

Mohamadsa Vs. Allisa

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Court : Karnataka

Decided On : Jan-19-1988

Reported in : 1988(2)KarLJ89

Judge : K.A. Swami and ;D.R. Vithal Rao, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 ;Karnataka Village Offices Abolition Act, 1961 - Sections 4, 5(1), 6 and 7 ;[Limitation Act, 1963](#) - Article 110

Appeal No. : R.F.A. No. 749 of 1987

Appellant : Mohamadsa

Respondent : Allisa

Advocate for Pet/Ap. : Suresh Joshi

Disposition : Appeal dismissed

Judgement :

K.A. Swami, J.

1. This appeal by defendants 1 to 3 is preferred against the Judgment and decree dated 31-8-1987 passed by the learned Additional Civil Judge, Bijapur in O.S. No. 178 of 1983.

2. The learned trial Judge has passed a decree for partition and separate possession of 2/3rd share of the plaintiffs in the suit schedule properties bearing R.S. Nos.64, 74 and 77 of Niralgi village.

3. The relationship between the parties is not in dispute. It is not in dispute that the suit lands in question were assigned to the village office. Maktumsa was the Walikar of the village. The lands were to be enjoyed by the propositus Maktumsa. Maktumsa had three sons by name Madansa, Allisa and Mashaksa @ Mashanna. Madansa had three sons by name Mohammadasa, Hanifsa and Kasimsa. The two sons of Maktumsa i.e., Allisa and Mashaksa alias Mashanna are the plaintiffs 1 and 2 in the suit. The aforesaid three sons of Madansa are defendants 1 to 3 in the suit. The suit was for partition and separate possession of 2/3rd share in the aforesaid three lands as well as in other two lands bearing R.S. Nos.61/1 and 61/2 of Niralgi village, Sindhgi Taluk.

4. The case of the plaintiffs is that the lands bearing R.S. Nos.64, 74 and 77, which shall hereinafter be referred to as the suit lands were assigned to the village office which was granted to their father Maktumsa; that as the suit lands were assigned to the village office, the same were to be enjoyed by the holder of the village office which was to go to the elder member of the family ; that it was because of this, the suit lands were enjoyed by Madansa. The village office came to be abolished by the Karnataka Village Offices Abolition Act, 1961 and the suit lands were also regranted on 3-9-1973 in the name of Mohammadasa; that after the regrant, the suit lands became rayatwa lands and as such the plaintiffs became entitled to have 2/3rd share.

5. The defendants resisted the suit. They contended that the plaintiffs were not entitled to have any share in the suit lands; that the suit lands were exclusively enjoyed by their father Madansa and after his death by the defendants and that the regrant also had taken place in the name of defendant No. 1; therefore, he had become exclusive owner; that the suit was barred by res judicata and that the suit was barred by time.

6. On the basis of the pleadings of the parties, the trial Court framed the following issues:

- 1) Do the plaintiffs prove that they are entitled to partition and possession of 2/3rd share in the suit property?
- 2) Does defendant-1 prove that defendant-1 alone is the owner of suit land in view of the regrant?
- 3) Is the suit of the plaintiffs hit by the principles of res judicata?
- 4) What decree and what order?

ADDITIONAL ISSUE:

- 1) Whether the suit is barred by time?

7. The trial Court held that the plaintiffs were entitled to partition and separate possession of their 2/3rd share; that defendant-1 failed to prove that he alone was entitled to be the exclusive owner of the suit lands because they were regranted in his name; that the suit was not hit by res judicata and it was not barred by time.

8. The records of the case were also called for and received.

9. In the light of the contentions urged, the following points arise for consideration:

1) Whether the suit is barred by res judicata having regard to the order passed by the Mamlatdar, Sindhgi, in Wahiwati Suit as per Ex.D.28 and the Judgment and decree passed as per Ex.D.6 and Ex.D.7 respectively in O.S.No. 69/1966?

2) Whether the suit was barred by time?

POINT NO. 1:

10. Sri Suresh S. Joshi, learned Counsel for the appellants submit that during the lifetime of Maktumsa, Madansa, the father of the defendants officiated as walikar and on that basis, he filed Wahiwati Suit No. 6/1947 in the Court of the Mamlatdar, Sindhgi for a permanent injunction in respect of one of the suit lands viz., S.No.64 of Niralgi village against Allisa, plaintiff-1 and 5 others. That suit ended in his favour and a decree for permanent injunction was passed on 4-11-1947 as per Ex.D.28, that that that decree operates as res judicata against both the

plaintiffs herein as the basis for the share claimed by the other plaintiff is also similar to the one claimed by Allisa who is no other than the brother of plaintiff-2. Similarly Mohammedsa son of Madansa, defendant-1 in the present suit, filed C.S.No. 69/1966 in the Court of the Munsiff, Bijapur against Allisa for a declaration that he was the owner of the suit lands bearing S.Nos.64, 74 and 77 of Niralgivillage which are concerned in the present suit also and for a permanent injunction. That suit was decreed on 30-6-1966. Ex.D.6 and D.7 are the Judgment and decree respectively passed in the said suit by the Court of the Additional Munsiff, Bijapur. The contention is that the decree passed in C.S.No.69/66 operates as res judicata. Therefore, the plaintiffs are not entitled to claim any share in the suit properties.

11. The trial Court has rejected the contention. It has held that the order Ex.D.28 and the Judgment and decree D.6 and D.7 are of no consequence after the abolition of the Village Office as the rights of the parties are governed by the provisions of the Karnataka Village Offices Abolition Act, 1961 (hereinafter referred to as the 'Act'); that after the abolition of the village office and regrant, the suit lands have become available for partition as on regrant the suit lands have become ryotwari lands.

12. We have perused the order dated 4-11-1947 (Ex.D.28) passed by the Mamlatdar, Sindhgi in Wahiwati Suit No. 6/1947. That was a suit filed under the provisions of the Bombay Mamlatdars Court Act, 1906. It was a wahiwati suit for permanent injunction filed by Madansa, father of the present defendants on the basis of possession against Allisa (plaintiff-1 herein) and 5 others who were not in any way concerned with the parties herein or the land S.No. 64 of Niralgivillage. Mashaksa @ Mashanna (plaintiff-2 herein) does not claim through Allisa who was a party to Wahiwati Suit No. 6/1947 even though both of them are brothers. They claim through their father Maktumsa. As such the order passed in Wahiwati Suit No. 6/1947 as per Ex.D.28 against Allisa cannot at all operate as res judicata against plaintiff-2 Mashaksa @ Mashanna as he was not a party to the said suit. The Mamlatdar under the Bombay Mamlatdars Court Act, 1906 was not competent or had no jurisdiction to entertain and try a suit for partition and separate possession. Therefore, one of the essential requirements to apply the Rule of Res

Judicata viz., that the Court which tried the previous suit must have been competent to try the subsequent suit or issue raised in a subsequent suit is not satisfied. The Court of the Mamlatdar was not competent to try the present suit even as per the law as it stood then. In addition to this in Wahiwati Suit No. 6/1947, the issue relating to the right of the plaintiffs to one of the suit lands viz., S.No. 64 of Niralgi village which was the subject matter of Wahiwati Suit No. 6/1947 was not directly and substantially in issue. That was merely a suit for permanent injunction based on the ground that Madansa, the father of the defendants was in possession and enjoyment of one of the suit lands viz., S.No. 64 of Niralgi village as 'holder of the village office.' In such a suit, the title to the land will not be directly or substantially in issue. The only question that arises for decision is whether the plaintiff was in possession of the suit land on the date of the suit. Any observations or matters which were not and could not have been directly in issue and not being essential to support the Judgment, cannot be construed to be conclusive. Therefore, a decree for permanent injunction does not operate as res judicata in a subsequent suit filed either for partition or for declaration of title. (See BASAVANNAGOUDA FAMIRA GOUD PATIL BY LRD. v. STATE GOVERNMENT AND ORS., 1976(2) KLJ 149)

13. Civil Suit No. 69/1966 was filed by the present defendant-1 against Allisa, the present plaintiff-1, in respect of all the three suit lands herein for a declaration that he was the owner of the present suit lands and for a permanent injunction. He claimed title to the suit lands on the ground that the suit lands were walikar inam lands granted to his father who died about two years ago and after his death, the revenue authorities had appointed him as the walikar of the village and the three suit lands herein were granted to him and he was in possession and enjoyment of the same. Allisa remained absent though served. The suit was decreed declaring that the plaintiff (defendant-1 herein) was in peaceful possession and enjoyment of the suit lands being the walikar of the village in question and the defendant (present plaintiff-1) was restrained by way of permanent injunction from obstructing the possession of the plaintiff therein.

14. From the Judgment Ex.D.6, in C.S.No. 69/66, it is clear that the title of the present defendant-1 to the suit lands was declared on the basis that he was in

possession and enjoyment of the suit lands being the walikar of Niralgi village, to the office of which the suit lands were assigned. No doubt, it was a suit for declaration of title and injunction in respect of the suit lands in question. But it was not filed against all the sons of Maktumsa; it was filed only against Allisa, the present plaintiff No. 1. As Mashanna @ Mashaksa, the brother of Allisa does not claim through Allisa but he claims in his own right as a heir to Maktumsa, the decree declaring the title and granting permanent injunction passed in C.S.No. 69/1966 against Allisa cannot operate as res judicata because one of the requirements to attract the rule of res judicata is that the former suit must have been between the same parties or between the parties under whom they, or any one of them litigating under the same title. In addition to this, the basis for passing the decree in C.S.No. 69/66 was that Mohamadsa was officiating as walikar of the village as per the law stood then. Before the abolition of the village office, the lands assigned to the village office were to be enjoyed by the officiator of the village office. After the abolition of the village office, on the coming into force of the Act, that basis has disappeared. The suit lands have ceased to be Sheth-Sanadi lands assigned to the village office and on regrant, the suit lands have become Ryotwari lands available for partition among those who are entitled to a share in them as per the personal law relating to succession and inheritance of properties. Therefore, the decree in C.S.69/ 66 cannot be held to operate as res judicata.

15. The consequences of abolition of village office and regrant of the lands assigned to the village office are considered in a Division Bench decision of this Court in SHIVAPPA FAKIRAPPA SHETSANADI v. KANNAPPA MALLAPPA SHETSANADI, : ILR 1987 KAR3155 . In that decision, after referring to a Full Bench Decision of the High Court of Bombay in LAXMIBAI v. GANESH, : AIR 1977 Bom350 which is approved by the Supreme Court in NAGESH BISTODESAI v. KHANDO THIRMAL, : [1982] 3 SCR 341 which arose out of a decision of this Court, it has been held thus:

'9.....There is nothing in Section 4 of the Act which can be held to affect the personal law of the parties so as to deprive the junior members of the family of their right to claim partition of the suit land on the abolition of the village office and resumption and regrant of the land.

10. Section 4 of the Act, as it is already pointed out, abolishes all village offices and extinguishes all the incidents appertaining to the village office and resumes the land annexed to the village office subject to the provisions of Sections 5, 6 and 7 of the Act. Section 5 provides for regrant of the land resumed under Section 4 of the Act to the holder of the village office. It provides that the land resumed under clause (3) of Section 4 in case not falling under Sections 6 and 7 of the Act shall be regranted to the person who was the holder of the village office immediately prior to the appointed date on payment by or on behalf of such holder to the State Government the occupancy price. It is this holder of the village office immediately prior to the appointed date who is referred to as the 'holder' in the latter portion of the Act. As to what would be the effect of regrant will be considered a little later.

12. The decision of the Supreme Court in Nagesh Bisto's case : [1982]3SCR341 though rendered under the provisions of the Bombay Paragana and Kulkarni Watans Abolition Act and Bombay Merged Territories Miscellaneous Alienations Abolition Act, 1955, having regard to the similarity of the provisions contained in the Act, its squarely applies to the case on hand. In the Act also, the expressions 'holder of a village office' and 'holder' are defined as meaning a person having an interest in a village office under an existing law relating to such office. The proviso therein is not relevant for our purpose. An 'interest in the village office' means and includes the right of survivorship of a member of a joint family. In other words, a member of a joint family even though he may belong to a junior branch, has a right to succeed to the office in the event none is available in the senior branch to succeed to the office. This right of survivorship is, as already pointed out, one of the four rights of the members of the Hindu Joint Family in respect of a joint family property. Thus the result of the aforesaid discussion is that the inferior village office which was granted to the great-grand-father of the parties and the suit land which was annexed to the said office, on abolition of the village office and resumption of the suit land as a consequence of abolition of the village office became available for regrant under Section 5 of the Act. The plaintiff, who was officiating as Sheth-Sanadi immediately prior to the appointed date became entitled to have the suit land regranted as per Section 5 of the Act. Accordingly, the regrant has been made in his name. But the village office and the suit land annexed to it did not cease to be the joint family property nor there is any evidence to show that the junior

members of the family, i.e., the defendants, ever relinquished their right either in the village office or in the suit land so as to make the village office and the land annexed to it, the exclusive property of the plaintiff or his father. Thus the village office and the land annexed to it continued to be the joint family property till the appointed date on which date the village office was abolished and the land annexed to it was resumed.

13.....Until the abolition of the village office and the resumption of the suit land annexed to the village office, the suit land was to go along with the village office and as such it was not available for partition. After the abolition of the village office and resumption of the suit land, it became a ryotwari land only on regrant and as such it was then that the suit land came to be released from the nature of its impartibility.

14.....The definition of the expression 'holder of a village office' or 'holder' means a person having an interest in the said office under an existing law relating to such office and the expression 'existing law relating to a village office' includes any enactment, ordinance, rule, bye-law, regulation, order, notification, firman, hukum, vat hukum or any other instrument or any custom or usage having the force of law relating to a village office which may be in force immediately before the appointed date [Section 2(f)]. The village office in question was governed by the Bombay Hereditary Offices Act, which did not exclude the members of the joint family from succeeding to the office in the event of non-availability of a member in the senior branch of the family to succeed to the village office. Thus the law governing the village office on the appointed date did not prohibit the junior branches succeeding to the village office in the event of non-availability of a member to succeed to the village office in the senior branch. It is this right which is called the 'right of survivorship' which is one of the rights of the members of the joint Hindu family. It is this right which is not excluded by the Act. Therefore, the junior members of the family had an interest in the village office and as such they must also be considered as 'holders of the village office' in question. It is this right which indicated the interest of the junior members of the family in a village office under an existing law relating to such office. The regrant was made in the name of the plaintiff under Section 5 of the Act because he was a person who was a holder

of a village office immediately prior to the appointed date. Such a regrant did not take away the right of the junior members to seek partition in the suit land as per their personal law.'

16. No doubt the rule laid down in Shivappa Fakirappa Shetsanadi's case, : ILR 1987 KAR3155 was in a case arising out of a suit for partition filed by members of the Hindu Joint Family whereas the case on hand relates to members of a Muslim family, still it can be applied in as much as in the instant case the plaintiffs and the defendants being the descendants of the common propositus Maktumsa to whom the village office was granted, also fall within the definition of 'holders of a village office' because the suit lands were assigned to a village office, and the plaintiffs are the sons of Maktumsa, the defendants are the grandsons of Maktumsa, being the children of Madansa, who was the brother of plaintiffs, being one of the sons of Maktumsa. As such the plaintiffs had an interest in the village office under an existing law relating to village office because in the absence of the heirs from the elder branch, the plaintiffs were entitled to officiate as Sheth-Sanadis. On the abolition of the village office, as per Section 4 of the Act, the suit lands stood resumed to the State, subject to the provisions of Sections 5, 6 and 7. Sub-section (1) of Section 5 of the Act provides that 'a land resumed under clause (3) of Section 4 shall, in cases not falling under Section 6 and Section 7, be granted to the person who was the holder of the village office immediately prior to the appointed date.....' On the abolition of the village office, the suit lands came to be regranted in the name of the 1st respondent. Such a regrant did not take away the right of a junior member of the family who had an interest in the village office to seek partition and possession of his share in the suit lands according to his personal law. The regrant was made in the name of the 1st defendant under Section 5 of the Act because he was a holder of village office immediately prior to the appointed date.

17. In addition to the above, A Division Bench of this Court in APPASAHEB TULIJARAMRAO NIMBALKAR AND ORS. v. KRISHNABAI BHRITARGANAPATRAO DESHMUKH, RFA 25 of 1963 DD 23-10-1968 while considering the effect of regrant made under the Bombay Paragana and Kulkarni Watan (Abolition) Act, 1950, which is in pari materia with the Act with which we are concerned has held thus:

'The regrant to the holder of the Watan is part of the scheme of the abolition of the watan and resumption of the lands. Suppose the suit lands had been regranted to plaintiff No. 1 as the holder of the watan, the lands could not have been resumed by him from Ramachandra Rao if he were alive or had left male issue. We have held that Ramachandra Rao died as an undivided member of his joint family. When he was an undivided member of the family he obtained the suit lands on regrant on the basis that he was the holder of the watan. Illustration (b) to Section 90 of the Indian Trusts Act makes it abundantly clear that in such a case, he must hold the lands for the benefit of himself and other members of the undivided family.'

This principle is applied to a Mohammedan family holding Sheth-Sanadi lands immediately on the appointed date, by a Seamed Single Judge of this Court in AMINSAHEB DASTAGIRSAHEB MULLA AND ORS. v. HUSEN-SAHEB RASULSAHEB MULLA AND ANR., RSA 281 of 1972 DD 22-6-1976. The relevant portion of the Judgments as follows:

'Shri R.P. Hiremath, learned Counsel for the defendants has not been able to show any authority in support of the proposition that the land which was a seth sanadi inam land was not partible. The lower Appellate Court, while deciding the case, has relied upon a decision of this Court in R.F.A.No. 25/1963 (Appasaheb and ors. v. Krishnabai)

20. The trial Court has rejected this contention. The suit lands came to be regranted in the name of the 1st defendant only on 3-9-1973. It is only from that date, the suit lands became available for partition. Till then, the plaintiffs could not have maintained a suit for partition. The suit is filed within 12 years from the date of regrant. Possession of the defendants of the suit lands in exclusion of the plaintiffs can be considered to have become adverse only from the date of regrant i.e., from 3-9-1973. The trial Court has applied Article 110 of the Limitation Act. That Article applies to a person who is excluded from joint family properties to enforce a right to share therein; but it does not apply to Muslims because there is no joint family among Muslims.

21. On regrant of the suit lands in favour of the 1st defendant, the plaintiffs and the defendants became the co-owners as each one of them became entitled to a share

in the suit lands. A right of a co-owner can be extinguished by another co-owner by an Act of ouster and thereby depriving or keeping away by positive act the other co-owner from the use and enjoyment of the property for a continuous period of 12 years. Apart from the fact that there is no plea of ouster raised by the defendants and no issue is also raised in this regard, even if it is presumed that exclusive possession and enjoyment of the defendants from the date of regrant i.e., 3-9-1973 amounted to ouster and thereby it became adverse to the plaintiffs, the suit is filed within a period of 12 years from 3-9-1973, as it is filed on 19-12-1983. Therefore, applying Article 65 of the Limitation Act, 1963, the right to seek partition and possession of their share by the plaintiffs cannot be said to have been lost as 12 years have not elapsed from 3-9-1973. Accordingly, it is held that the suit was filed well within time. Hence point No. 2 is answered in the negative.

22. It is lastly contended that the parties are not residing together and they have divided their ryotwari lands long back. The division of the ryotwari properties and the parties not living together are not relevant. The suit lands are the Sheth-Sanadi lands attached to the village office. As long as the village office continued, the suit lands were to go along with the village office and were to be enjoyed by the holder at the village office. They came to be released from the category of sheth-sanadi inam lands and became ryotwari lands and available for partition only on the abolition of the village office and regrant of the same under Section 5 of the Act. Till then the plaintiffs could not have sought for partition and possession of their shares in the suit lands. Therefore, the fact that the plaintiffs and the defendants had divided their ryotwari properties and were living separately for a long period is of no consequence and does not have any bearing on the right to seek partition of the suit lands which had accrued to them only on 3-9-1973. Accordingly, the contention is rejected.

23. The learned Counsel for the appellants on 19-1-88 took time till today (25-1-1988) to point out that 2/3rd share allotted to the plaintiffs by the trial Court is not in accordance with law. Therefore further pronouncement of the Judgment was postponed to today (25-1-1988). No argument is advanced today and nothing is pointed out as to how the allotment of 2/3rd share to the plaintiffs in the suit properties is not in accordance with law.

24. Apart from the plaintiffs and the defendants, there are no heirs of deceased Maktumsa, the original grantee. He had three sons (1) Madansa; (2) Allisa; and (3) Mashanna @ Mashaksa. The last two are the plaintiffs. The first one Madansa is no more and the defendants are the sons of Madansa. That being so, the defendants are entitled to the share to which their father Madansa was entitled in the suit lands which was $\frac{1}{3}$ rd. So also each of the plaintiffs is entitled to $\frac{1}{3}$ rd share. Thus both of them together are entitled to $\frac{2}{3}$ rd share. Hence the $\frac{2}{3}$ rd share awarded by the trial Court to the plaintiffs in the suit lands cannot be held to be illegal.

25. No other contention is urged.

26. For the reasons stated above, we do not see any ground to admit this appeal. It is accordingly dismissed.

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