

(2015) 07 KAR CK 0376

In the Karnataka High Court

Case No : Regular Second Appeal Nos. 5742 and 5800 of 2010

Vasanth

APPELLANT

Vs

Jaya and Others

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Evidence Act, 1872 — Section 68
Karnataka Land Reforms Act, 1961 — Section 133
Succession Act, 1925 — Section 63

Citation : (2015) 07 KAR CK 0376

Hon'ble Judges : S. Sujatha, J

Bench : Single Bench

Advocate : V.P. Kulkarni, for the Appellant; Anoop G. Deshpande, Advocates for the Respondent

Final Decision : Dismissed

Judgement

S. Sujatha, J—Both these appeals are filed challenging the judgment and decree of the lower appellate Court in R.A. No. 344/2006 dated 28.6.2010.

2. RSA No. 5742/2010 is filed by the plaintiff challenging the judgment and decree of the lower appellate Court as far as modifying the judgment and decree of the trial Court in respect of item No. 4 of the suit property i.e., Sy. No. 180 measuring 4 acres 32 guntas.

3. RSA No. 5800/2010 is filed by the defendants challenging the genuineness of the Will executed by Smt. Bhagirathi in favour of the plaintiff. Both these cases are clubbed together and heard.

4. The facts of the case in brief are that the suit properties originally belonged to the propositus Sri Sheshagiri who had three sons viz., Damodar, Tukaram and Govind. Damodar was married to Smt. Bhagirathi and he died issueless leaving behind his wife Smt. Bhagirathi on 8.11.1970. Smt. Bhagirathi adopted the plaintiff Sri Gopal, son of Tukaram, in the year 1971. Smt. Bhagirathi executed

the registered Will bequeathing half portion of the suit properties in favour of Sri Vasant (son of Govind), the plaintiff herein. The plaintiff instituted O.S. No. 4/1998 seeking a declaration that the plaintiff is the owner in respect of half share in the suit properties pursuant to the Will executed by Smt. Bhagirathi on 2.8.1996 inter alia claiming for partition and possession of the said half share and consequential relief of injunction against the defendants restraining them from alienating the suit property and obstructing the enjoyment by the plaintiff. The defendant was represented through the power of attorney holder and the suit was contested. After considering and evaluating the evidence on record, the trial Court decreed the suit. The defendants preferred appeal challenging the said judgment and decree of the trial Court and the same came to be partly allowed modifying the judgment and decree of the trial Court as far as item No. 4 of the suit property is concerned. The plaintiffs are before this Court challenging the said judgment of the lower appellate Court to the extent of modifying the judgment and decree of the trial Court. The defendants are before this Court challenging the genuineness of the Will dated 2.8.1996 executed by Smt. Bhagirathi in favour of the plaintiff Vasant.

5. Heard the learned counsel for the parties and perused the records.

RSA No. 5742/2010

6. The learned counsel for the appellant contended that half portion of the suit property was bequeathed by Smt. Bhagirathi in favour of the plaintiff through a registered Will dated 2.8.1996 registered on 2.9.1996. The lower appellate Court has modified the judgment and decree of the trial Court on the basis of the order passed by the Land Tribunal, Kumta, granting occupancy rights in favour of Ramadas Anant Vittal son of Tukaram. The said order of the Land Tribunal is totally against the provisions of the Karnataka Land Reforms Act, as the plaintiff was not a party to those proceedings and any order passed by the Land Tribunal without he being a party to the proceedings is not binding on him. Moreover, the defendant No. 1 has given consent before the Land Tribunal to grant occupancy rights in favour of Ramadas Anant Vittal who was not competent to give such a consent as far as the properties belonging to this plaintiff. The Tribunal without appreciating the same on the consent given by the defendant No. 1 has declared Ramadas Anant Vittal as the occupant in respect of item No. 4 of the suit property. The appellant in this appeal has confined his arguments only to the extent of modifying the judgment and decree of the trial Court.

7. On the contrary, learned counsel for the respondent contended that Civil Court has no jurisdiction to entertain the suit challenging the orders of the Land Tribunal. The learned counsel invited my attention to the averments made in the memorandum of appeal which reads thus:

.....The appellant herein is taking necessary steps to challenge the order of the High Court passed in writ petitions and also the order passed by the land tribunal in a separate proceedings. The appellant submits that the order of the High Court

and the order of the Land Tribunal are collusive and illegal and they are not binding on the appellant.....

The Civil Court has no jurisdiction to entertain the suit challenging the orders passed by the Land Tribunal in view of section 133 of the Karnataka Land Reforms Act. The Tribunal has granted occupancy rights to Ramdas Anant Vittal S/o. Tukaram subsequent to passing of the judgment and decree of the trial Court. Accordingly, the same is properly appreciated by the lower appellate Court in the appeal, which cannot be found fault with.

RSA No. 5800/2010

8. At the time of admission of the appeal this Court framed the following substantial question of law for consideration in this appeal.

"Whether both the Courts have committed a serious error in giving positive finding on the Will dated 2.8.1996 executed by Bhagirathi by ignoring the material evidence placed on record that too without there being any reason to disinherit defendant No. 1 and thus the judgments are perverse and illegal?"

9. The learned counsel for the appellant contended that Gopal was adopted by Smt. Bhagirathi in the year 1971 as per the Hindu Adoption and Maintenance Act, 1956. A general power of attorney was executed by Smt. Bhagirathi in favour of Vasant. The general power of attorney was for the maintenance of the properties of Smt. Bhagirathi. Taking advantage of the same, the plaintiff is claiming the rights over the suit properties as a bequeathed under the Will, which is totally surrounded by suspicious circumstances. The Courts below having not appreciated the Will not being proved by the plaintiff shifted the onus on the defendant to prove the suspicious circumstances which is contrary to law. The learned counsel relied on Exs.D.1 and D.2, the photographs more particularly Ex.D.2, wrongly identified by PW.2 as the photograph of Smt. Bhagirathi, contended that the Courts below have not appreciated this clinching evidence and wrongly held that the Will executed by Smt. Bhagirathi is genuine.

10. On the other hand, learned counsel appearing for the respondents submitted that, Smt. Bhagirathi though adopted Gopal as the adopted son, in the year 1971, as per Hindu Adoption and Maintenance Act, 1956 she had every right to bequeath the properties fallen to her share. It is also contended that the adopted son Gopal was married to defendant No. 1 and left to Bombay along with his wife and Gopal expired in the year 1993. The strained relationship between defendants and Smt. Bhagirathi, can be evidenced by the dispute between them adjudicated before the revenue authorities. In her old age, Vasant was residing with her in Madangeri, taking care of her health and properties. A Power of Attorney was also executed by Smt. Bhagirathi in favour of Vasant for maintenance of her properties at Madangeri, whereas the defendants were residing at Bombay, failed to maintain cordial relationship with Smt. Bhagirathi, not taking care of Smt. Bhagirathi, which made Bhagirathi to bequeath her half portion of the suit properties in favour of Vasant out of love and affection and

freewill. The primary factors to prove the Will, i.e., examining one of the attesting witnesses and the scribe are fulfilled by the propounder of the Will. If there is any suspicious circumstance alleged by the defendants, onus lies on them to prove the same. The Will having proved as per Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, the Courts below have rightly held the Will to be genuine, which cannot warrant any interference by this Court against the concurrent finding given by the Courts below.

11. After hearing the parties, the moot question to be decided by this Court is the genuineness of the Will said to have been executed by Smt. Bhagirathi in favour of the plaintiff. The learned counsel appearing for the defendants invited my attention to the deposition of P.Ws.2 and 3. It is true that P.W.2 is working as a peon in the office of the Tahasildar. He has deposed that Bhagirathi had signed the Will in his presence. PW.2 has elicited that he had no knowledge about the family members of Bhagirathi and wrongly identified Ex.D2 as the photograph of Smt. Bhagirathi, though rightly identified Ex.D.1, the photograph of Smt. Bhagirathi, the said discrepancy found in the evidence of P.W.2 would not discard the other material evidence adduced by him more particularly, Smt. Bhagirathi having signed the Will in his presence. It is not necessary that the witness should know the contents of the Will or the family background of the testatrix.

12. Both the Courts below have observed that the long gap of six years of executing the registered Will would naturally be the reason for the wrong identification of Ex.D2, which is not fatal. The said concurrent finding does not warrant any interference, in view of the specific evidence led by PW.2 as regards Smt. Bhagirathi visiting the Sub-Registrar's office and executing the Will in his presence. PW.3 is the scribe of the Will, who deposed, the Will drafted on 02.08.1996 was registered on 02.09.1996. Thus, Smt. Bhagirathi had ample time to make up her mind to register the Will.

13. It is settled law that the scribe and attesting witness need not know the contents of the Will nor the beneficiaries or the family of the testatrix. The strained relationship said to have been alleged by the plaintiff between the defendants and Smt. Bhagirathi also suggests that, Smt. Bhagirathi had developed some love and affection with Vasant, who is none other than her husband's brother's son, who was taking care in her old age, whereas Gopal, the adopted son was residing at Bombay with his wife and children without caring her. The circumstantial evidence supports the case of the plaintiff that the Will executed by Smt. Bhagirathi, though does not absolutely disinherit the regular succession, only half portion of the properties are bequeathed to the plaintiff, the same is executed in her sound state of mind. Defendants though claiming right over the suit properties on the basis of the adoption made by Smt. Bhagirathi have not stepped into the witness box, tendered for cross examination. It is only the Power of Attorney holder of defendant No. 1 who deposed before the Courts below. As such, no probative value would be given to the evidence of DWs.1 and 2 who are all strangers to the Will and are interested

parties to the defendants.

14. It is settled law that, if suspicious circumstances are alleged by the parties, the burden lies on the party who alleges, to prove the same. Mere making allegations would not suffice to disbelieve the Will.

15. The other point to be decided is the trial Court modifying the judgment and decree as far as item No. 4 of the suit property is concerned. It is an undisputed fact that occupancy rights are granted by the Land Tribunal, Kumta in favour of Ramdas Anant Vittal as regards item No. 4 of the suit property. Section 133 of the Land Reforms Act contemplates bar of a civil suit against granting of occupancy rights. It is contended by the plaintiff himself in the memorandum of appeal that, on the rejection of occupancy rights claimed by the Ramdas Anant Vittal by the Land Tribunal, writ petition filed by the said Ramdas was compromised between him and defendant No. 1, pursuant to which, on the consent given by defendant No. 1, occupancy rights are granted, as such appellant is taking necessary steps to challenge the order of the Land Tribunal and also the order passed by this Court in writ petition in a separate proceedings. Thus, lower appellate Court is justified in modifying the judgment, setting aside item No. 4 of suit property, as plaintiff cannot claim any right on this property, occupancy rights being conferred on Ramdas Anant Vittal by the Land Tribunal.

16. The concurrent finding given by the Courts below do not call for any interference by this Court. Therefore, the substantial question of law raised by this Court is answered in favour of the plaintiff and against the defendants.

17. Accordingly, for the foregoing reasons, both the appeals are dismissed.