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Thayappa Vs. Aswathanarayanappa

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Court : Karnataka

Decided On : Sep-28-1987

Reported in : ILR1987KAR3710

Judge : Chandrakantaraj Urs and ; Navadgi, JJ.

Acts : Hindu Succession Act, 1956 - Sections 14(1) and 30

Appeal No. : R.F.A. No. 191 of 1978

Appellant : Thayappa

Respondent : Aswathanarayanappa

Advocate for Def. : P. Krishnappa, Adv.

Advocate for Pet/Ap. : C.N. Kamath, Adv.

Disposition : Appeal dismissed

Judgement :

Chandrakantaraj Urs, J.

1. The appellant Thayappa who was defendant No. 1 in the trial Court is aggrieved by the judgment and decree passed in O.S. 6 of 1976 on the file of the then Civil Judge, Bangalore District, Bangalore, The judgment and decree is dated 9-12 1977.

* R.F.A. No. 191 of 1978 dated 28th September 198(sic)

2. The suit was filed by the plaintiff-Aswathanarayanappa and his cousins Smt. Ankamma and Smt. Nagamma who were the daughters of his pre-deceased uncle, the brother of his father The suit was for partition and possession of the suit schedule properties which he claimed were joint-family properties of the joint family. They alleged that one Koogur Munishamappa was the propositus and he had two sons Koogur Venkatappa and Koogur Nagappa. Kugoor Munishamappa, the Propositus, died long ago. Kugoor Venkatarpa died some five years before the filing of the suit. The other son of Koogur Munishamappa, that is, Koogur Nagappa also died long prior to the filing of the suit. Koogur Venkatappa, the first son, was married to Sunkamma who died some three years before the presentation of the suit leaving behind her daughters Ankamma and Nagamma, plaintiff Nos.2 and 3.

3. The other branch of the family headed by Koogur Nagappa consisted of Papamma who died some 7 years before the filing of the suit leaving behind her sons, Thayappa, Defendant No 1 and Aswathanarayanappa, Plaintiff No. 1. The relationship is not disputed.

4. In the suit claim for partition by metes and bounds and separate possession, Defendant No. 1 set up in defence, the will said to have been executed by Sunkamma, wife of Koogur Venkatappa by which the properties were to be divided only between himself and his brother plaintiff No. 1. He also denied the claims of the 1st plaintiff to a share on the ground that he had left the family after taking his share some 20 years before the filing of the suit and he was living separately in the village Bile Shivalaya of Hosakote Taluk. He denied that the 1st plaintiff was in the joint family along with him. He also contended that plaintiffs 2 and 3 were married some 35 years before and they had been given all the money, jewels etc. and therefore, they were not entitled to any share in the joint family properties. He asserted that Sunkamma, his aunt, died on 15-7-1972 and she had executed a registered Will dated 11-6-1971 in terms of which plaintiffs 2 and 3 had received Rs. 5,000/- each and therefore, they were not entitled to any share in the suit schedule properties in terms of the Will.

5. On account of certain acquisitions having taken place before the filing of the suit, defendants 2, 3 and 4 the Acquisition Officers and the Deputy Commissioner, Bangalore, were made parties only for the purpose of formality. In any event, they remained ex parte.

6. On such pleadings, as many as 7 issues were framed. They are as follows ;

(1) Whether the 1st defendant proves that the 1st plaintiff separated from the joint family about 20 years back ?

(2) Whether wife of Kugoor Venkatappa has executed a Will as alleged by the 1st defendant ?

(3) Whether plaintiffs 2 and 3 have received Rs. 5000/-each under the said Will of their mother If so, whether they cannot claim a share in the suit properties ?

(4) Whether plaintiffs are entitled to any share in the suit properties If so to what share ?

(5) Whether the suit is barred by Limitation ?

(6) Whether defendant-4 is not a necessary or proper party to the suit ?

(7) Whether the plaintiffs are entitled to the declaration sought for V

The issues were held against defendant No. 1. In the result, the suit came to be decreed and a preliminary decree was directed to be drawn up as prayed for. Even after recording a finding that the will set up by Defendant No. 1 was validly executed by Sunkamma, the trial Court held that she was not competent to make disposition therein on account of the fact that she lacked title to make such dispositions in favour of plaintiff No. 1 and defendant No. 1.

7. Before us, Mr. Kamath, learned Counsel for the appellant, while not challenging the findings recorded in respect of other issues, has Contended that the said Will Exhibit D-1 should be so interpreted to give effect to the terms of the Will and it must be understood in such a manner that what Sunkamma had willed was only the undivided interest of her husband Venkatappa and therefore, the trial Court

had erred in holding that the dispositions of suit-schedule A and B properties in favour of defendant No. 1 and Plaintiff No. 1 were not capable of being given effect to on the ground of lack of competence to make such dispositions. Therefore, we have to examine the scope and merit of this appeal on the submissions made. In that sense, what falls for determination by us are the following :

(1) Whether Sunkamma, mother of plaintiff Nos. 2 and 3 was competent to testamentary dispose of her share of the undivided interest of her husband by Exhibit D-1 ?

(2) If the answer is that she was capable of so disposing of, then whether the Will should be read in such a manner so as to give effect to the dispositions to the extent possible in favour of defendant-1 and plaintiff-1 ?

8. Mr. Kamath straight away drew our attention to a Full Bench Opinion of this Court in the case of Sundar Adappa and Ors. -v.- Girija andOrs., 1962 Mys. L.J. 1. He placed reliance on the observations made in the said decision by Hegde, J., as he then was, speaking for the Full Bench which is to the following effect :

'In other words, while the interest of the deceased coparcener is quantified and provision is made for its intestate succession under Section 6, the same interest is made capable of testamentary disposition by Section 30(1). To sum up Section 6 read with Section 30(1) conferred on a coparcener in a Mitakshara family or his heirs as the case may be the following rights :- (1) the coparcener's undivided interest as quantified by Section 6 would go by intestate succession to his personal heirs under the 'Act' ; and (2) the same interest could be disposed of by the coparceners by means of testamentary disposition under Section 30(1).'

Before we examine the effect of those observations, we may briefly state the thrust of the arguments advanced by Mr. Kamath, for the appellant. It was his contention that if the Will was duly executed, the Court should lean in favour of giving effect to the testatrix's disposition as far as possible. He also drew attention to Section 6 which provided for a notional partition for the purpose of determining the share of the deceased coparcener and therefore, what was disposed of under the will was a specific known interest inherited by Sunkamma on the death of her husband

Venkatappa who was entitled to half share in the joint family properties and therefore, the bequests made must be understood as a bequest of her interest in favour of Plaintiff No. 1 and Defendant No. 1. When that was possible, the Court atleast should give what would have been her share in the interest of her deceased husband to plaintiff No, 1 and Defendant No. 1 in addition to what they were entitled to in their own right as coparceners.

9. We have been taken through Sections 4, 6, 14, 19, 23 and 30 of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Act'). Mr. Kamath laid emphasis on the fact that by virtue of Section 4 of the Act, the provisions of the Act should prevail over any other law and therefore, if Section 6 provided for devolution of interest by succession and not by survivorship, Sunkamma should beheld to have inherited 1/3 interest of her husband's half interest in the joint-family properties. This proposition cannot he and is not disputed.

10. The question is what is the interest which has been transferred to plaintiff No. 1 and defendant No. 1 by way of bequests under the Will. Therefore, we must necessarily look at the recitals in the Will which we think, make the matters clear. Exhibit D-1 is dated 1(sic)-6-1971. It is stated in Kannada.

From the above, it is clear that the testatrix was not claiming 1/3 interest in her husband's half interest in the joint family properties but she was claiming the whole half interest as belonging to her on the ground that her daughters had been given by way of gifts by her and her husband during his life time. In other words, her assertion was to deny the very right of inheritance which she claimed for herself to her daughters, plaintiffs 2 and 3.

11. Even later, the following is the testamentary disposition ;

This again is not merely conferment of the right over the properties in Schedule-B in favour of defendant No. 1 and Plaintiff No 1 but to deny the rights of plaintiffs 2 and 3. The language is very clear and leaves no doubt in our mind that the disposition was made not in respect of her fractional interest in the undivided interest of her husband but her late husband's interest itself. We are, therefore, on a proper interpretation of the Will at Exhibit D-1, have no hesitation to come to the

conclusion that the dispositions of properties by bequests was beyond her competence.

11. In fact, the decision of this Court in Sundar Adappas case1, supra, is not really helpful to the appellant's case as made out in this Court as well as in the trial Court, in so far as it relates to the question of the Will. In Sundar Adappa's case1, the Division Bench which was originally seized of the matter formulated the questions for the opinion of the Full Bench having regard to the importance of the question that arose before it on account of the changes made in the Act to the customary law applicable to Hindus. Parties therein were governed by Aliya Santhana law of Dakshina Kannada District. The questions formulated were as follows :

'(1) Whether, by virtue of the Explanation to Sub-section (1) of Section 30 of the Hindu Succession Act, 1956, the interest of the first defendant in the share taken by him as the sole member of a nissanthathi kavaru, became capable of being disposed of by Will and

(2) Whether Sub-sections (3), (4) and (5) of Section 36 of the Aliyasantbana Act are inconsistent with the Explanation to Sub-section (1) of Section 30 of the Hindu Succession Act, 1956 and, do they, by the operation of Sub-section (1)(b) of Section 4 of the Hindu Succession Act, cease to apply ?'

The answers given by the Full Bench to both the questions were in the negative. It was stated as follows in the concluding paragraph of the opinion :

'For the reasons mentioned above, both the questions referred for our decision are answered in the negative.'

In other words, on the facts of that case, the Will made by the 1st defendant who died during the pendency of the suit was held to be incompetently made.

12. It is further contended by Mr. Kamath that whatever she is deemed to have inherited from her husband at a notional partition just before his death contemplated under Explanation to Section 6 of the Act became her absolute property in terms of Section 14 of the Act and therefore, whatever she has

disposed of under the Will Exhibit D-1 should be given effect to confining it to her interest so inherited. The difficulty is, the terms of dispositions which we have extracted above earlier specify not her fractional interest in the Schedule-B properties. Therefore, the trial Court found it difficult to implement the terms of the Will and give effect to the bequests. It is only when ascertained properties fall to the share of a Hindu female which can be said to have been acquired by her before or after the commencement of the Act that becomes her absolute property in terms of Sub-section (1) of Section 14 of the Act. In fact, in the recent decision of the Supreme Court in the case of Jagannathan Pillai -v.- Kunjithapadam Pillai and ors., : [1987]2SCR1070 it has been explained in no uncertain terms that wide meaning should be given for the word 'possessed' occurring in Sub section (1) of Section 14 of the Act. The Supreme Court has held that there was no escape, from the conclusion that possession, physical or constructive of any property, in legal sense, on the date of the coming into operation of the Act was not a sine qua non for the acquisition of lull ownership in property. In fact, the intention of the Legislature was to do away with the concept of limited ownership in respect of the property owned by a Hindu female altogether. The ruling pre-supposes that there must be a specific property possessed in the manner suggested by the Supreme Court, which becomes absolute property of a Hindu female which she is capable of disposing of under Section 30 of the Act. But, on the facts which in themselves are not in dispute before us, there was no ascertainment or identity of the property which may be said to have been possessed by the testatrix Sunkamma. She appears to have been in overall control and administration of the properties of the joint family after the death of her husband. Certain other recitals in Exhibit D-1 clearly indicate that If certain sums were paid by the Government for acquiring certain properties, she would herself collect the compensation and make disbursements in favour of daughters and in case compensations were paid after her death the compensations received, for the lauds acquired by the Government (Military Department) must be paid to her daughters. In other words, we should not lose sight of the fact that in this part of Karnataka rights available to a widow to acquire interest in the coparcenary property available to a widow in some other parts of Karnataka would not at all be available to Sunkumma. In Mithakshara School outside, the South, namely, Karnataka, Kerala, Tamilnadu and parts of

Andhra Pradesh, wife or a widow of a coparcener is entitled to a share in the joint family properties in her own right as such widow, in the sense, she, when there is a partition, actual or notional, will be entitled to a share under the customary Hindu law itself and does not have to depend upon the proviso to Section 6 as in the case of widows or other class- 1 female heirs in this part which forms part of the erstwhile State of Mysore. The rights in the erstwhile Mysore State in so far as it related to unmarried daughters and widows were strictly controlled by the provisions of Section 8 of the Hindu Womens Property Right Act, 1933 of the erstwhile State of Mysore. That Act was repealed by the Act and therefore, the effect on the death of Venkatappa was that nothing other than the proviso to Section 6 governs the right of inheritance of Sunkamma and plaintiffs 2 and 3. In that view of the matter, It is hardly necessary for us to go into the question, whether or not Sunkamma was competent to make a will and will-away her properties to some one also.

13. Undoubtedly, Section 30 of the Act confers on a Hindu the right to make testamentary disposition of the property when he/she has title. But, that is not the same as saying that under Section 6 of the Act a female has a right to make testamentary disposition of her undivided interest unless she has acquired that right in the Co-parcenery property by virtue of law applicable to her. As we have pointed out, in other parts of Karnataka and elsewhere, when such interest in acquired by a widow she may dispose of the same under Section 30 of the Act.

14. We, therefore, do not find any compelling reasons to interfere with the conclusion reached by the trial Court that Exhibit D-1 though proved to have been duly executed is not capable of being given effect to on account of the incompetence of the testatrix to make dispositions in the manner she had made. It is not difficult to understand the problem. Schedule-B properties mentioned in the will consisted of immovable properties. But which of that should go to whom would be an impossible task unless the testatrix indicated further as to particular property in the B-Schedule should go to one or the other of her nephews. Nor this Court should overlook the fact that there is disposition of properties, which plaintiffs 2 and 3 could otherwise possess as female heirs of Class I to their father, just as the Testatrix in favour of Plaintiff No. 1 and Defendant No. 1

15. In the result, we dismiss this appeal as misconceived.

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