

Joseph Devaraj and Others Vs. Balaraj and Another

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Court : Karnataka

Decided On : Sep-21-2015

Judge : Anand Byrareddy

Appeal No. : Regular First Appeal No. 978 of 2009 connected with Regular First Appeal No. 977 of 2009

Appellant : Joseph Devaraj and Others

Respondent : Balaraj and Another

Judgement :

(Prayers: This Regular First Appeal filed under Order 41, Rule 1 read with Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree dated 10.06.2009 passed in O.S.No.7378/1995 on the file of XXXVIII Additional City Civil Judge, Bangalore, dismissing the suit filed for partition and separate possession.

This Regular First Appeal filed under Order 41, Rule 1 read with Section 96 of the Code of Civil Procedure, 1908, against the judgment and decree dated 10.06.2009 passed in O.S.No.7907/1997 on the file of XXXVIII Additional City Civil Judge, Bangalore, dismissing the suit filed for partition and separate possession.)

1. These appeals are heard and disposed of by this common judgment having regard to the fact that the parties are the same and were laying claim to the same properties.

2. The appeal in RFA 978/2009 arises out of the judgment in the civil suit OS 7378/1995.

3. The facts, as stated by the plaintiffs in that case, was that the first plaintiff, Joseph Devaraj was the son of late R. Joseph, Plaintiffs no.2,3 and 4 - Lesley, Alphonso and Dominic, respectively, were the sons of the first plaintiff.

The first defendant, Balraj, was the younger brother of the first plaintiff. The second defendant was the wife of Balraj.

The parties were Christians.

Late R. Joseph was said to be an erstwhile employee of M/s Hindustan Aeronautics Limited, Bangalore. He is said to have retired, from service, in the year 1962. He is said to have acquired a house bearing Khaneshmari no.96/89 at Marathahalli, Varthur Hobli, Bangalore South Taluk. A plot of land in Binnamangala Manavarthe Kaval, Bangalore. And also agricultural lands bearing survey no.27 and 28 of Chinnappanahalli, Krishnarajapuram Hobli, Bangalore South Taluk, measuring about 9 acres and 28 guntas.

Joseph is said to have died on 12.02.1972. He is said to have left behind a will dated 23.10.1968. It was the plaintiffs' claim that under the will, Joseph had bequeathed all his properties to his wife, J. Amruthamma. She and the first defendant were appointed as joint executrix and executor, respectively. It was also claimed that in terms of the will, plaintiffs no.2 to 4 were to be allotted their share as may be allotted by Amruthamma, after they attained majority. It was further claimed that, in terms of the will, if Amruthamma did not allot any shares, the property would automatically revert to defendant no. 1 and the plaintiffs, in equal shares.

It transpires that Amruthamma and Balraj had obtained Letters of Administration, in respect of the properties of late Joseph in August 1973, but had not complied with the mandatory requirements under Section 317 of the Indian Succession Act, 1925 (Hereinafter referred to as the 'IS Act', for brevity), even as on the date of the suit, in the year 1995.

It was said that the first plaintiff was working abroad and hence plaintiffs no. 2 to 4 were under the care and custody of their grand father till his death. After his death, they were said to be under the care and custody of their grand mother, Amruthamma. Even the defendants and their family were all living together with Amruthamma. Amruthamma is said to have died on 3.03.1994. And it was said that she had died intestate.

After the death of Amruthamma, the plaintiffs, who were then in their thirties, had approached the first defendant seeking partition of the properties concerned. It transpires that he refused to comply and hence serious differences having arisen between them, the plaintiffs are said to have moved to the address shown in the plaint, in June 1994. And the suit had then been filed seeking partition and separate possession of the properties, in terms of the will of Joseph.

Defendant no. 1 had filed his written statement in the suit admitting the relationship, but claimed that the plaintiffs had not stated the correct sequence of events. It was asserted that the plaintiffs were not in joint possession of the properties. It was stated that even during the life time of Amruthamma, the plaintiffs had filed a suit for injunction restraining her from alienating the very suit properties and that the said suit was pending. Further, that Amruthamma had left behind a registered will bequeathing all the properties to the first defendant and that he had sought probate of the will in case no.P and SC 116/1995 and that the plaintiffs had entered appearance and had sought to implead themselves in those proceedings and that the same was pending.

It was further asserted by the defendant that the properties described in the plaint Schedules 'A' and 'B', were bequeathed by Joseph, under his will, absolutely in favour of Amruthamma and that she had sold Schedule - A property in the year 1974. And the properties described in Schedule - B, were said to have been sold in the years 1990 and 1994.

It was also claimed that several items of the properties described in Schedule - C had been sold by Joseph himself during his life time. In addition, Amruthamma had in turn sold some more items of the said Schedule - C properties.

It was contended that the suit was barred by limitation. It was also contended that having regard to the tenor of the will of late Joseph, the suit was misconceived.

The petition for probate filed by the first defendant, in respect of the will of Amruthamma, in P and SC 116/1995 having been contested by the plaintiffs was converted into a testamentary suit, as OS 7907/1997 and was tried along with the above suit.

4. On the basis of the pleadings, the trial court had framed the following issues, in the two suits.

In OS 7378/1995:

"1. Whether the plaintiffs prove that all the suit properties are available for partition?

2. Whether they prove that they have share in the suit properties?

3. Whether the defendant proves the execution of the Will in his favour by his mother?

4. Whether the plaintiffs are entitled for the relief sought?

5. What order or decree?

Additional Issues:

1. Whether plaintiffs prove that the will dated 22.01.1992 said to have been executed by Smt. J. Amrurhamma, is forged, fabricated and concocted document, and that Smt. J. Amruthamma was not in sound disposing state of mind as on that date?

2. Whether the plaintiffs prove that portion of Sy.No.27 has been acquired by BDA and that they are entitled for a share in the compensation payable?

3. Does defendant No. 2 prove that the suit is bad for mis-joinder of parties?

In OS 7907/1997:

"1. Whether the plaintiff proves the due execution of the alleged will dated 22.1.1992 said to have been executed by Smt. Amruthamma?

2. What order or decree? "

Insofar as OS 7378/1995 was concerned, the trial court had answered Issue nos.1, 2, 4 and additional issue nos.1 and 3 in the negative and issue no. 3 in the affirmative while answering issue no. 2 partly in the affirmative.

The issue no. 1 framed in OS 7907/1997 was answered in the negative and the suit was dismissed.

And consequently, the suit in OS 7378/1995 was decreed and the relief sought for in the suit in OS 7907/1997 was dismissed. The defendants in the first suit, who were the plaintiffs in the second, being aggrieved by the judgment have preferred these appeals.

5. The learned Senior Advocate, Shri Jayakumar S. Paul, appearing for the counsel for the appellants would urge the following :

That in interpreting the terms of the will of Joseph, the trial court had erred in coming to the conclusion that all the properties of Joseph were bequeathed in favour of Amruthamma. A plain reading of the will would, on the other hand, indicate that the intention was only to ensure that Amruthamma was provided maintenance during her life time, with the aid of the said properties.

It is contended that the second error committed by the trial court was in having failed to note that by the tenor of the will of Joseph, Amruthamma had no right whatsoever to execute any will in respect of the properties and to bequeath the same in favour of defendant no. 1.

It is also contended that the trial court, has in its judgment, merely stated that from the oral and documentary evidence on record, Amruthamma was seen to have been enjoying the suit properties as the absolute owner thereof, without specifying the document or the material evidence that conferred any such right on her. On the other hand, she was competent only to act as the executrix under the will, on

the strength of the probate granted in the proceedings in P and SC 76/72, along with defendant no. 1, who was a joint executor.

It is contended that a plain reading of the will would indicate that under the will, Amruthamma, as the executrix, was directed to distribute the sale proceeds among her sons and grandsons. It would thus indicate that she had no absolute right in the property to have bequeathed or gifted the property to the defendants.

It is hence contended that the appeals be allowed.

6. The learned Senior Advocate, Shri Udaya Holla, appearing for the counsel for the respondents seeks to justify the judgment of the trial court. And would seek to interpret the will of Joseph in a manner so as to indicate that Amruthamma was bequeathed the properties absolutely and therefore there was no fetter on her right to in turn, bequeath or gift the same to the defendants.

7. In the light of the above rival contentions, the points that arise for consideration are:

- i) What is the right conferred on Amruthamma by Joseph, in his will?
- ii) Did any right vest in the plaintiffs under the terms of the will of Joseph?
- iii) Did Amruthamma have a right to gift or bequeath any property that came to her, under the will of Joseph?

In order to address the above points, it is necessary to discern the intention of the testator, Joseph in his will dated 23.10.1968. There is no dispute between the parties about the execution of the will by Joseph. The controversy, however, is as to the intention expressed therein. It would thus be convenient if the entire content of the said will is reproduced, for ready reference.

The text of the will is as under.

"WILL

This is the Last Will and Testament of Me, R. Joseph, aged 62 years. Roman Catholic Christian, son of Sri. Rayappa, residing at No. D8, HAL. Colony, Bangalore -17, made this Twenty third day of October, One thousand Nine hundred and Sixty-eight.

1. I am now leading a quiet retired life after working in HAL, Bangalore.

2. I own a house bearing Kaneshmari No. 96/69 in Marthahalli, Varthur Hobli, Bangalore South Taluk and two lands bearing Survey Nos. 27 and 28 in Chinnapanahalli, Krishnarajapuram Hobli, Bangalore Taluk and a plot of land measuring 40 x 90 ft. in S. No. 2 of Binnamangala Manavartha Kaval, Krishnarajapuram, Hobli, Bangalore Taluk. The house was purchased by me in my and my wife Srimathi Amruthamma name for Rs. 4000.00 under a duly Registered Deed of Sale dated 1.12.1966 from its previous owner Sri Anka Reddy, Survey Nos. 27 and 28 of Chinnapanahalli were purchased by me for Rs. 10,000.00 under two Registered Deeds of Sale dated 4.03.1962 and 2.07.1962 from their previous owners H.M. Chinnappa Reddy and his two sons. The plot of land in Binnamangala Manavarthe Koval Krishnarajapuram Hobli, Bangalore Taluk was purchased by me for Rs. 500.00 under a duly Registered Deed of Sale dated 12.12.1956 from its previous owner Sri. A.M. Ramarao. In Survey No. 27 of Chinnappanahalli, I have formed a layout by dividing the land into plots with a view to sell them as building sites. I am the absolute owner of the aforesaid properties having acquired the same by my own exertions and without the assistance of any ancestral property or held from any one. Excepting myself none else has any right or interest therein. I have five sons and two daughters namely

(1) J. John Sunder Raj

(2) J. Deva Raj,

(3) J. Jayaraj,

(4) R.J. Shantaraj,

(5) J. Balaraj,

(6) J. Mary Bhagyawathi and

(7) J. Ghani Soundari Susheela. I have celebrated the marriage of all the sons excepting the fifth son J. Balaraj and the daughters. The two daughters have been comfortably settled with their respective husbands. My first four sons have been living separately from me while my last son J. Balaraj is living with me and wife Smt. Amruthamma. My three grand sons namely Leslie, Alphenso and Domnic (all minors) sons of my second son J. Devaraj are under my care and protection.

3. I am now making this will while of sound disposing mind possessing good senses and sound memory with the object of preventing any possible misunderstandings that might arise in the family. I give, devise and bequeath to my wife Srimathi Amruthamma the house bearing Kaneshmari No. 96/69 at Marthahalli, Varthur Hobli, Bangalore Taluk absolutely. I also, give, devise and bequeath the plot of land in Binnamangala Manavarthe Kaval to my wife Srimathi Amruthamma absolutely.

4. I have formed a layout in Survey No. 27 of Chinnappanahalli and intended to form a layout in Survey No. 28 of the same village with a view to sell the plots as buildings sites. The entire sale proceeds of the above sites, I earmark for the maintenance of my wife Srimathi Amruthamma. My wife Srimathi Amruthamma shall be entitled at her discretion to give to my five sons J. John, Sunder Raj, J. Devaraj, J. Jayaraj, R.J. Shantharaj, J. Balaraj and my three grandsons viz. Leslie, Alphonso and Domnick; minor sons of my second son J. Devaraj, such sums as she thinks proper out of the sale proceeds of the sites in the event of the said persons approaching her obediently. In the event of my demise taking place before I sell the sites, my wife Srimathi Amruthamma shall carry out all my intentions stated above. My grandsons mentioned above shall be entitled for their share which may be allotted to them by my wife only after they attain their majority. In the event of my wife's death, any property not allotted by her will automatically revert to my last son J. Balaraj one half of the property and the other half to my three grand sons mentioned above and my second son J. Devaraj equally.

5. My father Rayappa to whom I have been paying Rs.20.00 every month shall be paid the same Rs.20.00 per month as long as he is alive by my wife.

6. My wife shall as residuary legatee, be entitled to take all other

properties moveable, immoveable or cash not mentioned in this will and which I might leave behind. She shall also be entitled to the entire decree amount due to me in L.A.Mis.33/1966 on the file of the Civil Judge's Court (Rural), Bangalore.

7. I do not owe any monies to anyone. Should any monies be still found due at the time of my demise, the same shall be met out of my properties.

8. I appoint my wife Smt. Amruthamma and my fifth son J. Balaraj jointly as executors of this Will authorize them to carry out all the directions contained therein and to do all other acts and things necessary for administering the estate.

9. This Will shall take effect after mydemise.

IN WITNESS WHEREOF, I, R. Joseph have hereto set my hand at NO. D8, HAL. Colony, Bangalore-17, this day Twenty third day of October 1968.

Signed by the Testator and acknowledged by himtobe the last Will and Testament in the presence of us, who at his request, in his presence have hereto subscribed our names as witnesses.

Sd: R. Joseph

Witnesses:

1. Sd. P. Nanjundappa,

No. D9, H.A.L. Colony,

Bangalore -17.

2. Sd: B. Muniappa,

M -6. H.A.L. Township,

Bangalore -17.

It is clearly spelt out by the testator that the house bearing Kaneshmari no. 96/69 at Marathahalli, Bangalore South Taluk and a plot of land in Binnamangala Manavarthe Kaval are bequeathed absolutely to his wife Amruthamma.

The testator has then declared that he has formed a residential lay out in land bearing Survey no. 27 of Chinnappanahalli and that he intended to form one inland bearing survey no. 28 of the same village. And his intention was to sell all the sites. And that the entire sale proceeds was for the benefit of Amruthamma for her maintenance.

And further Amruthamma could, at her discretion, give such sums of money to her five sons and the three grand children, out of the said sale proceeds.

And in the event, the testator were to die before carrying out his intention as above, Amruthamma could proceed in the manner he intended.

In so far as the grandchildren were concerned, Amruthamma would allot any share of the sale proceeds to them only after they attained majority.

In the event of her death, without the said property being "allotted" (sic), such property remaining, would be divided equally between defendant no. 1, on the one hand, and all the plaintiffs, together, on the other.

There is no ambiguity in the intention of the testator that his wife should be the beneficiary of all his properties. In so far as the house sites formed, or to be formed, in the land in Chinnappanahalli, again he had declared that he intended to sell all the sites and the proceeds should go towards the maintenance of Amruthamma. He had left it to her choice to share any part of the proceeds with their sons and minor grandsons, on their attaining majority.

And it was also declared that should the testator die before selling the sites referred to above, she was given a free hand to sell the same and enjoy the proceeds. Apparently, Amruthamma did not choose to sell all the sites and instead chose to bequeath and gift the remaining properties, under registered documents

to the defendants.

It is abundantly clear that Amruthamma had indeed been conferred an absolute right over the properties. It is only if she intended that any of the sons or grandsons should have the benefit of the proceeds that she could confer such benefit. She did otherwise have the power of disposition by way of sale, gift or a bequest by implication. Hence, if she had disposed of the properties in whatever manner, the plaintiffs could not lay claim to the same on the basis of the terms of the will relying on that part of the will, whereby Joseph had indicated that if any properties remained, which Amruthamma had not "allotted" (sic) before her demise, the same would be divided equally between defendant no. 1, on the one hand and all the plaintiffs, together, on the other hand.

The above points framed for consideration thus stand answered as follows.

An absolute right was conferred on Amruthamma in respect of the properties that are the subject matter of the will of Joseph.

There was no vested right conferred on the plaintiffs, in terms of the will.

Amruthamma had the power and right to bequeath or gift the properties involved.

In so far as the challenge to the genuineness of the will of Amruthamma is concerned, the same having been held proved in accordance with law, by the trial court. The detailed reasons assigned in that regard are mainly attacked on the ground that the opinion of a hand writing expert has been negated. There is no illegality in that regard, the court was not bound by any such opinion. The court cannot be said to be divested of its discretionary jurisdiction, especially in the facts and circumstances of a given case. There was other evidence in the case on hand which could not be ignored even if some doubt was raised about the differences in the admitted and disputed signatures of the testatrix.

In the result, the appeals are dismissed.

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