

(2005) 11 KAR CK 0010

In the Karnataka High Court

Case No : Regular Second Appeal No. 578 of 2000

Roshanbi and Others

APPELLANT

Vs

Usmansab Shaikaji Attar Since deceased by his LRs. and
Another

RESPONDENT

Date of Decision : 16-11-2005

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : (2006) ILR (Kar) 560 : (2006) 4 KarLJ 336 : (2006) 1 KCCR 424

Hon'ble Judges : Huluvadi G. Ramesh, J

Bench : Single Bench

Advocate : B.S. Kamate, for the Appellant; M. Ram Bhat, for the Respondent

Final Decision : Allowed

Judgement

Huluvadi G. Ramesh, J.—This Second Appeal is by the plaintiffs being aggrieved by the Judgment and Decree passed by the II Addl. Civil Judge, (Sr. Dvn.,) Belgaum, in R.A. No. 75/1988 allowing the appeal filed by the defendant and dismissing the suit of the plaintiffs.

2. The plaintiffs have filed a suit for partition and separate possession of their 7/8th share in the suit property. The suit property is a residential house bearing CTS. No. 883/A and 883/B situate at Aralikatti Deshpande Galli, Belgaum. The original propositus - Shaikji had two wives namely Halimabi and Roshanbi. The defendant is the son of Halima Bi, the first wife of Shaikji. The plaintiffs - 2 to 8 are the children of second wife who is plaintiff No. 1 - Roshanbi. The relationship between the plaintiffs and the defendant is that the defendant is the step - son of plaintiff No. 1. Plaintiffs - 2 to 8 are the step brothers. The suit property was said to be purchased by Shaikji on 28.9.1926 and he died in the year 1969. It appears that the mother of the defendant Halimabi died prior to Shaikji and after that, Shaikji married plaintiff No. 1. Another brother of defendant namely, Umarsab also died prior to Shaikji. It is stated that there was a division effected, by way of family arrangement, in respect of suit property bearing CTS No. 883/A

and 883/B in the year 1979 and there is no partition in the suit house and since there was some misunderstanding between the parties, they started living separately from the plaintiffs. According to the plaintiffs, there was no division in the suit house by metes and bounds. Further it is stated that the plaintiffs together have got 7/8th share and defendant has got 1/8th share in the suit property and though the plaintiffs requested the defendant to effect partition and allot separate possession, the defendant did not do so. As such, they have sought for equitable partition and separate possession.

3. According to the defendant, while admitting that he is staying separately in CTS No. 883A, he is residing there from 1957 onwards and not from 1979. He has also admitted that the suit property earlier was bearing No. 883. According to him, after the marriage of Shaikji with plaintiff No. 1, there was a partition and according to the said partition, the property is enjoyed separately by the parties. It is contended by defendant that the division made in the City Survey Records, is not challenged by the plaintiffs at any time. As such, according to the defendant, there was a partition during the life time of Shaikji.

4. Based on the pleadings, the Trial Court has raised as many as six issues and after trial and after hearing the parties, the Trial Court decreed the suit of the plaintiffs. Being aggrieved by the same, an appeal was preferred before the Civil Judge, (Sr. Dvn.,) Belgaum, in R.A. No. 75/1988 which was earlier disposed of on 13.11.1995 dismissing the appeal. Against the said order the defendant has preferred an appeal before this Court in R.S.A. No. 299/1996 disposed of on 17.9.1998. By allowing the application for production of additional evidence, the matter was remitted back to the Lower Appellate Court to dispose of the matter in accordance with law and to consider the I.As and the documents produced. On remand, the Lower Appellate Court considered the document at Ex. D.7 produced. During the pendency of the appeal before the Lower Appellate Court, the application/document was produced on 18.1.1994 and after considering the said I.A., it has held that the document produced is believable and had been acted upon and accordingly allowed the appeal and dismissed the suit of the plaintiffs. Being aggrieved by the same, this R.S.A. is filed by the plaintiffs.

5. Heard the counsel for the appellants.

6. It is the submission of the learned Counsel appearing for the appellants that the Trial Court had rightly assessed the evidence on record and considered that any such entry in the C.T.S. records in respect of the division of the property is only an arrangement as there was misunderstandings between the family members. But, based on the so called document of the year 1958 produced before the Lower Appellate Court on remand by the Munsiff Court, the Lower Appellate Court held that there was earlier partition. It is contended by the appellants that the said document is of the year 1958 and both the suits were filed in the year 1985 itself. The defendant failed to produce the same and there is no proper explanation offered, till the same is filed before the Lower Appellate Court during the year 1994 after a lapse of nine years, although it was claimed

to be in the custody of the defendant. Further it is contended that the alleged document was not a registered one to be considered as a partition deed to act upon it and only whatever arrangement that is being made in the year 1979 is only a temporary arrangement and that the plaintiffs have demanded for equitable partition. Since the defendant has refused, the suit was filed in the year 1985. Accordingly, it is submitted that the Lower Appellate Court has committed an error in acting upon the document which is not even registered and which is belatedly produced before the Court. Under such circumstances, it is argued that the Lower Appellate Court could not have interfered with the finding of the Trial Court.

7. It is the argument of the Counsel for the respondent that Ex. D7 is the memorandum of partition which need not be registered and it has been acted upon evidencing partition and there is no such concept of joint family under the Mohammedan Law and although there is a change of entry in the CTS records dividing the suit property between the plaintiffs and the defendant, the same has not been disputed or challenged and long back the partition has taken place and the entry in the CTS records of the year 1979 evidences partition. The 1st defendant being the son of the first wife of Shaikji was given half share and the remaining half share was given to the wife and children of the second wife and accordingly submitted that the impugned judgment does not call for interference.

8. At the time of admission, the following substantial questions of law were raised for consideration:

1. Whether the first Appellate Court is justified in accepting Ex.D7 holding that the said document has got presumptive value u/s 90 of Indian Evidence Act and no rebuttal evidence is forthcoming on behalf of plaintiff in not examining, even though the defendants not examined proper witnesses to prove the execution and contents of the documents by the executant and attested by the persons on whom it purports to be executed and attested?

2. Whether the first Appellate Court was justified in giving presumptive value to the document at Ex.D7 and whether Ex. D7 is proved in accordance with law?

3. Whether the judgment and decree passed by the first Appellate Court is legal and valid in reversing the judgment and decree of the Trial Court after accepting Ex. D7?

9. Heard the Counsel for the respective parties.

10. It is seen at the first instance, after the matter was remanded by this Court to the Lower Appellate Court to consider the additional evidence produced and pass orders in accordance with law since on earlier occasion the first Appellate Court had not considered the IA for production of additional evidence sought to be produced by the respondents herein, while considering the document of the year 1958, the Appellate Court was of the view that the document is thirty years old and the executant, attesting witnesses and the scribe all are no more and

having analysed the same, and referring to Section 90 of the Evidence Act has observed that the said document has got presumptive value based on which the partition has been made during the lifetime of Shaikaji as per Ex. D7. But, it is seen the entries in the CTS extract are been made in the year 1979. According to the plaintiffs, those entries are only in the form of a temporary arrangement and as such, there is no question of challenging the same, however, they have sought for equitable division of the suit property. It is seen, though Ex. D7 was of the year 1958 wherein some of the properties have been shown to have been earmarked and assigned to the plaintiffs and defendant and if it is to be treated as a partition deed, necessarily it has to be compulsorily registered. But EX. D7 is an unregistered document. Moreover, according to the defendant, this document has got presumptive value. The suit is filed in the year 1985 and this document came to be produced in the year 1994 at the appellate stage, after suffering a decree before the Trial Court. It is seen this document has not seen the light of the day for nearly eleven years till it was produced at the appellate stage that too it was in custody of the defendant in the back ground it is to be held that the document was not in proper custody as per Section 90 of the Evidence Act. Shaikaji who is said to have created the document at Ex. D7 died in the year 1969 and the entries in the CTS register came to be made in the year 1979. If really the 1958 partition was acted upon as per EX. D7, immediately after the death of Shaikaji such entries would have been made within a reasonable time. But, after a lapse of a decade, in the year 1979 such entries are made. No cogent reasons are assigned for non - production of Ex. D7 at the stage of trial which throws a suspicion as to the existence of Ex.D7 and that too when it is said to be in the interest of the defendant himself. The author of the document, and the attesting witnesses are not available so as to examine them. The acceptance of this document has to be closely scrutinised in the factual background and circumstances of the case. Further more, it has to be seen that the plaintiffs are in all, 8 in number whereas the defendant is alone.

11. It is the contention of the defendant's/respondent's Counsel that there was an earlier partition and in the year 1979 the entries came to be made evidencing the partition. The contention of the appellants' Counsel in this regard is that it was only in the form of an arrangement and no such division by metes and bounds has taken place and as such, Ex. D7 cannot be acted upon. After examination of the shares assigned to defendant and plaintiffs, it is seen that plaintiffs 2 to 8 were born to the second wife of Shaikaji and they are in all, eight in number including the wife; the defendant claims to be the son of the first wife and his mother is also no more and he has taken four rooms in the suit property and only five rooms are given to the plaintiffs. Hence, Ex. D7 cannot be accepted. The Lower Appellate Court has not properly applied its mind in appreciating Ex. D7. Further, the so called evidence of partition sought to be adduced by the defendant is of the year 1979 though Ex. D7 is of the year 1958 and there is no reason why EX. D7 is not acted upon till 1979 i.e., when the entries are made in the CTS register. In that background, as rightly contended by

the appellants, probably as a matter of immediate arrangement the property has been earmarked and separate possession was given without there being actual partition and in that view of the matter, there may not have been any challenge to the mutation entry in the CTS register and since there was no challenge to the entries made, the Lower Appellate Court was of the view that there was a partition and accordingly held so which in my view, is not correct.

12. Regarding share and entitlement of the parties, it is seen that plaintiffs 2 to 6 have equal share along with the defendant. The prayer of the plaintiffs is that they are entitled for $\frac{7}{8}$ share and that the defendant being born to the first wife and is alone would be entitled to a share as per the Mohammedan Law. Taking the property of Shaikaji as it is and without creating any document of alienation, the property will have to be inherited by the sons and surviving legal representatives of Shaikaji and the respective shares have to be worked out as per the Mohammedan Law. The Trial Court while decreeing the suit of the plaintiffs has held the 1st plaintiff has got $\frac{1}{8}$ th share and plaintiffs 2 to 6 each have got $\frac{1}{8}$ share and plaintiffs 7 and 8 each have got $\frac{1}{16}$ th share in CTS 883/A and 883/B. Similarly, the share of the defendant also has to be worked out and he would be having equal share as that of plaintiffs 2 to 6.

13. For the foregoing reasons, the appeal is allowed. The judgment and decree of the Lower Appellate Court is set aside while confirming the judgment and decree of the Trial Court. The shares of the respective parties to be worked out equitably during the final decree proceedings. Parties to bear their own costs.