

(2005) 12 KAR CK 0021

In the Karnataka High Court

Case No : Regular Second Appeal No. 916 of 2003

Thaniyaru Poojarthi and Another

APPELLANT

Vs

Sheena Poojary (deceased) by L.Rs. and Another

RESPONDENT

Date of Decision : 22-12-2005

Acts Referred:

Hindu Succession Act, 1956 — Section 7, 7 (2), 7 (3)

Citation : (2006) 1 KCCR 317

Hon'ble Judges : V.G. Sabhahit, J

Bench : Single Bench

Advocate : A. Ananda Shetty, for the Appellant; Sanathkumar Shetty K., for the Respondent

Final Decision : Dismissed

Judgement

V.G. Sabhahit, J.—This appeal by Defendants 1 and 2 is directed against the judgment and decree passed by the District Judge, Udupi in RA No. 16 of 2001 (Old RA No. 6/96) dated 16.8.2003 dismissing the appeal and confirming the judgment and decree passed by the Court of Civil Judge Udupi, in O.S. No. 95/90 dated 29.3.1996 decreeing the suit of the Plaintiffs for 1/4th share each in the schedule properties and for mesne profits and costs.

2. The essential facts of the case leading upto this appeal with reference to the rank of the parties before the trial Court are as follows:

The Plaintiffs filed the suit O.S. No. 95/90 seeking for partition and division of the plaint "A" property into four equal shares and for separate possession of two such shares in favour of the Plaintiffs by metes and bounds and for mesne profits with costs.

3. It is averred in the plaint that the suit schedule property as described in "A" schedule referred to as "plaint property" was held on tenancy right and some of the items on absolute right by one Thungu Poojarthi, daughter of Rangu Poojarthi which tenancy right property she got to her share under the terms of the oral

partition that took place between herself and Akkani Poojarni under the terms of a document styled as Karar dated 19.8.1956. Rangu Poojarthi the grand mother of themselves and Defendant was the adopted daughter of one Achchu Hengsu executed a registered gift settlement deed whereunder she had gifted the properties covered by the gift settlement deed and held by her on permanent tenancy right jointly in favour of Thangu Poojarthi and her grand daughter Akkani Poojarthi daughter of Parameshwari except item Nos. 10.11 and 12 which were obtained later on darkhast by Thungu Poojarthi and the said properties so gifted were divided between Thungu Poojarthi and Akkani Poojarthi under the terms of the karar dated 19.8.1956. Thungu Poojarthi the mother of the Plaintiffs and the Defendants were in possession and enjoyment as was personally cultivating the plaint property till her death took place on 10.8.1959. She died intestate leaving behind the Plaintiffs and the Defendants and her eldest daughter by name Koosu Poojarthi as her personal heirs under law. Koosu Poojarthi died some years back without any legal heirs and she left no legal heir and wherefore the Plaintiffs and Defendants each have got 1/4th share and Plaintiff together are entitled to half share in the said property and the Defendants together are entitled to one half share. It is averred that, after the death of their mother they and Defendants are cultivating the property, however, on account of old age the Plaintiffs are not now or permanently cultivating the plaint property or in a position to help the Defendants in the matter of cultivation of the plaint property. It is further averred that after coming into force of the Karnataka Land Reforms Act, 1974 the second Plaintiff and Defendants applied separately for grant of occupancy right in respect of item Nos. 1 to 9 of plaint A schedule property and Land Tribunal, Udupi, after holding necessary enquiry has granted occupancy right jointly in favour of Plaintiffs and Defendants and Koosu Poojarthi by order dated 23.3.1977 and despite lawyer's notice issued to the Defendants on 27.12.1989 since the Plaintiffs are not given the share, the suit is filed for the above said reliefs.

4. The suit was resisted by the Defendants denying the allegations made in the plaint regarding "kararu" dated 19.8.1956 and averring that Rangu Poojarthi was not adopted daughter of Achchu Hengsu as alleged in the plaint and it is not correct to state that Thungu Poojarthi, mother of the Plaintiffs and Defendants was in possession and enjoyment of the plaint A schedule properties till her death and on her death the Plaintiffs acquired half right over the same. It is further averred that the grand mother of the Defendants Rangu Hengsu had two daughters-Thungu Poojarthi and Parameshwari Poojarthi. Thungu Poojarthi is the mother of the Plaintiffs and Defendants and Parameshwari Poojarthi is the mother of one Akkani Poojarthi. Plaintiffs and Defendants are the children of Thungu Poojarthi. The aforesaid Rangu Hengsu had executed a registered gift settlement deed dated 8.9.1943 and conferred absolute right in respect of certain mulgeni properties in favour of the branch of Thungu Poojarthi and the aforesaid Akkani Poojarthi. The said properties have been orally divided between the aforesaid two branches about forty years ago and thereafter the respective

branch family people have applied for the grant of kumki lands of their respective kadim lands on darkhasth filing separate applications and the said kumki lands were granted on darkhasth by the Government in favour of the aforesaid branches separately and separate patta has been granted. The plaint A schedule properties have been throughout enjoyed by the family of the aforesaid Thungu Hengsu as aliyasanthana family properties and as such Plaintiffs are entitled to get only per capita share in the same and this Defendant is having three children and her daughter Indira is having four children. Thus, in the branch of Defendant there are eight members and second Defendant is having six children and her daughter Vanaja is having two children and another daughter Sumathi is having one daughter and as such the branch of the second Defendant is having ten members. Thus including the Plaintiffs, in all there are 20 members in the aliyasanthana family of Thungu Poojarthi and Plaintiffs are each entitled to get 1/20th share in the same. It is further averred that the first Plaintiff Sheena Poojary is residing in Kukkuje village, Dondarangadi, Karkala Taluk since for the last 20 years and he never enjoyed the properties in question. Similarly, the second Plaintiff has been residing separately from other members of the family. Originally he was working in Bombay and thereafter he was in Yerlapadi of Karkala Taluk and since ten years he is residing in Kondadi Balkodi, Bommarabettu village, Udupi Taluk and he never claimed any share in the plaint A Schedule properties and wherefore, the Plaintiffs are not entitled to any relief sought for in the suit.

5. The trial Court framed appropriate issues. On behalf of the Plaintiffs, second Plaintiff was examined as PW 1 and she got marked Exs.P1 to P72. On behalf of the Defendants, son of the first Defendant was examined as DW.1 and no documents were produced on behalf of the Defendants. The trial Court after considering the contention of the parties and the material on record held that having regard to the averments made in the pleading and other material on record the only question is about the fact as to whether the share is to be ascertained with reference to the law applicable to aliyasanthana family or under the Hindu Succession Act and further held that since Ranju Poojarthi was the tenant and was absolute owner of the property and she has gifted the properties in favour of Thungu Poojarthi and daughter of Parmeshwari who predeceased the donor and the contents of the document would clearly show that the gift was made in favour of Thungu Poojarthi and Akkanni and since Thungu Poojarthi died after coming into force of the Hindu Succession Act in view of the provisions of Section 7, the succession would be under the Hindu Succession Act and wherefore, the Plaintiffs and Defendants would succeed to the property in equal share i.e., 1/4th share each and Plaintiffs 1 and 2 together will be entitled to half share and negatived the contention of the Plaintiffs that they are governed by the aliyasanthana family and allotment of share should be under per capital share u/s 36 of the Madras Aliyasanthana Act and accordingly, passed the judgment and decree dated 29.3.1996. Being aggrieved by the said judgment and decree, the Defendants have preferred RA 6/1996 which was later numbered

as RA 16/2001 on the file of District Judge, Udupi District, and the first appellate Court by judgment dated 16.8.2003 reappreciated the material on record and having regard to the contents of Ex.P3 held that the gift was exclusively in favour of Thungu Poojarthi and Akkani and not in favour of Kavaru which they were representing and since the other members of the family have been excluded by affording absolute right in favour of Thungu Poojarthi and Akkani, the recital that the property should be enjoyed by Thungu Poojarthi and Akkani "santati paramarya" was superfluous in view of the decisions of this Court in Saraswathi R. Rai Vs. Korapalu, and in Prasanna Kumar v. Suguna (1971(2) Mys. LJ 612). Having regard to the principles laid down in the said case, the property was gifted only in favour of Thungu Poojarthi and Akkanni and sons of Plaintiffs and Defendants are claiming property through Thungu Poojarthi, they are entitled to succeed to the property as per the provisions of the Succession Act and not law applicable to aliyasanthana under Madras Aliyasanthana Act, 1949 and not per capita as per the provisions of Aliyasanthana Act and accordingly held that the judgment and decree passed by the trial Court is justified and does not call for interference and accordingly dismissed the appeal and confirmed the judgment and decree passed by the trial Court and being aggrieved by the said judgment and decree, the Defendants have preferred this appeal which was admitted on 28.7.2004 for consideration of the following substantial question of law:

1)Whether the findings of the Courts below that Aliyasanthana Act is not applicable to the suit schedule properties are in conformity with the said Act and Section 7 (2) and (3) of Hindu Succession Act ?

6. I have heard the learned Counsel appearing for the parties on the above said substantial question of law.

7. The learned Counsel appearing for the Appellants submitted that after the execution of the gift settlement deed dated 8.9.1943 when the same was reduced to writing on 19.4.1966 and after partition, the property was divided between Thungu Poojarthi and Akkani and they constitute a kavaru and in view of the provisions of Section 2 of the Madras Aliyasanthaya Act, 1949 and in view of the provisions on definition of Kavaru as defined in Section 3(b) Thungu Poojarthi and Akkani constitute separate kavaru and wherefore they would constitute separate aliyasanthaya families and wherefore the partition has to be made per capita as per Section 36 of the Aliyasanthana Act and not as per the provisions of the Hindu Succession Act. The learned Counsel submitted that the Courts below were not justified in applying the provisions of Hindu Succession Act and the effect of partition has not been considered by the Courts below.

8. On the other hand the learned Counsel appearing for the Respondents submitted that the Courts below have held concurrently that gift settlement deed confer absolute right on Thungu Poojarthi and Akkanni the daughter and grand daughter of Rangu Poojarthi and gift was not in favour of the Kavaru and Thungu Poojarthi and Akkani became the absolute owners of the property and wherefore since the said properties were not inherited from the kutumba the provisions of

the Aliyasanthana Act is not applicable and wherefore the Courts below have rightly applied the provisions of Hindu Succession Act as Thungu Poojarthi died after coming into force of the Hindu Succession Act in 1959 and wherefore the judgment and decree passed by the Courts below is justified and substantial question of law has to be answered against the Appellants.

9. I have considered the contention of the learned Counsel appearing for the parties with reference to the material on record.

10. It is clear from the perusal of the material on record that there is no dispute that the schedule property is the property which had been gifted to Thungu Poojarthi under the gift settlement deed dated 8.9.1943 and that land Tribunal has conferred occupancy right as per Ex.P10 in favour of the Plaintiffs, Defendants and one Koosu Poojarthi who died without leaving any heirs and the only question that arise between the parties is as to whether the allotment of share has to be made in accordance with the provisions of Hindu Succession Act or per capita as per the provisions of Madras Aliyasanthana Act, 1949. Both the Courts have concurrently held that the property is to be divided as per the provisions of the Hindu Succession Act since Thungu Poojarthi died after coming into force of the Hindu Succession on 10.8.1959 and the gift settlement deed dated 8.9.1943 as per Ex.P3 conferred absolute right in favour of Thungu Poojarthi and Akkani and gift was not in favour of the kavaru as there is no recital in the document itself that the gift was in favour of kavaru and the object in executing Ex.P3 was to see that Thungu Poojarthi and Akkani would not be deprived of any property as Rangu Poojarthi was the adopted daughter and the recital of Ex.P3 would clearly show that other members of the family were excluded by affording absolute right on Thungu Poojarthi and Akkanni. It is not disputed that schedule properties that are gifted were the absolute properties of Rangu Poojarthi as they were the tenanted properties and thereafter the application has been filed for conferment of occupancy right and the Land Tribunal, Udipi by order dated 23.3.1977 has conferred occupancy right jointly in favour of Plaintiffs and Defendants and one Koosu Poojarthi and the averment made in the plaint clearly shows that Koosu Poojarthi has died without leaving any heirs and wherefore the concurrent finding arrived at by the Courts below based upon the above said material on record is justified and once it is held that the document Ex.P3-gift settlement deed conferred absolute right in favour of Thungu Poojarthi and not on the kavaru which she represented. It is clear that the property was not inherited by the Kutumba but was of the property acquired under the gift settlement deed executed by the absolute owner Rangu Poojarthi as per Ex.P3 dated 8.9.1943 and occupancy right has been conferred in that behalf in favour of the Plaintiffs and the Defendants and one Koosu Poojarthi who has died without leaving any heirs. There is no merit in the contention of the Counsel appearing for the Appellants that since there was partition between Thungu Poojarthi and Akkanni, they constituted separate aliyasanthana family and wherefore the share has to be ascertained per capita as per the provisions of the Aliyasanthana Act as it is clear from the perusal of the material on record

that Ex.P3-the gift settlement deed conferred right on Thungu Poojarthi and Akkanni individually and not as representing the members of the Kavaru and question of applying the provisions of Aliyasanthana Act in respect of the property which has not been inherited by the kutumba but by virtue of gift settlement deed by the absolute owner of the property as per Ex.P3 would attract the provisions of Section 7 of the Hindu Succession Act and since Thungu Poojarthi has died on 10.8.1959 coming into force of the Hindu Succession Act and the schedule properties were not inherited by Thungu Poojarthi as a member of the kutumba or kavaru, it is clear that the Courts below were justified in applying the provisions of Hindu Succession Act and holding that Plaintiff and Defendants are entitled to equal share i.e., 1/4th share and Plaintiffs together are entitled to half share in the schedule properties and accordingly, I answer the substantial question of law by holding that the finding of the Courts below that Aliyasanthana Act is not applicable to the suit schedule properties is justified and the same is in conformity with the provisions of Section 7 of the Hindu Succession Act and pass the following order:

The appeal is dismissed. The judgment and decree passed by the Court of District Judge, Udupi, in RA No. 16 of 2001 dismissing the appeal and confirming the judgment and decree passed by the Court of Civil Judge, Udupi, in O.S. No. 95/1990 is confirmed. However, there shall be no order as to costs in this appeal.