

Nagalingappa Vs. Smt. Indirawwa and ors.

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Court : Karnataka

Decided On : Sep-12-2002

Reported in : 2003(1)KarLJ415

Judge : B.K. Sangalad, J.

Acts : [Evidence Act, 1872](#) - Sections 4, 68 and 90

Appeal No. : Regular Second Appeal No. 523 of 1998

Appellant : Nagalingappa

Respondent : Smt. Indirawwa and ors.

Advocate for Def. : Anant Mandagi, Adv. for Respondents-1 and 2 and ;B.R. Patil, Adv. for Respondents-25, 48 and others

Advocate for Pet/Ap. : B.S. Patil, Adv. for ;P.G. Upanal and ;A.V. Katariki, Adv.

Judgement :

B.K. Sangalad, J.

1. Being aggrieved by the judgment and decree dated 18-4-1998 passed by the Civil Judge (Senior Division), Saudatti, in R.A. No. 4 of 1996 (Old R.A. No. 142 of 1990) confirming the judgment and decree dated 10-7-1990 passed by the Munsiff, Ramdurg, in O.S. No. 165 of 1989 the plaintiff has preferred this appeal.

2. The ranks of the parties shall be followed as in the lower Court. The appellant is the plaintiff. The respondents are the legal representatives of original respondents as noted in the cause title.

3. The facts in nutshell are that the appellant is the legally adopted son of one Rudrappa Patter who died in the year 1955 leaving behind his wife who also died in the year 1963 and the appellant (the adopted son). The adoption of the appellant took place on 7-11-1953 according to the religious practice of the community of the respondents. The adoption ceremony took place at a place called Shirasangi on 7-11-1953. The adoption deed, after the adoption, was executed at Ramdurg on 18-11-1953. Since the date of adoption, the appellant has become the adopted son of Rudrappa who had three brothers by name Kalappa, Manappa and Lingappa. The appellant filed suit O.S. No. 165 of 1989 for partition and separate possession of his 1/4th share in four agricultural lands situated at Chippalakatti, bearing R.S. Nos. 42, 2/2, 5/2 and 125/1 and three agricultural lands situated at Kunnal Village, Ramdurg Taluq bearing R.S. Nos. 96, 91/5 and 92/4 and five house properties situated at Chippalakatti Village bearing V.P.C, Nos. 76/1+2, 71/1, 71/2, 71/3 and 145. These properties shall be referred to as suit properties. It is further stated by the appellant that by virtue of the certified copy of the registered adopted deed, he is the adopted son of late Rudrappa, the only legal heir to be entitled to 1/4th share in the suit property.

4. The respondents have resisted the suit claim but, Kalappa and Manappa have admitted the adoption of the

appellant. The case of the other defendants is that one Muralidhar was taken in adoption as such, the appellant is not the adopted son. After the service of notice, the defendants appeared. Among these defendants 9 and 20 have submitted their own written statement. The rest of the defendants 1, 4, 6, 12, 14, 15, 17 to 23 have adopted the written statement of defendant 20 and defendants 2, 3, 5, 7, 8, 10, 13, 14 and 16 have adopted the written statement of defendant 9. The case of defendant 20 can be stated as under:

'The plaintiff was not adopted by Rudrappa at any time. He is the son of Shankarappa Manappa Pattar shown in the Pedigree. Therefore, the plaintiff is not entitled to maintain this suit describing himself as the adopted son of Rudrappa. The Pedigree produced along with the plaint is not correct and the plaintiff has wrongly shown himself as the adopted son of Rudrappa. It is Muralidhar, the deceased husband of defendant 20 and father of defendants 21 to 24 who was adopted by deceased Rudrappa and as such, the pedigree showing the plaintiff instead of Muralidhar as the adopted son of Rudrappa is wrong and misleading. The genealogy at Schedule B is not correct. It is also denied that the plaintiff was adopted on 7-11-1953 according to the religious customs prevailing in the community to which the parties belong and that as per the request of Rudrappa, the plaintiff's genitive father has given the plaintiff in adoption. It is also stated that the plaintiff describing himself as the adopted son of Rudrappa has misled and according to him, he was given in adoption to one Murugeppa. Therefore, the plaintiff is trying to put forth a false claim. It is also further denied that the adoption ceremony took place at Shirasangi on 7-11-1953. This defendant admits that Shekawwa w/o. Rudrappa died in the year 1964. But it is denied that the plaintiff is the sole legal heir of Smt. Shekawwa. It is also stated 'It is true that there was no partition in the family during Rudrappa's lifetime. Rudrappa was ailing with Cirrhosis in 1953 and had even become unconscious and it appears that plaintiff's father Shankarappa and his other relatives in collusion brought about a false document purporting to be an adoption deed while Rudrappa was unconscious. On account of the illness, the adoption now set up by the appellant is false. After the death of Rudrappa, his widow Shekawwa adopted Muralidhar in accordance with the religious rights and customs of the community and by virtue of this adoption Muralidhar became the adopted son of Rudrappa and accordingly Muralidhar has described himself as the adopted son of Rudrappa. O.S. No. 77 of 1965 by Eswarappa was filed against Muralidhar, Shankarappa and other members of the family were parties to this suit. Muralidhar was impleaded as the adopted son of Rudrappa. Shankarappa who was a defendant did not even dispute the status of Muralidhar as the adopted son of Rudrappa. In all the Government records Muralidhar was described as the adopted son of Rudrappa'. Therefore, it is stated that the suit of the plaintiff has to be dismissed'.

5. Defendant 9 also has filed the written statement. At the very outset, he has stated 'It is true that the plaintiff is the adopted son of Rudrappa and he was adopted in the year 1953 according to the religious customs prevailing in the community. It is true to say that Rudrappa had three brothers by name Kalappa, Manappa and Lingappa and defendants 8 to 16 represented Manappa's branch and in the suit properties, branch of Kalappa, Manappa, Lingappa and Rudrappa will have 1/4th share each. It is to be noted that this defendant has also got share in the suit property as there has never been partition in the family properties. This defendant is ready and willing to pay the prescribed fees for the share in the suit properties'.

6. Mr. B.S. Patil, learned Counsel for the appellant submitted that the adoption took place on 7-11-1953 according to the religious customs and it was registered on 18-11-1953. To say that he was not adopted and Muralidhar was the adopted son of Rudrappa, no document is coming forth. There is no registered deed. Moreover the document which has been registered is more than 30 years old. Therefore, naturally the presumption arises that the document is genuine. In addition to this, it is also submitted that Manappa's branch admits adoption and rights of the plaintiff. Even Kalappa by inference admits adoption. Defendant 9 in the written statement has admitted that there was no partition in the family.

7. Mr. B.R. Patil, learned Counsel for the respondents submitted that in the photograph the genitive father and the adopted father are there. Womenfolk is not at all found in the photograph as such, the photograph is doubtful, and moreover for about 24 years, the adopted son has kept quiet. Even according to Mr. Mandagi, the learned Counsel, the suit ought to have been filed for declaration of the adoption and he farther

submitted that since the period of limitation was over, the appellant has conveniently avoided a declaratory suit. It is also submitted that neither the scribe nor the attestors are examined. Therefore, both the Courts have rightly dismissed the suit and the appeal. Mr. Mandagi further submitted that the adoption ought to have been proved according to the Shastric law. There should have been the performance of 'HOMA' and it is Muralidhar who was taken in adoption. Therefore, the case of the appellant has been rightly rejected.

8. In view of these rival submissions, the point that arises for consideration is that who is the adopted son? Whether it is the appellant or Muralidhar? If it is found that the appellant is the adopted son, automatically, he is entitled for 1/4th share in the suit properties.

9. For the plaintiff P. Ws. 1 to 4 are examined and Exs. P. 1 to P. 28-A are marked for the defendants D.Ws. 1 to 4 are examined and Exs. D. 1 to D. 13 are marked.

10. According to the contention of the respondents, the suit is barred by limitation. This submission would have been accepted had the plaintiff filed the suit for declaration declaring him to be the adopted son and then sought for the partition. Since the suit is only for the partition, the contention of the Advocate for the respondents has to be negated,

11. No doubt, the burden lies on the plaintiff to prove that he is the adopted son. In my opinion, he has discharged his duty satisfactorily. The most important point in favour of the plaintiff is that of the document viz., adoption deed which is more than 30 years old. Therefore, Section 90 of the Indian Evidence Act is attracted. The lower Court has harped upon the fact that none of the witnesses is examined as such, the document cannot be believed.

12. That there was adoption deed which was registered has to be believed in view of the notice published in the 'Sandesh' paper on 28-12-1953. If at all adoption had not taken place, the defendants ought to have produced any document or any other material in addition to producing reliable evidence for other customary rights. The respondents in my opinion, have not ventured to do so. Simply, they want to set up that it is only Muralidhar who was taken in adoption. At the cost of repetition, it has to be stated that if Muralidhar was taken in adoption, some photographs and documents ought to have been produced. The same kind of burden lies on the shoulders of Muralidhar and other respondents also to establish that it was Muralidhar who was taken in adoption. This contention is set at naught by the written statement of defendant 9. This defendant admits adoption and rights of the plaintiff. In addition to this defendants 2, 3, 5, 6, 7, 10, 13, 14 and 16 by inference admit the adoption and the rights of the plaintiff by endorsing the written statement filed by defendant 9. Merely defendant 20 has filed the written statement denying adoption is no ground to reject the case of the plaintiff. If the defendants other than Manappa's branch are asking the plaintiff to prove the adoption, it is equally true that they have to prove the adoption by discharging their duty. At least the plaintiff has produced the photograph and he has examined the photographer also. The photographer is an independent witness. There is nothing on the record to show that the photographer is bent upon telling lie in order to help the plaintiff. In addition to this, the evidence of P.Ws. 2 and 3 is also helpful. Ex. P. 14 is the photograph and Ex. P. 16 is the negative. This patently speaks that adoption did take place.

13. The other contention of the respondents is that none of the attesting witnesses is examined. The contention may be accepted provided if any of the attesting witnesses is alive. But none- of the attesting witnesses is alive. The defendants also have not brought any material on the record to show that at least one of the attesting witnesses is alive. According to the plaintiff, Shirasappa died on 8-1-1988, Krishnachari Gangannavar died on 28-12-1970. When none of the witnesses is alive, the utter course was to prove the ceremony by other methods. The contention of Mr. B.R. Patil that no womenfolk were found in the photograph cannot be accepted. The education and the knowledge in Shastric law should all be taken into consideration with reference to the family background. Merely the woman is not made to sit in the photograph does not mean that such ceremony should not be believed. Mr. Mandagi submitted that no 'HOMA' was performed and no Shastric laws were followed and there was no giving and taking ceremony. Mr.

Mandagi further submitted that the plaintiff was not made to sit on the lap of the adoptive father. This submission cannot be accepted because admittedly, the plaintiff was not a child. He was already 24 years old. So it was too much to expect that a person of 24 years old could be made to sit on the lap of the old man. Therefore, in view of the factual circumstances, this submission also cannot be accepted. It has to be reiterated that the adoption took place on 7-11-1953 and it was registered on 18-11-1953 and the suit was filed in the year 1989. The certified copy of the registered adoption deed is produced. It has come from the proper custody. This deed is at Ex. P. 15.

14. Mr. B.S. Patil, learned Counsel for the appellant relied upon the decision in the case of Haradhan Mahatha and Ors. v. Dukhu Mahatha : AIR1993Pat129 wherein it is held as follows:

'(B) Indian [Evidence Act, 1872](#), Sections 69 and 90--Presumption--Will, more than 30 years old Executants and attesting witnesses not alive--Mode of proof required under Section 69, not possible--No suspicion as to unnaturalness of or tampering with said document--Presumption could be raised in favour of it.

The question arises in which case the Court should exercise discretion of raising presumption and in which one the discretion should be refused. In my view, there cannot be any straight-jacket for exercising discretion by the Court under Section 90 of the Act. If the two conditions laid down in Section 90 are fulfilled in relation to a particular document and its genuineness is not disputed, then the Court should exercise its discretion under Section 90 of the Act, even if the executant or attesting witnesses are alive and available, and admit the document into evidence thereby waiving its formal proof. Otherwise unnecessarily Court's time will be wasted in formally proving the document by examining the witnesses and the same will frustrate the very purpose of incorporating Section 90 in the Act. It has been noted by Lord Hailsham in Halsbury's Laws of England, 4th Edition, Volume 17 in para 129 that such documents prove themselves notwithstanding the fact that one of the subscribing witnesses is alive'.

In Probhat Chandra Kanrar and Ors. v Smt. Rani Bala Kanrar and Ors. : (1989)2CALLT18(HC) it has been held as follows:

'(A) Indian [Evidence Act, 1872](#), Sections 68 and 90--Two provisions do not militate against each other--Right of Court to presume under Section 90 is not controlled or curtailed by Section 68.

(B) Indian [Evidence Act, 1872](#), Sections 68 and 90--Ancient document--Presumption of genuineness of--Discrepancy between English and Bengali dates therein--Document already acted upon--It cannot be invalidated on the ground of this discrepancy'.

In Kunhamina Umtna and Ors. v. Special Tahsildar and Ors. : AIR1977Ker41 it has been held as follows:

'(A) Indian [Evidence Act, 1872](#), Sections 90 and 68--Scope of Section 90--Thirty years old document--Proof of execution--Presumption under Section 90 is in the discretion of Court.

(B) Indian [Evidence Act, 1872](#), Sections 68, 67 and 90--Execution of document--Proof of--Calling of attesting witness--Necessity--Documents of 30 years old--Presumption under Section 90'.

'The question has been considered in depth by Justice Raman Nair in Sumathi Amma v. Kunjuleskhmi Amma, 1964 Ker. L.T. 945, 1964 Ker. L.J. 1222. The learned Judge observed (at pages 946 and 947).-- 'I regard the Privy Council decision in the cases of Gangamoyi Debi v. Troiluckhya Nath Chowdary, (1906) ILR 33 Cal. 537 (PC), (1906)33 Ind. App. 60, Md. Ihtishan Ali v. Jamna Prasad, AIR 1922 PC 56, Gopal Das and Anr. v. Sri Thakurji and Ors. , Vishuanath Ramji Karale v. Rahibai Ramji Karale and Ors. AIR 1931 Bom. 105, Pandappa Mahalingappa v. Shivalingappa Murteppa, AIR 1946 Bom. 193 and Kalu Nimbaji Shingne v. Bapurao Chikaji Shingne, AIR 1950 Nag. 6 as authority for the proposition that, in cases where Section 68 of the Indian Evidence Act has no application the certificate of registration in the light of the presumption in Section 114, illustration (e) of the Indian Evidence Act is evidence of execution and can, in fit cases, be accepted as proof thereof '.

15. All these decisions eloquently highlight the principles of Sections 90 and 68 of the Indian Evidence Act. The principles enunciated in these two sections clearly apply to the case on hand. Another contention of the respondents is in respect of custom. To meet this point Mr. B.S. Patil has relied upon the decision in the case of Kondiba Rama Papal alias Shirke (dead) by his heirs and L.Rs and Anr. v Narayana Kondiba Papal, : AIR1991SC1180 .

16. The respondents have relied upon the decisions in the cases of Govinda v. Chimabai and Ors. AIR 1968 Mys. 309 and Ramanna Gowda and Ors. v Shankarappa and Ors. : AIR1988Kant248 . The facts on hand are entirely different. Therefore, the decisions relied upon by the Counsel for the appellant more effectively play an important role. Therefore, in my opinion, the approach of both the Courts below has resulted in miscarriage of justice. Therefore, for the above stated reasons, I am inclined to arrive at the conclusion that the judgment and decrees of lower Court are liable to be set aside. Therefore, the following order;

In the result, the appeal is allowed. The judgment and decrees of both the Courts below passed in O.S. No. 165 of 1989, dated 10-7-1990 and R.A. No. 4 of 1996, dated 18-4-1998 set aside and the suit of the plaintiff shall be decreed as follows:

The plaintiff has got 1/4th share in the suit properties and the same be awarded to this extent by partition and separate possession. The parties to bear their own costs.

B. Padmarzgi, J.

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ORDER

Heard the learned Advocates for the appellant on an application for rectification of survey number of the suit properties under Section 151 of the CPC and perused the case records. It is stated on behalf of the appellant that the above appeal was allowed by this Court on 12-9-2002 and the decree was drawn accordingly. But, in the copy of the decree in the judgment dated 12-9-2002, the Survey Number of one land property is wrongly shown as 21/5 whereas the correct Survey Number is 91/5. Similarly, the Survey Number of the house property is shown as 12/5, whereas, the correct Survey Number is 145. On account of these errors, it is stated that the appellant is unable to file the execution petition. Hence, it is prayed that this Court may be pleased to rectify the errors in Survey Number crept in the decree copy.

It appears that there is a mistake in mentioning the above said Survey Numbers in the decree drawn by this Court. Hence, the request made on behalf of the appellant being reasonable and proper, the same is granted. The Registry is directed to rectify the mistake in the decree drawn by this Court in the manner as indicated below:

'The Survey Number of one of the landed property which has been mentioned as 21/5 is to be rectified as 91/5 and it should be read as 91/5 instead of 21/5 in the decree. Likewise, the Survey Number of the house property wrongly shown as 12/5 is to be rectified as Survey No. 145 and it should be read as Survey No. 145 in the decree drawn by this Court'.

The Registry is directed to carry out the said correction in the decree drawn by this Court and similar corrections may be made in the cretin lied copies of the decree issued, if any, to the parties by obtaining them back. It is ordered accordingly.

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