is an exception to the rule incorporated in the proviso to Section 6. While construing a provision of the type we have to construe it strictly and if the case of any person cannot be brought within the four corners of the exception it should be held that it would not affect the interest of such a person. In the instant case Shankara Rao did not file a suit before his death nor had he expressed his intention to separate from the family. When he died he was an undivided member of the joint family and if on account of the proviso to Section 6, certain heirs of Shankara Rao became entitled to the share of Shankara Rao in the joint family property it cannot be said that they are in the same position which Shankara Rao or his heirs would have occupied if he had filed a suit for

partition or demanded partition and separate possession of their share in the joint family properties. Explanation 2 should be confined only to those cases where a coparcener has gone out of the family on account of his voluntary act and should not be extended to case where by operation of law certain persons become entitled to a share of the joint family property of a deceased coparcener.

If we accept the contention of Shri K. R. D. Karanth, not merely the plaintiff would be disentitled to claim a share on the death of Venkat Rao, but defendant Venkubai the widow of the 1st defendant also would not be entitled to claim share in the property of her husband, because both of them happen to be the heirs of Shankara Rao. Neither Venkubai nor the plaintiff is claiming any interest in the property of Venkat Rao, through Shankar Rao, but by reason of Schedule 1 to the Act The fact that the plaintiff instituted the suit before the death of Venkat Rao for a share in the estate of her husband does not preclude her from claiming a share in the estate of Venkat Rao as a widow of his Predeceased son.

We are of the opinion, that the contention urged on behalf of defendant 1 (a) by Shri K. R. D. Karanth has therefore to be rejected. It is not disputed that in that event the plaintiff would be entitled to 1/18th share as an heir of Venkat Rao in the family properties. The court below was therefore right in holding that plaintiff was entitled to 4/18th share in the family properties.

12. Before concluding it is necessary to refer to some other aspects of the case urged before us. Venku Bai the wife of Venkat Rao (defendant 1) died during the pendency of this appeal. We are told that she has left a will bequeathing her interest in the family properties in favour of Sushilabai, defendant 1 (d) and K. S. Narayana Rao and that K. S. Narayana Rao, has been appointed as an executor under the Will, K. S. Narayana Rao, it appears has obtained a probate of the said Will. We are also informed that Defendant 1 (a) Shivaji Rao and defendant 1 (e) Kamalabai have taken action for annulment of the said probate and the said proceedings are pending. Shri P. M. Nanaiah, the learned counsel for the legatees submitted that we should pass a decree holding that the legatees have become entitled to the share of Venkubai and they should be given possession of the said share.

We do not have all the material necessary to decide the rival contentions of the parties regarding the Will. Moreover, the matter is pending before a competent court. The legatees are Parties to the said proceedings. In the circumstances we find it unnecessary to pronounce upon either the validity of the will or its efficacy. We need not therefore go into the said question in these proceedings. They shall be bound by the final decision on that question to be rendered by the competent court. We are told that the properties are in the possession of a receiver. We direct that the share of Venkubai shall continue to remain with the receiver until the rights of the parties are finally adjudicated upon in the proceedings referred to above.

13. Kamalabai, defendant 1 (e) has filed an application I. A. No. 21 before this

court seeking permission to amend the written statement by including a claim in respect of certain amounts mentioned therein. Her case is that either by oversight or mistake, large sums of money belonging to the family have not been included in the plaint-schedule and in the decree drawn up by the court below and that it is necessary that those amounts should also be included in the decree and her share in those amounts should be determined in this appeal. We find it difficult to dispose of this application at this stage. We deem it appropriate to direct the court below to dispose of the above application in accordance with law and if the Court below ultimately comes to the conclusion that the amounts mentioned in the said application formed part of the joint family property it would make a further decree in accordance with law. I. A. No. 21 shall therefore be sent to the court below for its consideration and disposal by it. I. As. 27, 29, 34, 35 and 38 and 39 are applications made by one or the other party for directing Coffee Board to disburse the amount standing to the credit of the Coffee estate which is one of the items of the plaint A schedule.

It is unnecessary to pass any order on those applications. It is open to the court below to Pass appropriate orders with regard to the amount in deposit in the Coffee Board on the basis of applications to be made before it by the parties. These applications are therefore dismissed. We are told that a sum of Rs. 7,000/- has been received by this Court and is standing to the credit of the estate. We direct that the said sum be sent back to court below for payment to the parties in accordance with their shares.

13. I. A. No. 28, an application filed by K. S. Narayana Rao one of legatees under the will of Venkubai is to implead him as a supplemental respondent in the appeal. For the reasons already mentioned it is unnecessary to implead him as a party to this appeal at this stage. It is open to him to approach the court below after the termination of the Proceedings relating to the will in the event of the case being decided in his favour to deliver the share of Venkubai to him, in the capacity of an executor. I. A. No. 28 is therefore dismissed.

14. I. A. No. 30 is an application made by the appellants to record that Venkubai died during the pendency of this appeal. No separate order is necessary on this application because the said question is dealt with earlier. The application is rejected.

15. Shri P. M. Nanaiah, the learned counsel for the plaintiff submitted that certain amounts have been drawn by the parties during the pendency of this appeal and the court below should be directed to take into account while passing a final decree that the said payments have been made to them. We accordingly do so.

16. It was brought to our notice that in the course of the judgment and decree of the court below there were some discrepancies with regard to the share to which the parties were entitled to. So in order to make the matters clear we pass a fresh decree in substitution of the decree passed by the court below. There shall be a preliminary decree directing partition of the properties belonging to the

family as follows:

(1) The plaintiff is entitled to 4/18th share in the properties described in plaint A schedule and in the sum of Rs. 1.07.949-48 ps. and the interest accrued thereon as set out in para, 19 of the judgment of the lower Court.

(2) Defendant 1 (a) Shivaji Rao is entitled to 7/18th share.

(3) Defendant 1 (b) Venkubai is entitled to 4/18th share. It shall be distributed in accordance with the decision on the Will said to have been made by her.

(4) Defendants 1 (c) 1 (d) and 1 (e) are each entitled to 1/18th share in the said properties. The court below will pass a final decree on the above basis and in accordance with the directions given above.

(5) Account shall be taken under Order 20. Rule 18 of the CPC and appropriate consequential orders may be made after such enquiry,

(6) The suit as against defendant 2 stands dismissed.

17. The costs incurred by the plaintiff and defendants 1 (a) to 1 (e) in this court and in the court below shall come out of the estate. Defendant No. 2 shall bear her own cost both in this Court as well as in the court below. The court-fee payable on the plaint shall be paid out of the estate.

18. The trial Court shall proceed to dispose of the suit expeditiously. The appeal is accordingly disposed of.