

Babu Rao Vs. Datta Rao

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Court : Karnataka

Decided On : Jul-01-1991

Reported in : ILR1991KAR3262

Judge : B. Jagannatha Hegde, J.

Acts : Aliyasanthana Law; Marumakkathayam Law

Appeal No. : M.S.A. No. 41 of 1986

Appellant : Babu Rao

Respondent : Datta Rao

Advocate for Def. : B.P. Holla, Senior Adv. and ;Udaya Holla, Adv. for R-1 to R-3

Advocate for Pet/Ap. : B.V. Acharya, Senior Adv.

Disposition : Appeal dismissed

Judgement :

B. Jagannatha Hegde, J.

1. The only point that arises for consideration in this Miscellaneous Second Appeal is - .

'Whether the bequest under the Will executed by Guruvappa on 23rd January 1931 was in favour of K. Babu Rao, Jaka Bai, Vasudeva Rao and Seethu or was it in favour of the entire Kavaru of Seethu with the incidents of law of Aliyasanthana?'

2. On 22-1-1931 one Guruvappa resident of Kodialbail village within the limits of Mangalore town executed a will Ex.P-1 bequeathing his moveable and immoveable properties. In Ex.P-1, he states that he is a retired - Shroff of Imperial Bank and a person following Aliyasanthana System of Law, that he has not derived any benefit from his Aliyasanthana family and that the properties that are subject-matter of the will were all his self- acquisitions and that he has been enjoying the same as such. He cancels an earlier will executed by him on 12-11-1991 and stipulates that his son Ram Mohan by his deceased first wife and his Aliyasanthana heirs are not entitled to inherit any of his properties. After stating so, he bequeathed the properties described under the will Ex.P-1 to his second wife Seethu, his children by her, namely, Jaka Bai, Babu Rao, Vasudeva Rao and also to his children by Seethu to be born thereafter. He states that these persons should enjoy the said properties independently, absolutely and for generation to generation. But, he stipulates that none of them have right to incur debts and encumber the said properties and if they do so, they are personally liable to discharge the same. He also stipulates that if after his death, his second wife Seethu contracts remarriage or enters into a fresh relationship (Sammamda) according to 'Tulu Practice', then the rights created in her favour under the will shall stand forfeited and that only his children born to Seethu Hengsu shall have rights in the properties thereafter.

3. While interpreting a will, the Court has to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole. The Court also must consider the surrounding circumstances, the position of the testator, his family relationship the probability that he would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure The Court is entitled to put itself into the testator's armchair. But all this is solely as an aid to arriving at a right construction of the will. The duty of the Court is to carry out the

intention as expressed and none other, as laid down in the case reported in GNAMBAL AMMAL v. T. RAJU AYYAR AND ORS.

4. Shri B.V. Acharya, Senior Advocate, learned Counsel for the appellants, contends that in Ex.P-1 will, the four named persons inherited the properties as tenants-in-common as the will Ex.P-1 clearly confers equal absolute rights on them, that the bequest in favour of Seethu is a conditional one and that the parties by conduct have treated the properties as having been owned by them as tenants-in-common.

5. Shri B.P. Holla, learned Counsel for the respondents, on the other hand, strongly disputes these contentions and submits that the disposition under the will was in favour of the entire Kavaru of Seethu Hengsu with all incidents of Aliyasanthana law.

6. It is not in dispute that Seethu and her children named in the will constituted a Kavaru under the Aliyasanthana system of Law. The will was executed in the year 1931. In NEMIRAJA PERGADE v. KAMALU HENGUSU AND ORS., Hegde, J (as he then was) observes - 'While construing a gift deed or a will it is necessary to bear in mind the ordinary notions that are likely to influence the donor, viz., the system of law which governs the donor, the prevailing notions in the community to which the donor belongs and his or her likely inclinations,'

7. Under the Aliyasanthana system of Law, where a gift or disposition is made in favour of all the members of a Kavaru, the law presumes that it is a gift or disposition in favour of that Kavaru and that the named persons will inherit the properties with the incidents of Aliyasanthana law or Marumakkathayam law. A Full Bench of the High Court of Madras examined this aspect in detail in the case reported in CHAKKARA KANNAN v. VARAYALAKANDI KUNHI POKKER AND ORS. in the light of all the Decisions rendered thereto. The Full Bench had to interpret a gift deed which reads thus:

'I have settled by this that the properties....and all dealings in my name and all moveables are to be enjoyed by me till my death according to my pleasure, and after my death they are to belong to my children, Ammadkutti (2nd defendant),

Kunhi Pokker (1st defendant) and Pathumma (the mother of the 3rd defendant), and that no one else has any right to my properties. Properties and dealings which I may acquire in future also are for the said children. After my death the above-mentioned persons, who are my children are to collect all outstandings due to me and arrears of rent and the assessment which was in my name has to be transferred in the names of my children and patta obtained and they are to hold the same in the same way I was holding them, paying the parappad due to the jenmies and getting renewals in their names.'

The Full Bench further observed that -

'Now there can be scarcely any doubt that, if we look to the terms of the instrument alone, the three donees therein named took an absolute interest and so far as their right of alienation is concerned it makes no difference whether they are tenants-in-common or joint tenants as in either case any of them could alienate his interest in the property. But it is contended, and the contention has a good deal of force in it, that the decisions have laid down the principle that the donees in such cases must hold the property with the incidents of tarwad property and that, therefore, Kunhi Pokker, that 1st defendant and one of the donees and the Judgment-debtor, had no saleable interest in it.'

It is further observed thus:-

'If it is to be held that the three donees in the case before us held the property with the incidents of tarwad property and that any one of them could not convey his interest, then it would be directly contradicting the terms of the instrument Exhibit I, because 'Exhibit I distinctly recites that the donees were to hold the property 'in the same way I was holding them', or, in other words, those three persons could alienate it even if such alienation may not be in the interests of the branch to which they belong, which would include the 3rd defendant, a daughter of Pathumma. The will states that no one else besides the three donees named has any right to the properties, whereas, if they belonged to the branch, the defendants of Pathumma born before or after the death of the testator would be entitled to them in their own right and not as representatives of any donee, so that, if we were to decide the case on the construction of the instrument of gift alone, I should have little

hesitation in holding that I must give effect to the terms of the instrument and should not import any artificial intention into the case. But the decisions that I have referred to have no doubt held that in such cases the properties must be deemed to be held with the incidents of tarwad property.'

This presumption was held to be applicable to such cases by the High Courts of Madras, Travancore and Cochin which exercised jurisdiction over the West Coast where Marumakkathayam and Aliyasanthana laws are being followed. A Division Bench of this Court in the case reported in NEMIRAJA BANGA AND ORS v. CHANDRARAJA BANGA AND ANR. also came to the same conclusion. In that case one Jinna Bhanga and his sister who were governed by Aliyasanthana law settled their properties in 1920 on Jinna Bhaga's wife and her four children (who were named). The settlement deed stated that the settled to look after the management of the properties and provided that the five persons with equal rights should go on enjoying the same from generation to generation as they pleased. The Division Bench held that the settled took the properties with all the incidents of Aliyasanthana law.

8. This question was again examined by a Division Bench of this Court reported in PRASANNA KUMAR v. SUGUNA AND ORS. In that Decision it is stated that where a gift or a bequest is in favour of all the members of the kavaru of an Aliyasanthana family a presumption arises that the gift or the bequest is in favour of the kavaru and that if the gift or bequest is in favour of some members of the kavaru, no such presumption could be raised.

9. Shri Acharya, Senior Advocate, learned Counsel for the appellant does not dispute the applicability of the well recognised presumption laid down in these cases, but he contends that the said presumption does not apply to Ex.P-1 as Seethu has been excluded from the bequest and also because the bequest in her favour is a conditional one. As already pointed out the will states that if after the death of the testator, his second wife Seethu contracts remarriage or enters into any fresh relationship, then, all her rights under the will would be forfeited and that thereafter, only his children born to Seethu Hengsu shall have rights in the properties. Can this clause mean that Seethu has been excluded or that the

bequest in her favour was a conditional one? It is not as if Seethu will inherit the properties on the happening of any event. The will comes into force immediately on the death of the testator and the vesting takes place and at once the property becomes kavaru property with all the incidents of Aliyasanthana law. The will does not stipulate any condition precedent for Seethu to claim the benefit under Ex.P-1. All that the testator says under Ex.P-1 is that Seethu will lose her right if she remarries and that his children born to her will continue to enjoy the properties. This clause essentially relates to the question how the family rights are to be regulated after the will comes into operation and the family gets the property. It is not also possible to hold that Seethu has been excluded from the bequest. The contingency stipulated under the will has also not taken place as Seethu has not remarried and did not lose her right. It was also not uncommon for a member of the Aliyasanthana kavaru or family losing certain rights over his or her joint family properties under certain circumstances without affecting the jointness of the family or the rights of the other family members.

10. In P.R. Sundara Aiyar's 'A Treatise on Malabar & Aliyasanthana Law' (1922 Edition - page 25 para 16), it is observed thus:

'Here, it may be convenient to consider the effect of loss of caste. Under the Hindu Law loss of caste involved forfeiture of rights in the family property. This is the law even now in Travancore as laid down by a Full Bench (*Selina Lydia v. Govindan Ayyappan* 4 Tr.L.R. 12). The learned Judges say 'It is undoubted that as well under the Hindu Law as under archaic system of that law prevailing in Malabar and Travancore, degradation from caste which accompanies conversion to Christianity or Mohamedanism entailed a forfeiture of a man's civil status and deprived him of the capacity to inherit. The convert is no longer regarded as a member of or coparcener of the family to which he originally belonged and his conversion operates to dissolve as far as he is concerned, the tie which bound the family together.' This undoubtedly must have been the law also in Malabar. But the Caste Disabilities Act has changed the situation entirely. 'A junior member would no longer forfeit his right by reason of changing caste. But even so, the change of caste may affect him in many ways. His right to be maintained out of the family funds cannot be affected. If the family finds it impossible to feed him at the family

residence owing to the social degradation it might involve, they are bound to give him separate maintenance. His separate residence would be due to no fault of his but entirely due to the prejudices of the family. It is out of the question also that a person who has lost caste should occupy the office of Kamavan and discharge the secular and religious duties appertaining to that position. Where the excommunication is due to any caste offence involving moral turpitude, the reason for his exclusion from the Karnavanship would be all the stronger. But (SIC) of these circumstances would justify his being denied his (SIC) to be maintained. If the person excommunicated is a female and has children subsequently outside caste, those children would not be members of the coparcenery and there is nothing in the Caste Disabilities Act to confer rights on them nor could such out-castes claim the benefits of family trusts which were intended only for the benefit of such as were in caste.'

11. Since Ex.P-1 will was executed in January 1931 the notions prevailing amongst the persons following Aliyasanthana system of law at that time only will have to be taken into account while interpreting the said will. Different consideration may arise in the case of a will or settlement deed of later years as the thinking of persons following that system of law has undergone considerable change due to break-up of joint-family system and enforcement of Madras Aliyasanthana Act, 1949, Hindu Succession Act, 1956 and the Madras Aliyasanthana (Karnataka Amendment) Act, 1961.

12. On a consideration of the will as a whole, I have to hold that the bequest is in favour of the kavaru of Seethu with all the incidents of Aliyasanthana Law.

13. Shri B.V. Acharya alternatively contends that the parties by their subsequent conduct have treated the properties bequeathed under the will as having been owned by them as tenants-in-common. He relies on Ex.P-4 a notice dated 3-11-1972 sent by registered post to Jaka Bai daughter of Seethu who was defendant-1 in the suit. That was a notice issued on behalf of the appellants wherein they had claimed 1/3 share on the assumption that the properties bequeathed under the will are owned by the named persons as tenants-in-common. Ex.P-5 dated 13-11-1972 is the reply to Ex.P-4 sent by Jaka Bai. Shri Acharya points out that the claim

made in Ex.P-4 to the effect that they are entitled to 1/3 share each has not been specifically denied. But, there is no admission in Ex.P-5 that the properties bequeathed under Ex.P-1 are not kavaru properties.

14. Shri Acharya also relies on the averments made by the first defendant Jaka Bai in her written statement that she was agreeable for the division of the plaint 'A' schedule property into three shares. But, it is also stated in the same written statement that Jaka Bai along with her children and grand-children are entitled to 9/11 share in the plaint 'A' schedule property and her willingness is subject to and without prejudice to her other contentions.

15. While interpreting the will the Courts are expected to find out the intention as expressed in the will only. Even otherwise, I do not find any clear admission on the part of Jaka Bai anywhere that the property bequeathed under Ex.P-1 was not the property of the kavaru. Further, the admission, if any, of Jaka Bai cannot bind the other eight Aliyasanthana descendants of Jaka Bai. It is also the duty of the Court ultimately to hold what is the correct construction of the document placed before it. In SUBRAMANIAN NAMBOODRIPAD AND ORS. v. K. VASUDEVAN NAMBOODIRIPAD, it is stated thus:

'When a claim is made on a document, the fact that at onces stage when a plaint was presented it was read in a particular way and at another time, when it is sought to be amended, it is sought to be read in another way, will certainly not justify the view that a new and inconsistent claim is sought to be introduced. These are really alternative ways of reading the document and it will be for the Court ultimately to decide what is correct construction is.'

16. I do not therefore find it possible to disturb the view taken by the learned Civil Judge that the will is in favour of the entire Kavaru of Seethu with the incidents of Aliyasanthana Law. The Appeal therefore fails and is dismissed. No costs.