

(2007) 02 KAR CK 0020

In the Karnataka High Court

Case No : Regular First Appeal No. 322 of 1995

Puttanna Shetty (since deceased represented by his LRs.
Smt. K. Vinoda Shetty and Others)

APPELLANT

Vs

Padma Shetty (since deceased represented by LRs. Smt
Neelamma Shetty and Others) and Others

RESPONDENT

Date of Decision : 08-02-2007

Acts Referred:

Evidence Act, 1872 — Section 114

Citation : (2007) 2 KarLJ 28 : (2007) 3 KCCR 2107

Hon'ble Judges : R. Gururajan, J;C.R. Kumaraswamy, J

Bench : Division Bench

Advocate : H.K. Shetty and K. Vittal Shetty, for the Appellant; U.C. Vasanth and K. Sachidananda Karanth for R1, for the Respondent

Judgement

1. This appeal is at the instance of the plaintiff. Suit is one for partition and separate possession in respect of schedules "B", "C" and "D" properties to the plaintiff and plaintiff claims 3/8th share and also seeks rendition of accounts or mesne profits from defendant-1 from 1.9.1989.

2. Facts as narrated in the plaintiff are as under:

Plaintiff and defendant-1 are sons of late Annayya Shetty. They formed joint family with their late father Annayya Shetty. They are governed by Mithakshara law of Inheritance and Succession. Plaintiff's father died in or about 1979 as undivided member of the family. So his 1/3rd share belongs to his legal heirs since wife had pre-deceased him. Annayya Shetty had another son by name Chennappa Shetty who had died and his widow/defendant-5 is impleaded. Annayya Shetty has also a daughter by name Yamuna. She was the mother of defendant-4. Defendants 2 and 3 are his daughters. Plaintiff was in military services for about 8 years. He was discharged from the Army on account of intermittent depression. After the death of the father, defendant-1, being the eldest son, continued to reside in the main family house and has been in

possession and enjoyment of all the family properties. The family has accumulated properties, both movables and immovables. On discharge from Army services, the plaintiff approached defendant-1 to give his due share but defendant-1 made over a small portion of property described in "C" schedule. That was due to intervention of grahastas. No share was given in the family movables. The small property handed over to the plaintiff is located in between other properties in such a way that the plaintiff is not able to enjoy the same. The plaintiff did not want to continue jointly. He therefore called upon defendant-1 to hand over his legitimate share. But defendant-1 did not like the same. Suit property fetch an annual net income of 80 muras of rice, 2000 coconuts, 12 candies of arecanuts, five quintals of cashewnuts besides other income apart from movables and outstanding. Defendants 6 and 7 are children of defendant-1 and defendant-8 is husband of late Yamuna. They were impleaded by way of an amendment. Defendant 8 has no right over suit schedule properties. On receipt of notice, the first defendant filed a written statement denying various allegations. According to him, "B" schedule properties are owned by the family. He stated that late Annayya Shetty had first wife and through her, one Lingappa Shetty and Laxmana Shetty are born and Annayya Shetty got divided the property between himself and the children of the first wife under registered partition deed dated 10.1.1966. The remaining property was retained by Annayya Shetty and his second wife's children, who are plaintiff and defendants 1 to 3. After partition, properties covered by R.S. Nos. 234/1, 29/2, 30-2B, 30/2C, 30/3B, 281/7, 281/5 do not constitute family properties of late Annayya Shetty. S. No. 249/1B is not included in the plaint "B" schedule. The aforesaid survey numbers are in possession of Lingappa Shetty and Laxmana Shetty, step brothers of plaintiff and defendant-1. Plaintiff is in possession of 97 cents of land in Sy. No. 30/2A, 12 cents of S. No. 281/1A, 26 cents in S. No. 30/3A and 3 cents in S. No. 30/2B. Defendants 2 and 4 are in possession of land in Sy. No. 249/1B. Annayya Shetty died on 1.3.1980. Plaintiff resided in the family house along with the father till his death and thereafter till 1982. Property was given to the plaintiff in terms of oral partition held in 1982 in the presence of grahastas. Plaintiff took one pair of oxen, two she-buffaloes, one pot, one chembu, one wooden bench, one copper gudana, copper cherige, a grinding stone, two bags of rice, agricultural implements, one pumpset in terms of the averments. The income as stated by the plaintiff is also denied. There are liabilities incurred for the purpose of last rites of Annayya Shetty. All the members are liable to share the liability which existed at the time of death of Annayya Shetty. Amount spent for effecting improvements are to be taken into account. He wanted the suit to be dismissed. Defendants 2 and 4 have filed written statement challenging the capacity of the wife to file suit representing the husband. Defendant No. 3 has filed a memo adopting written statement of defendants 2 and 4. Additional written statement was filed. Plea of limitation was raised. Learned Trial Judge framed as many as 12 issues and in addition to an additional issue, he has answered the same in terms of its findings in para 14. Ultimately, the learned Trial Judge has chosen to pass the following order:

The plaintiff's suit is dismissed. In view of the mental condition of plaintiff and the peculiar circumstances of the case, the parties shall bear their own costs.

This order is challenged in this appeal.

3. Learned Counsel for the appellant would take us through the material on record in particular, the pleadings and the evidence on record to contend that the Judgment and decree suffer from various errors of law in terms of his submissions. He says that the learned Judge has chosen to dismiss the suit by relying upon a portion of the evidence without taking into consideration, the entire evidence on record. He also says that the material documents would show that there existed no partition as sought to be made out by the defendant. He would also say that the material witnesses have not been examined by the defendant. He also relies on a few Judgments in support of his submissions.

4. Per contra, Sri. Karanth, learned Counsel for the defendant argues that the evidence of PW-1 is good enough to show partition in terms of the pleadings of the defendant. He also says that the partition has been acted upon by the party in the case on hand. Moreover, the best witness available was not placed before this Court and that therefore, the learned Judge was justified in accepting the case of the defendant.

5. After hearing, we have carefully perused the material placed on record.

6. Suit is filed for partition and separate possession. Relationship is almost admitted in terms of the pleadings. The plaintiff has sought for partition of suit schedule properties in his right as a son of late Annayya Shetty. Whereas, the contesting defendant would set up a plea of oral partition, in terms of the pleadings. Learned Judge has chosen to frame as many as 13 issues in para 13 and has chosen to answer the same in para 14 of the Judgment. Learned Judge after noticing various materials on record including the evidence has chosen to come to a conclusion that the plaintiff was admitted to hospital and he was treated by medical personnel. He would not be in a position to protect his interest in terms of the material placed on record. He has also chosen to notice the evidence of PW1 in this regard. After noticing the same and after noticing that there is no good relationship, he has chosen to come to a conclusion that Smt. Vinoda Shetty is a right person to act as next friend and prosecute the suit on his behalf. He has answered the additional issue in favour of the plaintiff. We accept his findings. Moreover, not much of the arguments are advanced on this issue by the parties.

7. In so far as issues 2 and 3 are concerned, learned Judge was of the view that they need not be considered in the light of the findings on issue No. 4. Issue No. 4 is a crucial issue which would decide the fate of this appeal. Learned Judge has chosen to accept the oral arrangement of parties in the case on hand in terms of its findings. Let us see as to whether the said plea is acceptable or not in the given circumstances. We see from the plaint that the plaintiff and the first defendant are the sons of late Annayya Shetty. They constitute a Hindu Joint

Family governed by Mithakshara law of Inheritance and Succession. Annayya Shetty died in the year 1979. He was un-divided by the rest of the family. His wife has pre-deceased him. Their relationship is as shown in genealogy. Plaintiff was in military services and he was discharged on account of intermittent depression. According to the plaintiff, he approached the defendant to give his due share of the family and he was given only a small portion of immovable properties and he was not given any share at all. He claims share in the property. As against this, the defence is one of oral partition at the intervention of grahastas. Evidence was led by the parties. PW-1 was examined on behalf of the plaintiff and two witnesses were examined on behalf of the defendant. 17 documents were marked on behalf of the plaintiff and 21 documents were marked on behalf of the defendant. Commissioner's report is marked as Ex. C1. PW-1 was examined and she has reiterated the averments made in the plaint. However, she would deny that there was complete oral partition in the year 1982. However, she would say that "C" schedule property was allotted to her husband's share. She was cross-examined at length. She would express her ignorance with regard to a partition between Annayya Shetty, his wife Lakshmi and sons born through Lakshmi. She also says that he was not aware as to whether any property was allotted to Lakshmana Shetty and Lingappa Shetty in terms of Ex. P-1. She further says that items 1-3 to 6, 11 and 12 shown in "B" schedule were allotted to the share of Lakshmi's sons. She was questioned in para 6 and the question would read as under:

Whether your husband was member of undivided family or separated?

Ans: We are separated.

She also says with regard to voter's list etc. Several suggestions made to her were denied. She also says that it is not correct to say that at that time, she started living separately. She also denies that the partition has taken place in their family due to intervention of elders. She would again deny partition in terms of cross-examination done with reference to Exs. D2 to D5. As against this evidence, DW-1 is examined and he would refer to various documents. However, he would say that the plaintiff was allotted in terms of partition, 1 acre 38 cents of land comprising of areca garden of 1 acre. He also says that immovables are granted to the plaintiff. He would say that the V.A. prepared a sketch on the eve of partition. Original was not filed. He would however, add by saying that in case it were to be decreed the property assigned in favour of the defendant are also to be taken into account. In cross-examination, he says that he would not remember the date when oral discussion was taken place but it was in February 1982. Partition was at the behest of the plaintiff. He also admits that grahastas were present when the V.A. measured the land. The grahastas did not work out legitimate quantum of share to which all the parties were entitled. Memo was not signed. He further admits that no entries are made in the revenue records pursuant to oral records. DW-2 was examined and he would admit that V.A. measures the property a day prior to partition. No doubt, the learned Judge in

his findings has chosen to notice the evidence. He also comments about the quality of evidence of DW-2. He says that according to the proportion of their shares, extent of land with certain particular proportionate yield will be allotted. DW-2 knows nothing in terms of the findings of the learned Judge. Learned Judge, ultimately says in para 24 that this only goes to suggest either that there was no such partition as stated by DW-1 took place or that DW-2 was not at all present when such alleged partition took place as stated by DW-1. He also notices Ex.D-2 and also comments that if at all there is oral partition, first time in 1982, there is nothing to built another house in a place where plaintiff do not reside. He also says that evidence of the witness on this amount is not accepted. He was not happy with the evidence of the defendant. In fact, he would go to the extent of saying that DW2's evidence does not corroborate that of DW-1. He further says at page 69 that when there was demand for partition and when defendant-1 was ready to part with some property, he fail to understand why defendant-1 would have kept that matter as a dangling sword and about one acre of areca garden is allotted to plaintiff. He also notices the temporary arrangements in the case on hand. However, the learned Judge accepts the case of the defendant by holding that there was oral partition in the family and for making over of schedule property to the plaintiff was not only by way of temporary arrangement. But it was by way of severance of status and partition. He has answered the same in affirmative in para 14. The sum and substance of the findings of the learned Judge is on the basis of the evidence of PW1. As mentioned earlier, PW-1 has chosen to answer the question with regard to her husband being a member of un-divided family or separated. The answer is "we are separated". This evidence has to be understood in the context of the entire evidence and this evidence cannot be read in isolation as has been done by the learned Judge. The pleadings and the subsequent evidence would go to show that the answer "we are separated" would not result in showing a state of severance of status and partition as held by the Learned Judge. In fact, the evidence of DW-2 is shaky even according to the learned Judge. Even the evidence of DW-1 is not to our satisfaction. The so called memo by V.A. was not placed before the Court. Taking into consideration, the entire material on record, we are not prepared to accept the findings of the learned Judge of severance only on the basis of a single sentence in cross-examination of the plaintiff. Therefore, in our view the findings on issue No. 4 require our interference and we do so by setting aside the findings on issue No. 4.

8. At this stage, we must also notice the case laws submitted by the parties.

Parameshwari Bai Vs. Muthojirao Scindia, is a Judgment of the Division Bench of this Court. The Division Bench after noticing Chikkam Koreswara Rao Vs. Chikkam SubbaRao and Others, has chosen to hold as under in para 11 and 18:

11. The presumption of law is strong legal presumption and is not likely to be repelled by mere balance of probabilities. The evidence repelling that presumption must be strong, distinct and satisfactory. However, intendment is

made in favour of marriage de facto and the presumption drawn is based upon cohabitation and repute. The weight of the presumption gets strengthened when it is proved that the party whose marriage is in question distinctly intending to marry and went through a form of marriage with that intention and also subsequently lived together as husband and wife and were estimated and reputed as such by those who knew them. Even when there is no positive evidence of any marriage having taken place, the presumption is not only with regard to the parties and the requisite ceremony to constitute a valid marriage.

18. We have already observed above that the presumption arising on the facts of the case is a very strong presumption and that unless the respondent adduces clear, cogent and reliable evidence, the presumption is not rebutted. The point therefore, that arises for our consideration is: whether suggestions made, the stray sentence elicited in the course of cross-examination of the lady and the questions put on interrogation cannot be sufficient to rebut the presumption arising from the facts of the case discussed above.

9. In *Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others*, the Supreme Court would notice the consideration of evidence. In fact, a party in possession of best evidence has not chosen to place best evidence by way of examination of grahasta or by way of filing memo. In that situation, the Court ruled against that party who has not chosen to place the best evidence. These two Judgments support the plaintiff. Even otherwise, an admission particularly in civil matter dealing with properties has to be clear and it has to be read in the light of the pleadings and the other evidence available on record. One stray sentence cannot be picked up for holding against the plaintiff in property matter as has been done in the case on hand.

10. In fact, the Supreme Court in *Chikkam Koreswara Rao Vs. Chikkam SubbaRao and Others*, would say in para 3 reading as under:

It is clear from the Judgment of the High Court that but for the aforementioned statement of the appellant, the High Court would not have disturbed the finding of the trial Court as regards the properties covered by Ex.B-6. Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive. There should be no doubt or ambiguity about the alleged admission. There is no difference in the nature of the acquisitions made under Exs.B-2 to B-5 and B-7 and that made under Ex.B-6. They were all made during the lifetime of Reddinaidu.

The said Judgment also supports the plaintiff.

11. As against this, learned Counsel for the respondent places before us *Pandurang Jivaji Apte Vs. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others*, in support of his submissions. In that case, the Court has considered Section 114 of the evidence Act in the matter of party failing to appear in Court. The Supreme Court also considering with regard to adverse interference in the

absence of any other evidence available on record. In para 11, the Court has noticed that adverse interference would arise when there is no evidence on the record on the point in issue. The said Judgment would not be applicable in the light of the material available on record. Similarly, the learned Counsel places before us with regard to incapacity of the plaintiff-husband to lead evidence. We have already ruled that the evidence of the wife can be accepted in the case on hand. In the light of the case laws and in the light of the material placed before us, we are satisfied that the findings on issue No. 4 is un-sustainable in law and the same is set aside. Learned Trial Judge has not chosen to answer issue No. 2 and issue No. 3 in the light of the acceptance of issue No. 4. Similarly he has not chosen to answer issue No. 6. He has also answered the other issues in subsequent paragraphs. Since, the entire suit is dismissed in the light of the findings on issue No. 4 and in the light of our setting aside issue No. 4, appeal has to succeed on the facts of this case. Once the order is set aside, the matter has to go back before the learned Judge for considering the matter afresh in the light of this order.

12. In these circumstances and on the facts of this case, this appeal is accepted. The order of the learned Trial Judge is set aside. Matter is remitted back for re-decision. Parties are to appear without waiting for any notice, what so ever, on 26.2.2007. Liberty is reserved to the parties to file additional documents and lead additional evidence in accordance with law. Learned Trial Judge is to complete the proceedings within six months from the date of receipt of a copy of this order.

13. In the course of hearing, we did suggest the parties to settle the dispute but for the reasons best known to them, they could not get the matter settled. However, setting aside of the order would not come in the way of the parties changing their mind and settling the matter amicably. However, it is left to the parties to take a decision on this aspect of the matter. Office is to send the records forthwith. No costs.