

(2010) 03 KAR CK 0010

In the Karnataka High Court

Case No : Regular First Appeal No's. 963 of 2000 and 99 of 2001

Smt. Maritangevva since dead by her LR

APPELLANT

Vs

Smt. Anusuya and Others

RESPONDENT

Date of Decision : 26-03-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152
Hindu Succession (Amendment) Act, 2005 — Section 6

Citation : AIR 2012 Kar 32 : (2011) 1 KCCR 810

Hon'ble Judges : N. Ananda, J; D.V. Shylendra Kumar, J

Bench : Division Bench

Advocate : S.S. Bhawakhan, in Regular First Appeal No. 963 of 2000 and 99 of 2001, S.B. Hebballi, in Regular First Appeal No. 963 of 2000, for the Appellant; B.V. Somapur, for Respondents 1, 2 and 4, G.S. Patil, for Respondents 5 to 10 in Regular First Appeal No. 99 of 2001, B.V. Somapur, for Respondents 1, 2 and 4 and Krishna S. Dixit, for Respondent 3 in Regular First Appeal No. 963 of 2000, for the Respondent

Judgement

D.V. Shylendra Kumar, J.—Regular First Appeal No. 99/2001 is filed by the original 7th Defendant in OS No. 129/1995 and Regular First Appeal No. 963/2000 is filed by the Defendants-1 to 6 in the said suit. The relationship between parties and their array before the Court below as per the genealogical tree furnished in the pleadings is as follows:

GENEALOGY Shiddappa - Basavva | _____
_____ | | | Sangappa Maliyappa
Basappa Channavva = = Maritangevva Mallavva (wife) (wife) (Deft. No. 7)
(Deft. No. 5) / Issueless | _____
_____ | | | | Parshappa Shivappa Nagappa
Shiddappa Parvatevva (Deft. No. 1) (Deft. No. 2) (Deft. No. 3) (Deft. No. 4)
(Deft. No. 6) = Anasuya (wife) (Pltf. No. 1) | _____ |
| Kavitha Maliyappa (Pltf. 2) (Pltf. 3)

2. It is the grievance of the Appellant in Regular First Appeal No. 99/2001 that she being one of the daughters of the propositor should have been granted a decree for 1/3rd share in all the suit schedule properties, more particularly when it has been established on record that the suit schedule properties are the ancestral properties of the joint family consisting of Plaintiffs and Defendants of which her husband was a member. The learned trial Judge while answering issue Nos. 11 and 12 vide paragraph 24 has held that the Appellant (7th Defendant-Marintangavva) is entitled to 1/3 share in the suit schedule properties. However, in the operative portion of the judgment, the same is not reflected so also in the decree made by the Trial Court. Thus we find the Trial Court has committed an error apparent on the face of the record. The Trial Court has committed an error in not reflecting the entitlement of 7th Defendant to 1/3rd share in suit schedule properties in the operative portion of the judgment and not drawing the decree in conformity with the judgment. Section 152 of the CPC provides for rectification of such mistakes at any point of time, either suo moto by the Court or at the instance of the parties. Though Section 152 provides for rectification of such mistakes, the 7th Defendant not having resorted to this course having preferred this appeal and with the ambitious intention of augmenting her share further, we have examined the merits of this appeal. While 1/3rd share in terms of the judgment is the correct share to which the 7th Defendant is entitled to, the further claim for augmenting her share by claiming a share in a share allotted to her father-in-law making a claim for 1/2 share is only an ambitious claim not tenable in law as the daughter-in-law in the family can claim only through her husband and not as a direct heir to her father-in-law. The Appellant can not get any share from out of the properties allotted notionally to the share of a father-in-law who was no more.

3. Even otherwise, in Hindu law the shares of joint family members are determined per stripes vis-a-vis their position in the family and not by what they would have got with reference to a notional partition that has to be effected at that point of time when a member of the family who is no more as of now. This is not the legal position either by applying the customary law or by the Hindu Succession Act. Therefore, the claim of Appellant for enhancing her 1/3rd share to 1/2 share is not tenable and the appeal is only to be disposed by affirming 1/3rd share granted by the Trial Court which perhaps by mistake, was not reflected in the decree. Therefore we allow R.F.A. No. 99/2001 in part and the Registry is directed to draw up the decree to indicate the share of the Appellant to be 1/3 in all the suit schedule properties.

4. In Regular First Appeal No. 963/2000 Defendants-1 to 6 have urged that the claim of the Plaintiff is not tenable as deceased Maliyappa. K. had bequeathed R.S. No. 18/02, 26/1 house No. 316, 17/1 situate at Badigu village in favour of 1 Defendant by executing a Will dated 02.05.1978 and registered on 06.11.1981; Maliyappa cannot seek share in family dwelling house bearing VPE 20; that R.S. 124/5B is the self acquired property of 1st Defendant.

5. The Trial Court had framed issue Nos. 3 to 5 to answer these contentions.

6. The 1st Defendant having pleaded the bequeath in his favour in terms of Will dated 09.08.1978 said to have been executed in his favour has not adduced any evidence at all. The evidence of 3rd Defendant belies his contention of bequeath. The said Will though produced before the Trial Court was not marked, in other words it was not tendered in evidence. The competence of testator to execute the Will was not made known to the Court. Therefore the Trial Court has rejected this contention. The Trial Court has held the plea of 1st Defendant that land bearing R.S. No. 124/54 is his self acquired property has remained plea without proof.

7. In so far as the sharing ratio particularly vis-a-vis the 4th Plaintiff is concerned, a daughter in the family who had been given, in marriage and the partition taking place subsequent to her marriage being the ground urged we find that irrespective of the legal position as perhaps which prevailed at the time of institution of suit, the present legal position in terms of a statutory developments particularly Section 6 of the Hindu Succession Act having been amended by Act No. 39 of 2005 and it reading at present as under:

6. Devolution of interest in coparcenary property.-

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the, same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this Sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken "place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of Sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the

coparcenary property shall be deemed to have been divided as if a partition had taken place and,--

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.--For the purposes of this Sub-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.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this Sub-section shall affect--

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been, enacted.

Explanation.--For the purposes of Clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.--For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court.

8. The share allotted to the 4th Plaintiff by the learned Trial Judge becomes even

otherwise validated by the strides taken by the legislation in amending Section 6 of the Hindu Succession Act 1956 by Act No. 39 of 2005. The share claimed by the Appellant in the dwelling Units on the premise that a married daughter cannot get a share in the dwelling house of the family also does not sustain in the wake of the legislative development as noticed above, which we are bound to apply while disposing of this appeal as of now. In the result we find no merit in this appeal.

9. The grounds urged in support of the rights claimed under the will, said to have been executed by Maliyappa in favour of the Appellant No. 1 which has been rightly negatived by the Trial Court, particularly as the Appellants were not able to make good a valid and legal will, having been executed and even otherwise the member of a joint family could not have executed a will in respect of specific properties of the joint family in favour of any person so also in favour of the 1st Appellant. The finding of the learned trial Judge on the execution of the will on the basis of scrutiny of evidence adduced by the 1st Defendant is a finding which we find wholly sustainable in the light of the material on record and we have to only affirm this finding of Trial Court to dismiss this appeal. Accordingly, appeal is dismissed.