

Mohammed Ashraf Vs. Tabbasum

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Court : Karnataka Dharwad

Decided On : Jun-30-2014

Judge : A.V. Chandrashekara

Appeal No. : R.F.A. No. 1107 of 2005 (PAR)

Appellant : Mohammed Ashraf

Respondent : Tabbasum

Judgement :

(Prayer: This R.F.A. is filed u/s. 96 of CPC against the Judgment and Decree dated 14.06.2005 passed in O.S.No. 113/98 on the file of the II Addl. Civil Judge (SR.DN.), Belgaum, partly decreeing the suit for partition and separate possession and etc.)

1. Plaintiff of O.S.No. 113/98 which was pending on the file of the court of II Addl. Civil Judge (Jr.Dn.), Belgaum, is before this Court by filing an appeal u/S. 96 of CPC. Suit filed by him for the relief of partition and separate possession of an immovable urban property bearing CTS No. 340 measuring in all 138.79 sqmts in the city of Belgaum, has been decreed in part granting 4/9th share only to the plaintiff and 2/9th share + 1/3 share to defendant no.1-Tabassum. It is this judgment and decree which is called in question on various grounds as raised in the appeal memorandum amongst other grounds.

2. Appellant is the plaintiff in the said suit. First respondent is the first defendant and remaining respondents herein are the defendant nos.2 to 6 in the said suit. Parties will be referred to as plaintiff and defendants as per their ranking given in the trial Court.

3. Facts leading to the filing of the suit before the trial Court in O.S.No. 113/98 are as follows:

Khatunbi was the mother of plaintiff and first defendant and deceased Mohammed Yusuf who was the husband of defendant no.2 and father of defendant nos.3 to 6. Suit schedule properties in question belonged to Smt. Khatunbi and she died on 14.04.1997. The husband of the second defendant and father of deceased nos.3 to 6 predeceased his mother. Hence, Ashraf is the only surviving son of first defendant and Tabassum is the only surviving daughter of Smt. Khatunbi. After the death of Khatunbi, Mohammad Ashraff had inherited 2/3 share and Tabassum has inherited 1/3 share. In this regard he had requested for partition and separate possession of his 2/3 share. Said suit was contested by first defendant alone claiming 1/3 share on the basis of the Will stated to have been executed by her mother on 08.03.1997 and 2/9 share by virtue of inheritance. Said stand has been accepted by the trial Court and the contention of the plaintiff has not been accepted in totality and therefore the plaintiff is granted only 4/9 share. Defendant nos.2 to 6 had remained *exparte* before the trial Court. On the basis of the above pleadings the following issues have been framed by the trial Court.

ISSUES

- 1) Whether plaintiff proves that he is entitled for partition and separate possession of 2/3rd share in the suit property?
- 2) Whether defendant proves that she is the absolute owner of the suit property by virtue of the Will executed by her mother?
- 3) Whether defendant proves that the suit is bad for non joinder of necessary parties?

4) Whether plaintiff proves that the defendant making attempt to alienate the suit property?

5) What order or decree?

4. Plaintiff is examined as PW1 and has got marked 25 exhibits. First defendant is examined as DW1 and one Nasirahmed Abdulla Kinikar as D.W.2 apart from getting 4 exhibits got marked on behalf of the first defendant. Ultimately, issue nos.1 and 2 have been answered partly in the affirmative and issue no.4 in the negative and consequently suit is decreed in part granting $\frac{4}{6}$ th share to the plaintiff and $\frac{4}{9}$ and $\frac{1}{3}$ share to the first defendant. It is contended before this Court that a Will executed in favour of an heir will not have binding force unless other heirs consent and in this regard Sec. 117 of Mohammadan Law is relied upon by the learned counsel for the appellant. It is also contended that if a Will is executed by a Mohammadan in favour of a non heir it is totally invalid unless it is consented to by other heirs and that such consent will bind the share of consenting parties only.

5. It is vehemently argued that even if Will is stated to have been executed by Khatunbi in favour of Tabassum is proved, it does not confer any right on her as Ashraff has not consented for the bequest so made by Khatunbi. Learned counsel for the respondent has supported the judgment of the trial Court. After going through the records and pleadings the following points arise for consideration of this Court.

1) Whether the trial Court is justified in granting $\frac{1}{3}$ rd share to first defendant Tabassum on the ground that Khatunbi has executed a Will in respect of the property bequeathing $\frac{1}{3}$ share in favour of Tabassum?

2) Whether any interference is called for by this Court? If so to what extent?

REASONS

6. Point No.1: Admittedly, the property in question belonged to Khatunbi, the mother of plaintiff and first defendant and mother in law of the second defendant and grandmother of defendant nos.3 to 6. She died on 14.04.1997. Husband of

the second defendant and father of defendant nos.2 to 6 predeceased his mother Khatunbi. The trial Court, on appreciation of the evidence tendered by the first defendant Tabassum in regard to the due execution of Will vide Ex.D3 in her favour by her mother, has held that Will in question has been proved and hence Tabassum entitled for 1/3 share of her mother on the basis of the bequest. Even if it accepted that Khatunbi has executed a Will in favour of Tabassum who is her daughter and the same is proved, the Will does not have effect unless the other heir consents to the bequest. In the present case the only is her brother and he has not consented to the bequest. Even otherwise, it is not the case of the first defendant that Ashraff has consented to such a bequest made by Khatunbi or that there is an implied consent of the plaintiff.

7. It is relevant to consider a decision of this Court in the case of Narunissa Vs. Shek Abdul Hamid, of this Court reported in AIR 1987 Kar. 222 (DB). It is specifically held at paragraph no.12 as under:

12. The well established position, in our opinion, is that a bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents the bequest is valid to that extent only and binds his or her share. That it is so is clear from the following enunciation in Mahaboobi V. Kempaiah (Second Appeal No. 99/150-51) : KAR 1955 Mys NUC 705.

A Mohammadan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. But a bequest of more than the legal third can be validated by the consent of the heirs; and similarly a bequest to an heir may be rendered valid by the consent of the other heirs. The limits of testamentary power exist solely for the benefit of the heirs and they may if they like forego the benefit by giving their consent.

8. The decision rendered by Division Bench of this Court in AIR 1987 KAR 222 has been followed by the Indore Bench of Madhya Pradesh High Court in the case of Kallobai and Anr. V. Babukhan and Ors. Reported in AIR 2009 (NOC) 2166 (MP). On reading the decisions mentioned above it is very clear that consent of other heir/s should be taken and in the absence of consent of other heir/heirs bequest to an heir is not valid.

9. Learned counsel for the respondent-Tabasum has relied upon a Division Bench decision of this Court reported in 2007 (6) AIR KAR. 427 (Allabux Vs. Smt. Allabi) to contend that Will executed by the mother in favour of Tabasum would be valid to the extent of 1/3 share of her mother and therefore she is entitled for 1/3 share plus 2/9 share. Decision of this Court reported in ILR 1986 KAR 2115 (Md. Khalilue Rehman Vs. Md. Fazlur Rehman) has been referred to and followed in Allabux case (2007 (6) AIR KAR. P. 427). In the said decision rendered in Md. Khalilur Rehman's case it is held as follows:

Mohammedan Personal Law dictates that if a Muslim executes a Will bequeathing any of his or all his properties in favour of one of his heirs, consent of the heirs would be necessary to validate the bequest and inaction for a long period by challenging the bequest are sufficient to presume that the said heir had signified consent by his conduct.

10. But in the subsequent Division Bench decision of this Court in the case of Narunnisa Vs. Sheikh Abdul Hamid (AIR 1987 KAR. 222) It is held that consent of other heirs is required for a Muslim to bequeath his or her properties in favour of other heir/heirs. In the absence of consent of other heirs, it is no bequest in the eye of law and this is so held while analyzing the provisions of S.117 of Mohammedan Law. This decision, being a judgment of this Court later to Md. Khalilur Rahmans case has a binding force. In Narunnisa's case it is clearly held that consent cannot be presumed because of inaction of the other heir in not challenging the bequest. Hence the decision in the case of Md. Khalilur Rehman (ILR 1986 KAR. 2115) which is the basis for the subsequent decision in Allabux Vs. Allabi's case, is of not helpful to the respondent herein.

11. It is not the case of the present plaintiff and first respondent herein that the plaintiff has consented to the bequest made by Khatunbi. In the light of the same, Tabassum will not get anything under the Will though it has been proved. Therefore, allotment of shares done by the trial Court needs to be altered.

12. According to Mohammadan Law, the son takes double the quantum of share of daughter. In this view of the matter, Tabassum is entitled for 1/3 share and 2/3 share would go to Mohammad Ashraf, the plaintiff. Hence, the trial Court is not

justified in granting 4/9 share to the plaintiff.

13. On the other hand, the trial Court has committed a serious error in not noticing the mandatory provisions of Sec. 117 of the Muslim Law more particularly explained in the case of Narunnisa by this Court. In this view of the matter, only 1/3 share will go to Tabassum and the remaining 2/3 will go to Ashraff. Hence, the trial Courts approach is incorrect and not according to the mandatory provisions of Muslim Law.

14. The fact of consent cannot be presumed by the inaction of another heir in challenging the bequest made. This is evident from yet another decision rendered by a Division Bench of this Court in Abdul Subhan Vs. Khyroonibi reported in ILR 1992 KAR 2823. The defendant nos.2 to 6 do not inherit anything in the present case because Mohammed Yusuf had predeceased his mother.

15. In the light of law reiterated by a Division Bench of this Court reported in AIR 1987 KAR 222, no inference about the consent of the plaintiff could be drawn in the present case. Hence, point no.1 is answered in the negative.

16. Point No.2: In view of the finding on point no.1, interference is absolutely called for insofar as it relates to the alteration of the share of the plaintiff and the defendant no.1. Consequently, appeal will have to be allowed.

ORDER

Appeal is allowed in part. Share of the plaintiff-appellant is declared as 2/3 and share of first defendant-Tabassum is declared as 1/3. Judgment of the trial Court stands modified accordingly and the preliminary decree be drawn in accordance with the alteration of share done by this Court.

In view of the relationship of the parties there is no order as to costs.

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