

(2005) 08 KAR CK 0001

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 4283 of 2004

Sreenivas Lad

APPELLANT

Vs

Ekanath and Others

RESPONDENT

Date of Decision : 22-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1

Citation : AIR 2005 Kar 405 : (2006) 1 CivCC 85 : (2005) 6 KarLJ 62 : (2005) 4 KCCR 2382

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : G.S. Visweswara, for V. Srinivasa Raghavan for Indus Law, for the Appellant; Anant Mandgi, for Respondents-1, 2, 7 and 11 to 19, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—This is a plaintiffs appeal against the dismissal of his application under Order 40, Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC" for brevity).

2. The facts are as follows.--

The appellant's suit is for partition and possession of 1/8th share of the suit properties, for accounts and future profits, till the date of decree.

It is the appellant's case that the suit properties are the self-acquired properties of late Vithal Rao Lad. The properties include extensive agricultural lands, buildings and a mining lease.

Vithal Rao was married thrice. His first wife bore him one daughter, Smt. Shoba, respondent 7 herein. On the death of his first wife, he married for the second time and had four sons by the second wife, namely, Uday Singh, who died in 1990 leaving behind respondents 11 to 15 as his legal heirs, Hiroji (respondent 2), Shivaji, who died in 1992, leaving behind respondents 16 to 18 as his legal

heirs and Ekanath (respondent 1). When the second wife died, Vithal Rao is said to have married Huligamma, the mother of the appellant. According to the appellant, Vithal Rao had four sons and three daughters namely, the appellant, respondents 3, 4 and 5 and respondents 8, 9 and 10, through her.

Vithal Rao died on 21-12-1970. At that point of time, the appellant and the other children of the third wife Huligamma were minors, except respondent 3. Therefore, the four sons of Vithal Rao by his second wife, assumed management of the properties and assets left behind by him.

In the year 1963, Vithal Rao had started a firm along with his four major sons at that point of time in the name and style of "V.S. Lad and Sons". Vithal Rao himself was managing the said business. He held many mining leases granted by the Government. These leases were not made part of the partnership property. The leases had remained in his name. However, on his death in 1970, the sons of Vithal Rao, namely, late Shivaji and late Uday Singh and respondents 1 and 2 came into the management of the properties. And they appear to have got the mining leases renewed in the name of the partnership firm "V.S. Lad and Sons".

The appellant, his mother, his brothers and sisters continued to live jointly with his step-brothers and sister above named. They were all provided for and taken care of with the income of the family Respondents 1 and 2, along with the two deceased step-brothers of the appellant, continued to manage the business of V.S. Lad and Sons. The appellant was even admitted as a partner. However, on the death of Shivaji, one of the partners, in a reconstitution of the firm, the appellant was left out.

The appellant contends that recently it was discovered that late Vithal Rao had left behind a registered Will dated 8-7-1965 whereunder he bequeathed all his properties including the mining leases held by him in favour of all his eight sons, including the appellant. As the appellant realised that the respondents 1 and 2 are gradually seeking to exclude the appellant as well his natural brothers and sisters from the benefits of the income from the family business and were indicating that they claim the properties and assets as their exclusive property -- the appellant had chosen to institute the suit.

Respondents 1 and 2 and the legal heirs of the deceased step-brothers of the appellant have resisted the suit claim. It is denied that the appellant is the son of a legally wedded wife of late Vithal Rao. His mother is alleged to be a "Lesi" or the kept mistress of late Vithal Rao. It is denied that the appellant was admitted as a partner of V.S. Lad and Sons or that he and his family had the benefit of the income of the family. Though the mining leases did stand in the name of Vithal Rao, over a period of time, the same were renewed in the name of the firm and are held by the firm. That the appellant is seeking to raise a false claim. That by virtue of his mother being the exclusive kept mistress of late Vithal Rao -- several items of property had been settled in her favour. That the appellant, his brothers and sisters and their mother had sold those properties as early as 1976

and migrated to Bangalore. And, as the business of V.S. Lad and Sons was low-key and indifferent, till the year 1984, question of paying any benefits to the appellant did not arise. It is since recently that V.S. Lad and Sons has prospered and is making profits consistently and this has prompted the appellant to set up a speculative claim. He, his mother, brothers and sisters have no manner of right over the suit properties.

3. It is in this background that the appellant had filed an application under Order 40, Rule 1 of the Code of Civil Procedure, 1908 seeking the appointment of a receiver in respect of the mining leases held in the name of respondent 19 as well as other businesses. This application is filed subsequent to the filing of the pleadings of the contesting respondents and the affidavit in support of the same is hence couched in a fashion to forestall the denial of his right to any such relief and it is contended that the contesting respondents have admitted that the appellant is the son of late Vithal Rao, though alleged to be an illegitimate son of a kept mistress. That documents are produced to indicate respondents 1 and 2 have acted as guardians for the appellant and his brothers and sisters during their minority and their schooling. That the contesting respondents do not deny the Will of late Vithal Rao.

4. The appellant has contended that the contesting respondents, after denying the right of the appellant, are continuing to encumber the suit properties and are contracting huge loans, thereby exposing the suit property to risk. Apart from the fact that a huge income is generated, the said respondents are methodically secreting the funds by recourse to creating sham contracts with their own kin. This apart from adopting other devious methods of accounting to conceal the real income derived from the business. In the result the share that is legitimately due to the appellant is not only deprived to him, but is continuously depleted by the said respondents by recourse to unfair and illegal practices.

5. The appellant submits that even though there is no apparent circumstance of waste or mismanagement, the actions on the part of the above respondents to deprive the appellant of his legitimate due require to be stemmed.

6. The respondents contend that the suit being false, the present application filed after a period of six years from the date of institution of the suit, is itself a ground for rejection of the application. That the leasehold rights in respect of the mining lease held by the firm cannot be the subject-matter of suit as the appellant is not claiming as a partner of the firm. And, as the firm is not dissolved, the application for appointment of receiver is not maintainable. The appointment of a Commissioner being a harsh remedy for the enforcement of rights, which require to be clearly established, such a relief cannot be granted for the mere asking. The relief, if granted, would result in depriving the respondents of management and control of a prosperous and well-run business, even according to the appellant. There being no accusation of waste and mismanagement, the application itself was misconceived. The application is filed with mala fides and deserves to be rejected.

7. Heard Sri G.S. Visweswara, Senior Advocate for Sri Srinivasa Raghavan for Indus Law Associates for the appellant and Shri Anant Mandgi for respondents 1, 2 7 and 11 to 19.

8. Sri Visweswara would contend that having regard to the facts and circumstances the well-accepted general principle is that a receiver should be appointed where it is just and convenient. No doubt that such an appointment is ordinarily made only where it is demonstrated that the plaintiff would not be in a position to realise the fruits of his decree if he succeeds and unless the property is protected. The Trial Court having rejected the application of the appellant on the ground that the appellant has failed to make out a prima facie case as the appellant is yet to discharge the burden of proving the Will of late V.S. Lad, the status of the appellant, the relationship of his mother with V.S. Lad, the right to file a suit for partition itself and the significant allegation of siphoning of funds from the business of the firm. The Trial Court has overlooked the several circumstances that demonstrated a prima facie case. The Trial Court has failed to note that there were serious questions to be tried. That the appellant was a son of V.S. Lad not being denied, the effect of the Will of late V.S. Lad was not considered. And when there was no document evidencing the formal transfer of the mining lease from V.S. Lad to the firm V.S. Lad and Sons, on the death of V.S. Lad, the appellant did obtain a vested right was also not considered. And especially when the several circumstances preceding the application which were pleaded in support of the case of the appellant could not be said to be without basis.

9. The learned Senior Advocate would contend that even if it were to be accepted that the appointment of a stranger to take over the management of the affairs of the suit properties would be detrimental to the interest of both parties and that there were no compelling circumstances for such appointment, the respondents themselves could be named as receiver with the appellant's nominee being associated as a co-accountant with their accountant and the accounts could be maintained under the joint signatures of the two. This would not in any manner hamper their business or cause any prejudice.

10. Per contra, Sri Anant Mandgi strongly resisted the appeal on facts and law. He submitted extensively on various aspects which were not even considered by the Trial Court in the impugned order. This was in order to emphasise the onerous burden which would be placed on respondent 19-firm, by the appointment of a receiver. He would submit that there is no explanation for the inordinate delay of six years in filing the application. The appellant was not a partner of the respondent-firm the suit was not for dissolution of the firm and there was no relief claimed against the firm. In the absence of any allegations of waste and mismanagement, the application could not be considered.

11. In the light of the rival contentions and the extensive case-law cited by both parties, I proceed to consider the appeal on merits.

12. The appellant is admitted to be the son of late V.S. Lad, though alleged to be an illegitimate son. It is also admitted that the mining leases held by late V.S. Lad were not transferred as property of the partnership firm established by V.S. Lad during his lifetime. The existence of a registered Will of the year 1965 is not seriously disputed.

13. The appellant has, in the affidavit in support of I.A. No. IX before the Trial Court, averred the several circumstances warranting the consideration of his prayer for the appointment of a receiver. Therefore, it could be said prima facie, that there were serious questions to be tried by the Trial Court. The suit could not be said to be speculative.

14. The circumstances that militate against the grant of the relief of appointment of a receiver are that the management of the suit properties, admittedly being exclusively in the hands of respondents 1 and 2 and in the face of the business of the firm being run smoothly and successfully, divesting such management and the induction of a third party stranger would be a retrograde measure, which would be detrimental to the interest of the parties to the suit.

15. The principles of law as would emerge from the extensive case-law cited would be:

A receiver may be appointed by Court when it appears to the Court just and convenient. The five principles upon which a Court can appoint a receiver are: (1) it is a matter resting in the discretion of the Court for the purpose of protecting the rights of all parties and the subject-matter; (2) the Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has an excellent chance of success in the suit; (3) not only the plaintiff must show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss, demanding immediate action and of his own rights he must be reasonably clear and free from doubt; (4) an order will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong; the position however may be different if the property is shown to be in media, that is to say, in the enjoyment of none; and (5) the Court should look to the conduct of the party who makes the application who must come to Court with clean hands.--

See: T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others, ; Srinivasa Rao Vs. Baburao and Another, and S.B. Industries, Freegunj and Another Vs. United Bank of India and Others,

16. The power to appoint a receiver is discretionary and the discretion has to be used in accordance with the principles on which judicial discretion must be exercised. The phrase "just and convenient" appearing in Order 40, Rule 1 of the CPC mean that the Court should appoint a receiver for the protection of the property or the prevention of injury, according to legal principles and not because the Court simply thinks convenient to do so. The phrase would denote what is practicable and what the interests of justice require. The discretion exercised

should be sound and reasonable. Powers of the Court under Order 40, Rule 1 of the Code of Civil Procedure, 1908 is to be exercised to advance the cause of justice and what is "just and convenient" depends upon the nature of the claim and the surrounding circumstances, and in a manner with care, caution and restraint so as to subserve the ends of justice.

See: *Madhu Lal v Ramji Das Chironji Lal*, AIR 1953 M.B. 85; *State Bank of India v. Trade Aid Paper and Allied Products India (Private) Limited* (1999)4 Comp. L.J. 323 and *ICICI v. Karnataka Ball Bearing Corporation Limited*. (1999)4 Comp. L.J. 331

17. The claim of the appellant to the suit relief is capable of being established only after a full-fledged trial of disputed facts. However, it is not in dispute that the appellant is not a total stranger laying claim to the suit properties without any basis. The allegations of a methodical concealment of the true and actual quantum of the income accruing from the utilisation of the suit properties by recourse to several alleged methods, is not, however, established prima facie. At the same time, it is contended on behalf of the respondents having regard to the nature of business, namely the income of the firm earned through its mining lease, the accounts are necessarily transparent as the mineral extracted, transported and sold is strictly regulated statutorily and therefore the income of the firm is ascertainable at all times and hence it would be unnecessary even to seek accounts at this point of time at the instance of the appellant.

18. Though the appellant does not claim to be a present partner of respondent 19-firm, the case of the appellant is that the mining lease held by the late V.S. Lad was never transferred in favour of the firm. That respondents 1 and 2 claiming in the dual capacity of legal heirs of V.S. Lad and as partners of respondent 19-firm, claim to be in exclusive possession and management of the lands covered under the lease, is only a circumstance which does not detract from the primary case that the appellant would be entitled to lay claim to an interest in the mining lease even in his capacity as an illegitimate son of V.S. Land. It cannot be said that the appellant's case was either frivolous or vexatious. Therefore, it would be reasonable to proceed with a view to ensure that no irreversible damage is occasioned to the interest of the appellant, should he ultimately turn out to be right at the trial. As the contesting respondents are in possession and management of the properties to dislodge them from that position by the appointment of a receiver, would occasion injustice, should it ultimately be established that the appellant's claim is ill-founded. The appointment of a stranger as a receiver would not be in the interest of either party. Therefore, having regard to the circumstances of the case, it would be equitable to appoint respondents 1 and 2 as receivers pending disposal of the suit. This shall be further subject to the appellant's nominee, who shall be a Chartered Accountant, being associated as a co-accountant with the accountant or accountants of the respondents to maintain accounts under their joint signatures and to submit reports as and when the Trial Court should call for the

same.

19. In the result, the appeal is allowed. The order of the Trial Court in LA. No. IX is set aside. Respondents 1 and 2 are appointed as receivers in respect of all incomes arising out of the suit properties including the income of respondent 19-firm. The accounts in respect of such income shall be maintained jointly by the accountant or accountants of respondents 1 and 2 and respondent 19, along with a nominee of the appellant, who shall be a Chartered Accountant, to maintain the same under the joint signatures of the two. And to submit reports as and when the Trial Court should call upon them to do so. the appellant shall bear the fees and such other charges payable to his nominee aforesaid.