

(2024) 07 KAR CK 0027

In the Karnataka High Court

Case No : Regular Second Appeal No. 510 Of 2018 (PAR)

Naveen & Others

APPELLANT

Vs

P. Bhagyamma, W/O Late Sri Ramakrishna & Others

RESPONDENT

Date of Decision : 12-07-2024

Acts Referred:

Citation : (2024) 07 KAR CK 0027

Hon'ble Judges : H.P. Sandesh, J

Bench : Single Bench

Advocate : Vijaya M.N, Y.K.Narayana Sharma, Archana Murthy P, P.N.Manmohan

Final Decision : Dismissed

Judgement

H.P. Sandesh, J

1. This second appeal is filed against the judgment and decree dated 30.01.2018 passed in R.A.No.442/2014, on the file of the II Additional District Judge, Mysore, dismissing the appeal and confirming the judgment and decree dated 02.11.2010 passed in O.S.No.452/2005, on the file of the I Additional Senior Civil Judge and CJM, Mysore.

2. The factual matrix of the case of the plaintiffs before the Trial Court while seeking the relief of partition and separate possession is that defendant No.1 is the brother of the plaintiffs and all of them are the children of late Papanna and Jayamma. The 'A' schedule property comprises of residential and a non-residential accommodation and the same was the absolute property of Papanna, which was his self-acquired property. The said Papanna died 14 years back intestate. After his death, the plaintiffs and defendant No.1 along with their mother have succeeded to 'A' schedule property. It is contended that immediately after the death of their father, the schedule property was transferred in the name of Jayamma i.e., mother of the plaintiffs and defendant No.1. The said Jayamma also subsequently passed away and on account of death of the mother, the property came to be vested with the plaintiffs and defendant No.1. It

is contended that the mother Jayamma had executed a Will dated 21.08.2002, whereunder, she has bequeathed the schedule property equally in favour of the plaintiffs and defendant No.1. It is contended that if she had no right to execute the Will in respect of rights of the plaintiffs and defendant No.1 over the 'A' schedule property, the said Will can be ignored and even otherwise, the bequeath under the Will dated 21.08.2002, is also not opposed to order of succession specified under the Hindu Succession Act and contend that equal provision is made to all the members of the family.

3. It is further contended that defendant No.1 is now working in Arkeshwara Rice Mill, Guttalu Main Road, Mandya. However, after the death of Jayamma, defendant No.1 started to make attempts to grab 'A' schedule property. The said property consists of two shops in the ground floor, one residential portion in the ground floor and one residential portion in the first floor. The defendant Nos.2 and 3 are in occupation of the first floor residential portion of the 'A' schedule property as mortgagees thereof. The defendant Nos.5 and 4 are the tenant and mortgagee respectively, of the shops situated in the ground floor of 'A' schedule property. Late Jayamma was living in the residential portion of the ground floor in the 'A' schedule property. Now the same is in joint possession of the plaintiffs and defendant No.1. The mortgages made in favour of defendant Nos.2, 3 and 4, have been made during the life time of Jayamma. Now the defendant No.1 is attempting to take possession of the mortgaged portion and alienate the ground floor and first floor portion of residential portions in 'A' schedule property in favour of others. The plaintiffs have got 4/5th share in the 'A' schedule property. The plaintiffs demanded defendant No.1 to divide their 4/5th share in 'A' schedule property on 19.06.2005. However, defendant No.1 did not heed to the legal demands of the plaintiffs and making clandestine efforts to alienate 'A' schedule property. Infact, the father of the plaintiffs and defendant No.1, late Papanna died in a road accident. Subsequently, the mother of the plaintiffs and defendant No.1 filed a claim for compensation under IMV Act in MVC No.215/1992 and compensation was also awarded. The plaintiffs are also entitled in respect of the said decretal amount.

4. In response to the suits summons, defendant Nos.1, 6 and 7 appeared and filed their separate written statement and other defendants did not contest the matter. The sum and substance of the written statement filed by defendant Nos.1, 6 and 7, is that 'A' schedule property is the self-acquired property of Papanna and he had executed a Will dated 18.10.1989 in favour of Naveen and Chethan, who are defendant Nos.6 and 7 and denied all other averments that the plaintiffs and defendant No.1 have succeeded to the estate of the deceased Papanna and also denied the Will dated 21.08.2002, which has been propounded by the plaintiffs. It is contended that Jayamma died on 30.06.2004 and other allegation that defendant No.1 made an attempt to grab the property is denied. However, admits that defendant Nos.4 and 5 are mortgagees, but denied the joint possession claimed by the plaintiffs and claimed that only defendant No.1 is in possession. It is also admitted that both mortgages made in favour of

defendant Nos.2, 3 and 4 have been made during the life time of Jayamma and denied all other averments made in the plaint.

5. The Trial Court taking note of the pleadings of the parties, framed the issues and additional issues, since defendant Nos.6 and 7 also claimed that they are the beneficiaries under the Will dated 18.10.1989. The parties were allowed to substantiate their case and plaintiff No.1 examined herself as P.W.1 and got marked the documents at Exs.P.1 to 6. On the other hand, defendant No.1 examined himself as D.W.1 and examined two witnesses as D.W.2 and D.W.3 and got marked the document at Ex.D.1. The Trial Court having considered the material on record, answered issue No.1 that 'A' schedule property is in joint possession of the plaintiffs and defendant No.1 and comes to the conclusion that the plaintiffs are entitled for 4/5th share in the suit schedule property and defendant Nos.1, 6 and 7 have failed to prove the contention that the plaintiffs have no right over the 'A' schedule property in terms of the Will dated 18.10.1989 and rejected the contention of defendant Nos.1, 6 and 7 and decreed the suit granting the share as claimed.

6. Being aggrieved by the said judgment and decree of the Trial Court, an appeal is filed in R.A.No.442/2014. The First Appellate Court considering the grounds urged in the appeal memo, formulated the point whether the appellants and their father, who are propounders of Ex.D.1 Will have proved its due execution and genuineness? The First Appellate Court having re-assessed the material on record, accepted the reasoning given by the Trial Court and dismissed the appeal.

7. Being aggrieved by the said concurrent finding, this second appeal is filed before this Court.

8. The main contention of the appellants is that both the Courts have committed an error in not accepting the document of Ex.D.1 inspite of examining two attesting witnesses as D.W.2 and D.W.3 and the very approach of both the Courts is erroneous. Both the Courts failed to properly appreciate and understand the pleadings of the parties, the evidence led and the documents produced before the Court. Having considered the grounds urged, this Court while admitting the appeal, framed the following substantial questions of law:

1. Whether both the Courts below were justified in ignoring Ex.D.1 -Will dated 08.10.1989 of B. Papanna inspite of the same being supported by attesting witnesses D.W.2 and D.W.3?

2. Whether both the Courts below were justified in granting decree for partition contrary to the contents of Ex.D.1?

9. The learned counsel for the appellants/defendant Nos.6 and 7 would vehemently contend that the concurrent finding of the First Appellate Court is erroneous and Ex.D.1 Will is proved by examining D.W.2 and D.W.3 and their evidence is very clear that the same was executed by Papanna. Both the Courts have committed an error in appreciating both oral and documentary evidence

placed on record and khatha and possession stands in the name of the appellants and the Will executed by the said Papanna is a genuine Will. The defendant No.1, who is none other than the father of the appellants herein, supports the case of the appellants. The learned counsel contend that when the attesting witnesses have unequivocally deposed regarding execution of the Will, the Trial Court ought not to have doubted the document of Ex.D.1. The Will does not suffer from any suspicion.

10. Per contra, the learned counsel for respondent Nos.1 to 4/plaintiffs contend that the suit is filed for the relief of partition and separate possession claiming 4/5th share and it is not in dispute that the property belongs to Papanna. There is no dispute with regard to the relationship between the parties is concerned. The learned counsel contend that the alleged Will is dated 18.10.1989 and the said Papanna died in the year 1991. The learned counsel brought to the notice of this Court that the khatha was transferred in favour of Jayamma immediately after the death of Papanna and the said Jayamma also died in the year 2004. Thereafter, an attempt is made by defendant No.1 and his two sons to grab the property belonging to Papanna. Though the learned counsel contend that the plaintiffs have also claimed the execution of the Will by the wife of Papanna, they have not pressed the relief on the basis of the said Will, since they have not examined any attesting witnesses. The learned counsel contend that the alleged Will is in favour of the grandchildren of the said Papanna i.e., children of defendant No.1. The said Will did not see the light of the day for a period of 14 years after the death of Papanna. Both the Courts have taken note of the fact that D.W.1 during the course of evidence has categorically admitted that he came to know about the Will on the date of eleventh day ceremony of his father. But the pleading before the Court is that he came to know recently when the documents were handed over to him i.e., after the receipt of the suit notice and summons and the same contradicts each other with regard to Will. The learned counsel contend that the Will has not been acted upon for a period of 14 years. Both the witnesses admits that D.W.1, D.W.2 and D.W.3 are friends and also compensation was received in respect of motor accident claim. The learned counsel contend that both D.W.1 and D.W.2 admits the signatures available in Ex.P.6 mortgage deed and Will are different and scribe also not examined and contend that the Will was drafted in flour mill and not explained as to why the Will was executed in flour mill, though contend that Will is drafted by an advocate. The learned counsel submits that during the course of evidence, difference of page is also brought to the notice of the Court and his age was 59 years as admitted, but in the Will age is mentioned as 62 years. Hence, both the Courts comes to the conclusion that the very Will does not inspire the confidence of the Court and the Will came into existence under suspicious circumstances and both the Courts have not committed any error.

11. Keeping in view the contentions urged in the appeal by both the learned counsel as well as the grounds urged in the second appeal and also keeping in view the substantial questions of law framed by this Court while admitting the

appeal, this Court has to analyze the material available on record.

12. Taking note of the material available on record, no doubt, Ex.D.1 is placed before the Court and defendant No.1 is also examined as D.W.1. There is no dispute with regard to the fact that 'A' schedule property is the self-acquired property of the father of the plaintiffs and defendant No.1. The contention of defendant Nos.1, 6 and 7 is that the Will was executed and no doubt, it is pleaded that the said Will was handed over to defendant No.1 after the receipt of the suit summons. D.W.1 pleaded that he came to know about the Will through yajamanas and well-wishers and the same was handed over to him when he had received the summons. But in the cross-examination he admits that he came to know about the Will on the eleventh day ceremony of his father. The evidence of D.W.1 is contradictory. It is important to note that D.W.1 admits that immediately after the death of his father, they did not make any attempt to act upon the Will and kept quiet and not taken any steps to change the khatha in favour of defendant Nos.6 and 7 and khatha was transferred in favour of the mother after the death of her husband. It is important to note that defendant No.1 who has been examined as D.W.1 admits that there is difference in the signature of executant found in Ex.P.6 and the signature found in the Will, when the same was compared with Ex.D.6(a). But an attempt was made that due to age difference, signature is slightly different. He categorically admits that even as on the date of death of his father at the age of 59, he was pursuing business and the said explanation also cannot be accepted. It is important to note that D.W.2, who is an attesting witness, though claims that the Will was executed in the flour mill, he also categorically admits that there is difference in signature in Ex.P.6 and Ex.D.1. D.W.3 is examined before the Trial Court and he also says that the Will was executed in the flour mill, but he categorically admits that he knows defendant No.1 since 30 years. D.W.2 is having acquaintance with defendant No.1 from last 25 years and hence it is clear that all of them are having acquaintance with each other i.e., witnesses D.W.2 and D.W.3.

13. Both the Courts have taken note of the material on record in respect of Ex.D.1 and rightly comes to the conclusion that even after the death of Papanna in the year 1991, no steps were taken and also the said unregistered Will did not see the light of the day for a period of 14 years. Nothing is mentioned with regard to disinheriting of all the four daughters and the said Will was not at all produced anywhere after the death in 1991, but only contention is that the same was delivered after he has received the summons. I have already pointed out that D.W.1 has categorically admitted that he came to know about the Will on the eleventh day ceremony of his father and what prevented him from producing the said Will and getting the khatha transferred in favour of defendant Nos.6 and 7, no explanation. It is admitted by defendant No.1 in the written statement that after the death of the father, the mother had executed two mortgage deeds and it is not in dispute that the mortgagees are in possession.

14. Having taken note of the admission on the part of D.W.1, D.W.2 and D.W.3,

all of them are having acquaintance with each other from last 25-30 years. D.W.1 categorically admits the difference in the signature found in the documents Ex.P.6 and Ex.D.1. For a period of 14 years, the said Will did not see the light of the day and also the very handing over of the said document is doubtful and knowledge is also contrary to each other. The evidence of the witnesses is consistent with the pleadings, since D.W.1 evidence is that he came to know about the Will immediately after the death of his father, but his pleading is contrary that he came to know about the same only after the receipt of suit summons and all these factors were taken note of by the Trial Court and the First Appellate Court. Hence, I do not find any error committed by the Trial Court and the First Appellate Court in ignoring the document of Ex.D.1 and the same is surrounded with suspicious circumstances and the evidence of D.W.1, D.W.2 and D.W.3 not inspires the confidence of the Court. Hence, I do not find any perversity in the findings of the Trial Court and the First Appellate Court in coming to such a conclusion ignoring the document Ex.D.1. Hence, I answer the substantial questions of law accordingly.

15. In view of the discussions made above, I pass the following:

ORDER

The second appeal is dismissed.