

(2007) 08 KAR CK 0065

In the Karnataka High Court

Case No : Regular First Appeal No's. 411 and 596 of 2006

Sri. M.S. Subbukrishna and Others

APPELLANT

Vs

Smt. Parvathi and Sri. M.S. Suresh
 Sri. M.S. Suresh
Vs Smt. Parvathi and Others

RESPONDENT

Date of Decision : 31-08-2007

Acts Referred:

Hindu Succession Act, 1956 — Section 13, 20, 24

Citation : (2008) 1 CivCC 296 : (2008) 1 KarLJ 438 : (2008) 1 RCR(Civil) 318

Hon'ble Judges : H.N. Nagamohan Das, J;Chidananda Ullal, J

Bench : Division Bench

Advocate : M.S. Rajendra Prasad and P. Nataraju Associates, for the Appellant;
K.V. Narasihman, for R-1, P. Nataraju Associates for R-2 and M.S. Rajendra
Prasad for R-2 to 9 R-1, for the Respondent

Final Decision : Allowed

Judgement

H.N. Nagamohan Das, J.—These two appeals are directed against the common judgment and decree dated 01.12.2005 in O.S. No. 7/2000 passed by the Principal Civil Judge (Senior Division) at Srirangapatna, partly decreeing the suit of the appellant/plaintiff for partition.

2. The appellants in R.F.A. No. 411/2006 were the defendants 2 to 9 before the trial Court, whereas the appellant in R.F.A. No. 596/2006 is the first defendant before the trial Court and whereas the first respondent in both the appeals was the plaintiff before the trial Court. For convenience, the parties in this judgment are referred to by their status before the trial Court.

3. In filing the plaint, the plaintiff had contended that she and first defendant developed love towards each other and they were living together at one point of time. That subsequently on 06.01.1994 the plaintiff and first defendant got married at Sri. Lakshmi Narayana Temple, K.R. Pet town. That out of this wedlock between the plaintiff and first defendant, a male child was born on 23.03.1994 and the child died immediately after an hour of its birth. That when

the male child was in the womb of the plaintiff, the first defendant executed a registered release deed on 19.01.1994 in favour of defendants 2 to 9 relinquishing all his rights in the schedule properties in their favour. That the schedule properties are the ancestral joint family properties of defendants and the deceased son of plaintiff died as stated above. The alleged release deed dated 19.01.1994 is hostile to the interest of the minor son of the plaintiff and therefore the same was not binding. The plaintiff's son died on 23.03.1994. That the plaintiff succeeded to her undivided share of her son in the schedule properties. That despite repeated requests and demands, the defendants had refused to divide and partition of the schedule properties and having no other alternative, the plaintiff had filed O.S. No. 7/2000 for partition and separate possession of her 5/63rd share in the schedule properties, if necessary by setting aside the release deed dated 19.01.1994, and further to render accounts thereon and for such other reliefs.

4. The first defendant entered appearance before the trial Court and filed his written statement admitting the marriage between him and the plaintiff. In the written statement he had denied that the plaintiff had given birth to a male child on 23.03.1994. However the first defendant admitted therein that on 19.01.1994 he executed a registered release deed relinquishing all his rights in the schedule properties in favour of defendants 2 to 9 for a consideration of Rs. 60,000/- and that the said consideration of Rs. 60,000/- was deposited by him in the name of plaintiff in F.D. A/c. No. 1/1994 for Rs. 50,000/- and further that he had deposited a further sum of Rs. 10,000/- in S.B. A/c. No. 3735 in her name at Vijaya Bank. However in the written statement he had opposed the claim of the plaintiff for partition and separate possession of her share to an extent of 5/63rd share as claimed by her in filing the suit.

5. The second defendant filed a separate written statement inter alia contending therein that the suit is not maintainable. The second defendant further denied that plaintiff gave birth to a male child on 23.03.1994. It was further contended in the written statement that the first defendant had since relinquished all his rights in the schedule properties under a registered release deed dated 19.01.1994 and as such the suit of the plaintiff is not maintainable and thus opposed the claim of plaintiff. Other defendants in the suit had adopted the written statement of the second defendant.

6. On the basis of the above pleadings of the parties the trial Court framed the following issues and the additional issue. The issues and additional issue read thus:

Issues

I. Whether the plaintiff proves that the suit schedule properties are joint family properties of plaintiff and defendants as they are in joint possession and enjoyment?

II. Whether the plaintiff proves that the 1st defendant is having income of Rs.

3.00 lakhs per year from the plaint schedule properties?

III Whether the 1st defendant proves that he had executed the release deed in favour of the other defendants and Rs. 60,000.00 has been paid to the plaintiff through Vijaya Bank.

IV. Whether the 1st defendant proves that the plaintiff is not entitled for maintenance as the same is already decided in MC 11/96 on the file of this Court?

V. Whether the suit filed by the plaintiff is barred by limitation?

VI. Whether the suit is under valued as court fee paid on plaint is insufficient?

VII. What order or decree?

Additional issue

I. Whether the suit is barred under Hindu Law?

7. The trial Court vide order dated 19.07.2004 held issue No. 6 and additional issue in the negative holding that the suit is properly valued and the Court fee paid is sufficient. It is further held on additional issue that the suit of the plaintiff is maintainable under Hindu Law. Aggrieved by this finding of the trial Court on issue No. 6 and additional issue, the first defendant at the first instance had filed two W.P.S. in No. 34513/2004 and 34813/2004 on the file of this Court. This Court vide order dated 17.02.2005 rejected both the writ petitions confirming the order of the trial Court by holding that the suit of the plaintiff claiming partition is maintainable.

8. As we see it is thereafter the plaintiff had examined herself as P.W.1 and got marked Ex.P.1 to Ex.P.27. On the other hand the defendants had examined five witnesses from their side as D.W.1 to D.W.5 and got marked Ex.D.1 to Ex.D.16. In the course of arguments before the trial Court the learned Counsel for the plaintiff had not pressed issue No. 2. On the basis of this submission made the trial Court held that issue Nos. 2 and 4 do not survive for consideration. The trial Court after hearing both sides and on appreciation of the pleadings, oral and documentary evidence on record concluded that on 23.03.1994 the plaintiff gave birth to a male child. After the demise of this male child, the plaintiff succeeded to the undivided share of her deceased son she being a class-I heir. The schedule properties are ancestral and joint family properties liable for partition in the hands of the plaintiff. The registered release deed dated 19.01.2004 is not binding and does not extinguish the right of deceased son of plaintiff in the schedule properties and decreed the suit of plaintiff in part declaring that she is entitled for 5/63rd share in the suit item Nos. 1, 3, 4, 6, 9 to 20. Hence, now these appeals by the defendants are before this Court filed in two sets i.e., defendant Nos. 2 to 9 one set and the other set being defendant No. 1.

9. Sri. MS. Rajendra Prasad, learned Senior Counsel for the defendants contend that the trial Court committed an error in not properly appreciating the oral and documentary evidence on record. He had further contended that the trial Court

committed an illegality in holding that the registered release deed dated 19.01.1994 as bogus, not binding and do not extinguish the right of the minor child, particularly when there is no proper pleading and evidence in this regard. According to him the Court below committed a grave error in holding that on 23.03.1994 the plaintiff gave birth to a male child without there being any acceptable evidence on record.

10. Per contra Sri. K.V. Narasimhan, teamed counsel for plaintiff supported the impugned judgment and decree of the trial Court. He contended, that the first defendant in his writ petitions in W.P. Nos. 34513/2004 and 34812/2004 admitted that the plaintiff was pregnant on the date of marriage, that is on 06.01.1994. Based on the admissions in the pleadings and evidence the trial Court is perfectly justified in passing the impugned judgment and decree.

11. We heard the arguments on both the side and perused the entire records in the appeal and the trial Court's secured by us.

12. As we see the defendants had admitted before the trial Court that the schedule properties are the joint family properties and that the first defendant is having a share in the schedule properties. However they have contended that the first defendant had relinquished all his rights in the schedule properties under a registered release deed dated 19.01.1994 by accepting a total consideration of Rs. 60,000/-. We further noted that after separation of first defendant from the joint family, he had no further share in the family properties. Hence, first defendant could no longer be regarded as a member of the coparcenary. If so, the son begotten after the relinquishment deed dated 19.01.1994 by the first defendant, he could not claim the status of a coparcener with the remaining members of the undivided family of defendants 2 to 9. At best the son of plaintiff can only be a coparcener with the father - first defendant, but he could not be added to the original coparcenary. The moment the father got separated, that relation got snapped and a son who was not conceived by then, could not be incorporated into and enjoined to the original joint family. Therefore the son of plaintiff, in our considered view, cannot claim any share in the joint family setup of defendant Nos. 2 to 9. In our further considered view the son of plaintiff can only claim his share in the joint family of himself and his father - the first defendant. Consequently on the demise of son, the plaintiff who has succeeded to the estate of her deceased son can only claim a share in the joint family assets of first defendant alone and not in the joint family properties of defendants 2 to 9. It was contended before us that the trial Court without appreciating this position in law committed an error in law in passing the impugned judgment and decree. This is how we see things in the case under the fact situation we have analysed.

13. The plaintiff's son had the right to question the release deed executed by his father - the first defendant if the same was adverse to his interest and right in the joint family properties. In the instant case it is worth noting that the plaintiff has not challenged the registered release deed dated 19.01.2000; let apart there

is no pleading thereto and furthermore there is neither an issue nor evidence on record with regard to the validity of the release deed dated 19.01.2000 executed by defendant No. 1 in favour of defendants No. 2 to 9. In the absence of specific pleading, issue and evidence on record, in our view, the trial Court had committed an error in concluding that the release deed as not binding on the plaintiff's son and will not extinguish his rights.

14. We have pointedly noted that the claim of plaintiff is mainly based on Section 20 of the Hindu Succession Act, 1956 and which reads as under:

Right of child in womb.- A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the death of the intestate.

In this context we have to observe that Hindu Law recognises the right of child in the womb in a Mitakshara family. In Mayne's Hindu Law 14th Edition the learned author observes, that the ancient Hindu Law makers expressed different views on this question. According to Vishnu and Yagnavalkya the partition is to be opened up again, in order to give the later born son the share which he would have had, had he been born at the time of partition. According to Manu, Gautama, Narada and Brihaspathi, the later born son has to receive the share of the father alone, whereas according to Vivadaratnakara; "A son born after the (other) sons have become separate from the father, shall take the entire share of the father, when the father is dead, when the father is living, he shall get only a share out of the father's wealth."

15. We add in this context that the right of a child in the womb (in a Mitakshara family) came up for consideration before the Courts earlier to the coming into force of the Hindu Succession Act, 1956 and also thereafter.

In *Mandali Prasad v. Ramchanlal* ILR 1947 Nag 848 it is held, that under Hindu Law a son begotten not born is equal in all respects to a son actually in existence except for the purposes of adoption. His membership with the family is considered as commencing from the date of conception. A son in uterus becomes (if he is born alive) a coparcener with all his rights as from the date of his conception as if he were in actual existence. He has, therefore, the right to take the joint family property by survivorship.

In *Ammireddi Sooramma Vs. Ammireddi Venkataratnam*, it is held therein, that under Hindu Law a posthumous son will be entitled to succeed to the father or to claim a share in the joint family property. But the principle cannot be extended to a case of still born son. The law of inheritance applies only to persons who are born, not to corpses. A living person though not born but only existed in the womb at the time the succession opened is treated by fiction under Hindu Law for the purpose of succession as if in existence at the time the succession opened, but a dead body cannot have a legal existence.

In the case of Jagat Krishna Das and Another Vs. Ajit Kumar Das and Others, it is held, that the institution of partition suit by a member of a joint family effects severance of the joint status in the family. Where in such a suit a share is allotted to the father, a son begotten as well as born after the institution of the partition suit, is not entitled to have the partition reopened and to claim redistribution of shares even if he was born before the completion of the partition by actual division of estate. But such a son is entitled to succeed to the father's share and to his separate or self-acquired property to the exclusion of the divided sons. However, a son who was in the womb on the date the partition suit was filed is entitled to a share in the partition.

In Katragadda China Anjaneyulu and Another Vs. Katragadda China Ramayya and Others, it is held that in a case of partition of the joint family property by the father amongst the sons even a son conceived after partition arrangement can challenge that partition if the father has not retained a share for himself. This rule however cannot be extended to a case other than that of a division by the father amongst his sons (for example a general partition taking place amongst the brothers of the family or even to a case of partition between father, son and grandfather).

16. From a reading of Section 20 of the Act and the law laid down in different decisions referred to above, in our considered view, the following principles will emerge:

- i) A child in the womb is entitled to for a share in coparcenary property of an undivided Hindu joint family.
- ii) The child is entitled for a share in the joint family property when born alive and not otherwise.
- iii) On behalf of the child in the womb no partition suit is maintainable.
- iv) In case of a partition of the joint family property by the father amongst his sons, even a son born after a partition arrangement can challenge the partition if the father has not retained separate share for himself exclusively.
- v) In a partition if a share is allotted to the father, a son begotten or born after the partition is not entitled to have the partition reopened and to claim redistribution of the shares. But a child begotten after partition is entitled to succeed to the father's share and to his separate or self-acquired property to the exclusion of divided sons.

17. Keeping the above principle in view, it is necessary to examine the fact situation in the instant case on hand. The specific case of the plaintiff is that on 23.03.1994 she gave birth to a male child and the child died after birth. On the other hand, the defendants had contended that the plaintiff has not given birth to a male child at all on 23.03.1994. As we see the plaintiff in support of her contention examined herself as P.W.1 before the trial Court and produced Ex.P.23 - birth certificate of the child. In the cross-examination of P.W.1 it is specifically

suggested that Ex.P.23 the birth certificate is a concocted document created in collusion with the officials in the hospital. Thus Ex.P.23 the birth certificate was seriously disputed by the defendants, as such the burden lies on the plaintiff to prove and establish the genuineness of Ex.P.23. But the plaintiff has not produced any other evidence to prove the genuineness of Ex.P.23 and her contention that she gave birth to a male child on 23.03.1994.

18. On the other hand, defendants summoned register of delivery cases of Kikkeri Hospital marked as Ex.D.16. D.W.5 is Doctor P.K. Vasudha and spoken to the register marked as Ex.D.16. D.W.5 in her evidence had admitted that there are over writings in Ex.D. 16 and that she does not know who wrote the over writings. In her evidence she further deposed that she was not working in the hospital when the relevant entries were made in Ex.D.16. On our perusal of Ex.D.16 we have noticed that the relevant page commences from serial No. 15/13 and closed at serial No. 24/24. The succeeding page commences from serial No. 25/25 and closed at 5/34. But strangely enough at the relevant pages after serial No. 25/24 an entry is inserted as serial No. 25/25 stating that the plaintiff has given birth to a male baby on 23.03.1994. Thereafter in the succeeding page the serial No. 25/25 is altered as 26/26 consequently 26/26 was also altered as 27/27, 27/27 as 28/28, 28/28 as 29/29, 29/29 as 30/30. Further in Ex.D.16 the date and timings of birth of each child is mentioned in the 5th column, meant to mention the said fact But in respect of the entry relating to the plaintiff the time of birth of the child is not mentioned. During the course of argument of learned Senior Counsel Sri. Rajendra Prasad appearing for the defendants, he had drawn our attention to the tampering aspect of the entries in Ex.B.16 referable to the entry pertaining to the case of birth of the child of the plaintiff. On the face of it Ex.D. 16 makes it clear that the entry relating to the plaintiff is inserted by tampering the entries in the record subsequent to 23.03.1994. This entry is not made in the normal course. There is no evidence on behalf of the plaintiff explaining the alternations made in Ex.D. 16. There is also no mention in this register that the child died after one hour after its birth. Therefore, in our considered view no reliance can be placed on the entries made in the register Ex.D. 16. Ex.P.23 is admittedly an extract from the register Ex.D. 16 and as such no reliance can be placed on the same. Except the oral interested testimony of P.W.I there is no other evidence on record to show that she gave birth to a male child. Thus plaintiff in our considered view had miserably failed to prove and establish that on 23.03.1994, she gave birth to a male child and that the child died after one hour. Therefore, we have no hesitation to hold that the claim of plaintiff is false and unfounded and as such is liable to be rejected in toto and we do accordingly.

19. Furthermore the material on record discloses that the first defendant filed M.C. No. 11/1996 against the plaintiff for divorce u/s 13 of Hindu Marriage Act, 1956. In this M.C. No. 11/1996 plaintiff filed LA. No. II u/s 24 of the Hindu Marriage Act for grant of maintenance and the same came to be dismissed on the ground that first defendant had deposited a sum of Rs. 60,000/- in the name

of plaintiff". Subsequently the divorce petition M.C. No. 11/1996 came to be dismissed. The learned Counsel for plaintiff contend that defendant No. 1 in his deposition in M.C. No. 11/1996 admitted that the plaintiff was pregnant before their marriage. He further contend, that defendant No. 1 in W.P. No. 34513/2004 also admitted that plaintiff was pregnant before their marriage on 06.01.1994. On the basis of these admissions by defendant No. 1 that the plaintiff was pregnant earlier to her marriage, the trial Court is justified in holding that plaintiff gave birth to a male child on 23.03.1994. We decline to accept this contention of the learned Counsel for plaintiff in the face of the contradiction in the evidence with regard to the very birth of the child. The deposition of defendant No. 1 in M.C. No. 11/1996 is marked as Ex.P25 and the copies of writ petitions in W.P. Nos. 34513/2004 and 34812/2004 are marked as Ex.P27. The relevant portion of admission of defendant No. 1 in Ex.P25 and P27 are specifically not marked as exhibits. Further the admission made in Ex.P.25 and Ex.P.27 are not confronted to the first defendant in his evidence in O.S. No. 7/2000 before the trial Court Therefore no reliance can be placed on Ex.P. 25 and Ex.P.27. Further even if there is admission by defendant No. 1 in Ex.P.25 and Ex.P.27 the same is not binding on defendant Nos. 2 to 9. Further what is stated in Ex.P.25 and Ex.P. 27 is only that plaintiff was pregnant on the date of marriage on 06.01.1994. This admission of defendant No. 1 even if taken into consideration it will not lead to the conclusion that plaintiff gave birth to a male child on 23.03.1994. The plaintiff is required in law to prove by placing acceptable evidence to show that she gave birth to a male child on 23.03.1994. As already stated the plaintiff has miserably failed to prove that she gave birth to a male child on 23.03.1994 as stated above.

20. The trial Court framed as many as seven issues and one additional issue. Issue No. 4 reads as under:

Whether the first defendant proves that plaintiff is not entitled for maintenance as the same is already decided in M.C. No. 11/1996 on the file of this Court.

The trial Court in the impugned judgment and decree held that in view of non-pressing of issue No. 2 by the plaintiff, issue No. 4 did not survive for consideration. Firstly, the trial Court committed an error in framing issue No. 4 relating to maintenance. On the basis of pleadings, prayer in the plaint and the documents produced by the parties issue No. 4 relating to maintenance will not arise for consideration. Therefore any finding by the trial Court on issue No. 4 is nonest in law. The material on record discloses that in M.C. No. 11/1996" the plaintiff filed an application, I.A. No. II u/s 24 of the Hindu Marriage Act for grant of interim maintenance. The trial Court vide order dated 23.03.1990 rejected LA. No. II in M.C. No. 11/1996. Finally by judgment dated 06.11.2000 M.C. No. 11/1996 filed by first defendant against the plaintiff came to be dismissed. In the final judgment in M.C. No. 11/1996 there is no finding stating that plaintiff is not entitled for maintenance. Therefore the rejection of I. A. No. II in M.C. No. 11/1996 for grant of interim maintenance is no bar for the plaintiff to proceed

against the first defendant for maintenance and for other reliefs in accordance with law.

21. For the reasons stated above, the following;

ORDER

I. Both the appeals are allowed.

II. The impugned judgment and decree dated 01.12.2005 in O.S. No. 7/2000 passed by the Principal Civil Judge (Senior Division) Srirangapatna is hereby set aside.

III. The suit of the plaintiff in O.S. No. 7/2000 is hereby dismissed with no order as to costs, however by way caution we add that liberty is reserved to the plaintiff to claim maintenance from the defendant if she is entitled thereto in law.