

(2015) 01 KAR CK 0053
In the Karnataka High Court
Case No : R.S.A. No. 935/2004 (PAR)

Somanath

APPELLANT

Vs

Nilamma and Others

RESPONDENT

Date of Decision : 30-01-2015

Acts Referred:

Hindu Succession (Amendment) Act, 2005 — Section 6

Citation : (2015) 01 KAR CK 0053

Hon'ble Judges : S.N. Satyanarayana, J.

Bench : Single Bench

Advocate : Shivashankar R. Ambali, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

S.N. Satyanarayana, J.—The plaintiff in O.S. No. 69/1987 on the file of the Civil Judge (Sr. Dn.) Jamakhandi, has come up in this second appeal impugning the judgment and decree dated 20.03.2004 passed in R.A. No. 134/2001.

2. Brief facts leading to this second appeal are as under:

"Appellant herein who is the plaintiff in the Court below, is the son of original first defendant- Shivaputrappa Ambli. Admittedly, plaintiff is the son of first defendant through his first wife. After the death of his first wife, Shivaputrappa Ambli married second defendant who is his second wife. In the second marriage he has three children who are defendant Nos. 3, 4 and 5. It is stated that the family of Shivaputrappa Ambli had in all three properties in Jamakhandi, they are house property bearing CTS No. 2423, a shop premises bearing No. 1315 in Jamakhandi town and agricultural land bearing R.S. No. 450/1B measuring 5 acres 28 guntas in Jamakhandi. These are the joint family properties of first defendant Shivaputrappa Ambli. The suit in O.S. No. 69/1987 was filed by the appellant herein during the lifetime of his father and his father's second wife. In the said suit during the pendency it is stated that by giving 1/5th share in the sale proceeds of house property defendant Nos. 1 to 5 sold the suit schedule

house property and thereafter with reference to two other properties, the suit was contested. In the said suit based on the evidence, the following issues were framed:

"ISSUES

- 1) Does defendant No. 6 prove that defendant No. 1 has sold the suit shop property bearing CTS 1315 of Jamakhandi for discharge of antecedent debts incurred for family necessity?
- 2) Whether suit of the plaintiff is maintainable without seeking relief of setting aside sale deed in favour of defendant No. 6?
- 3) Whether plaintiff is entitled to partition and separate possession of 1/5th share?
- 4) What decree or order?

Additional Issue No. 1.

Does plaintiff prove that defendant No. 1 had incurred Avyavaarik debt to satisfy his lust and sold suit properties to satisfy Avyavaharik debt?"

3. In support of the said issues, plaintiff adduced evidence as P.W.1 and he got his uncle Andappa Basappa ambli examined on his behalf as P.W.2. Incidentally P.W.2 is the younger brother of defendant No. 1. They together relied upon eight documents which were marked on their behalf as Ex. P.1 to Ex. P.8. By the time the evidence was commenced, first defendant had died and no evidence was adduced in support of the defence by defendant Nos. 2 to 5. It is only the LRs of original 6th defendant purchaser of shop property, contested the suit by adducing evidence. Two of the sons of 6th defendant are examined as D.W.1 and D.W.2 and another person was examined by them in support of their defence. They got 9 documents marked in support of their case as Ex. D.1 to Ex. D.9. The trial Court on appreciation of the pleadings and documents available on record proceeded to dismiss suit of the plaintiff for the relief of partition of two properties, namely, shop premises in Jamakhandi town which was purchased by 6th defendant and agricultural land of 5 acres 28 guntas in Jamakhandi.

4. Being aggrieved by the same, plaintiff preferred R.A. No. 134/2001. In the said proceedings also purchasers of the shop premises, namely, original 6th defendant's legal heirs opposed the appeal and for the first time 7th defendant who did not contest the suit on the original side also opposed the appeal in R.A. No. 134/2001. In the said appeal based on the pleadings the following points were framed for consideration.

POINTS

1. Whether it is a fit case to allow I.A. No. II?

2. Whether the sale deed of the suit shop bearing CTS No. 1315 of Jamkhandi in favour of deceased defendant-6 Phoolchand and sale deed of the suit land bearing Sy. No. 450/1B of Jamkhandi in favour of defendant-7 executed by deceased defendant-1 are for legal and family necessity of deceased defendant-1 ?

3. Whether the appellant/plaintiff is entitled for partition and separate possession of his share in the suit shop bearing CTS No. 1315 and suit land bearing Sy. No. 450/1B of Jamkhandi and if so, to what extent?

4. Whether the judgment and decree dated 8th June 2000 passed in O.S. No. 69/87 by Prl. Civil Judge (Senior Division) Jamkhandi dismissing the suit of the appellant/plaintiff in respect of suit shop and suit land are erroneous, opposed to law, facts and probabilities of the case?

5. What order?"

5. After hearing the parties the Court below confirmed the finding of the trial Court so far as the sale of suit shop in favour of 6th defendant as the sale which was for the necessity of the family and therefore declined to set aside the sale and grant share to the plaintiff in the shop premises. When it comes to the landed property the lower appellate Court refused to accept the defence raised by defendant No. 7 in the original suit who is the 14th respondent in the R.A. on the ground that he has failed to establish that the sale of the suit property by deceased Shivaputrappa Ambli in favour of defendant No. 7 is for the family necessity. Accordingly, the appeal of the plaintiff was allowed in part in granting 3/10th share in the suit landed properties which was sold in favour of defendant No. 7 and so far as the other relief in respect of prayer to set aside sale of shop premises in favour of 6th defendant is concerned, it was denied.

6. Being aggrieved by the judgment in R.A. No. 134/2001, plaintiff in the original suit, has come up in this second appeal. In the meanwhile it is also brought to the notice of this Court that there were two more second appeals with reference to the same suit between the same parties one in R.S.A. No. 1538/2007 which was filed by the 14th respondent in the lower appellate Court who is defendant No. 7 in the original suit and purchaser of suit schedule landed property. The said R.S.A. No. 1538/2007 came to be dismissed by a co-ordinate bench of this Court by judgment dated 19.08.2008 holding that it is not open for defendant No. 7 for the first time to raise objections at the stage of regular appeal without filing written statement in the original suit. With this the finding of the lower appellate Court in granting 3/10th share to plaintiff in respect of suit schedule landed property remained in tact.

7. It is further seen that, the final decree proceedings were initiated by the original plaintiff in FDP No. 18/2006 on the file of the Civil Judge (Sr.Dn.) Jamkhandi. In the said final decree proceedings, the final decree which was

passed was challenged by the very same respondent No. 14 in regular appeal and defendant No. 7 in the original suit, which came up for consideration before this Court in RSA No. 5640/2009, which was disposed of by judgment dated 26.06.2013 with a direction that within 45 days from the date of receiving the records, the Tahasildar to execute the commission warrant with reference to the final decree passed in FDP No. 18/2006. Subsequently, it is seen that, an application in I.A. No. 2 is filed in the final decree proceedings by defendant No. 7 in the original suit who is respondent No. 14 in the regular appeal on the ground that, though the sale which was made in his favour is held to be not for family necessity, defendant No. 7 is entitled to seek share granted in favor of his vendors in the final decree proceedings pursuant to the amendment to Section 6 of Hindu Succession (Amendment) Act, 2005.

8. The said application came to be allowed by the final decree Court, which was subject matter of W.P. No. 83558/2013, wherein, a coordinate Bench of this Court also confirmed the said findings. With this, it is clear that the right of the plaintiff seeking share in the suit schedule agricultural land has reached finality in plaintiff being granted share by modifying it as 1/6th and this Court find that in the background of facts of the case the said modified share is just and proper. Therefore, the same cannot be subject matter in this second appeal, inasmuch as the right of defendant No. 7 and plaintiff with reference to the suit schedule land property has reached finality in RSA No. 1538/2007. What remains in this second appeal is to consider whether the finding of the lower appellate Court in accepting the finding of the trial Court with regard to the sale of suit shop property by defendant Nos. 1 to 5 in favour of defendant No. 6 is for the family necessity is required to be looked into.

9. Hence, at the time of admission, this Court went through the judgments of both the Courts below. The learned counsel appearing for the appellants also took this Court through the evidence of plaintiff who is examined as P.W.1 and that of P.W.2 who is his uncle. On going through the same with reference to the pleadings, it is seen that, in the original suit, plaintiff has taken a specific plea that his father has incurred debts for "Avavavyaharika" dealings and he has also stated that his father was doing speculative business and he was addicted to voices. To substantiate the said pleading in his evidence, he has stated that his father was playing matka and cards and also would say that, he was buying used vehicles, getting them repaired and selling the same in the bargain, he was incurring loss. In addition to that, though he has pleaded that his father was having illicit relationship with women, no evidence is adduced in that behalf. So far as the evidence of P.W.2 is concerned, which would only speak in respect of the business, which was being carried out by defendant No. 1 in purchasing and selling old vehicles. With reference to "matka" he does not speak anything in his evidence.

10. It is further seen that in the evidence of P.W.1, he has stated that, he has come to know about the activities of his father in indulging "Matka" is on the

basis of a statement made by villager by name Virupaxayya Salimath. Incidentally, the said person is not examined. Therefore, though several allegations are made against his father, no evidence is available on record to demonstrate that defendant No. 1-Shivaputrappa father of plaintiff was indulging in illegal activities and he was addicted to vices, which necessitated him to sell the suit schedule shop property in favour of original defendant No. 6 and the said sale is to cover the loans incurred by him for his vices and not for family necessity.

11. In the absence of acceptable evidence, the trial Court has refused to believe the same and similarly, the lower appellate Court also has upheld the finding of the trial Court on this aspect. In that view of the matter, this Court find no justifiable grounds are made out to frame substantial question of law regarding the allegations of "Aavavyaharika" debts of defendant No. 1 and also his vices as cause for sale of suit shop property. In that view of the matter, this Court find no grounds are made out to admit this second appeal.

Accordingly, this second appeal is dismissed.