

Rukminibai and Another Vs. Babu and Others

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Court : Karnataka Dharwad

Decided On : Mar-17-2011

Reported in : 2012(3)KCCR1994

Judge : D.V. Shylendra Kumar

Appeal No. : R.S.A.No.699 of 2005

Appellant : Rukminibai and Another

Respondent : Babu and Others

Advocate for Pet/Ap. : For the Appellants: Veeresh R. Budhihal for R.L. Patil, Patil and Patil, Advocates. For the Respondents: Hanumantha Reddy Sahukar for D. Ravikumar Gokakakar, Advocates.

Judgement :

(Prayer: This appeal is filed under 100 R/W Order 41 Rule 1 OF CPC against the judgment and decree dated 10/01/2005 passed in R. A. NO.117/99 on the file of The I Additional Civil Judge (SR. DN.), Belgaum, Dismissing the appeal filed against the order dated:08.03.99 passed in FDP NO.27/78 on the file of The II Additional Civil Judge (JR.DN.) Belgaum, allowing the petition for drawing of final decree.)

1. Second appeal by defendants 4 and 5 in a suit for partition which had come to be decreed by a preliminary decree apportioning the shares and during the course

of the final decree proceedings for identification and distribution of the properties as per the shares, the 4th and 5th defendants having woken up a little late in the day, by challenging a report of the Commissioner who had been appointed by the Executing Court for dividing the properties in accordance with the respective shares of the members of the family by pointing out that one of the suit items namely residential property which had been sold by the plaintiff and the defendants other than the present appellants had joined is sue, contending that the property should not have been allotted to the share of the plaintiff and other defendants and particularly by claiming that while apportioning the house property for the sale of which the plaintiff and other defendants had joined to transfer it in favour of the 5th defendant/ purchaser and having raised certain other objections also but the trial court not finding much merit in such objections to the report of the Commissioner having nevertheless proceeded to conclude the final decree proceedings as per the report of the Commissioner and thereafter having preferred a first appeal to get over this final decree but having failed in the same as the learned Judge of the lower Appellate Court dismissed the appeal, are in Section 100 appeal before this court.

2. Submission of Sri. Veeresh Budihal, learned counsel for the appellants is that a sharer/co-parcener of a joint family property has a preemptive right to seek for allotment of a house property by offering to buy the share of other co-parcener or co-owners and when such an option was available to members of the family, the courts below have committed a grave error in law in nevertheless allotting it to the share of such co-parcener who had effected a sale of the very property in favour of the 6th defendant, that such course of action on the part of the courts below is clearly in violation of the provisions of Section 4 of the Partition Act, 1893 and therefore the present second appeal needs examination.

3. Apart from this, learned counsel for the appellants also seeks to raise the following other questions in the second appeal:

i) Whether both the Courts below are justified in accepting the Report of the Commissioner in toto mainly on the ground that the Commissioner was not cross examined by either of the contesting parties when actually both of them had filed

their respective objections and led their independent evidence?

ii) Whether the 1st Appellate Court is justified in confirming order passed by the Trial Court without looking in to the oral evidence let in by the Appellant and the contesting 6th Defendant and Confirming the order of the Trial Court mechanically?

iii) Whether both the Courts below were justified in confirming the Commissioner's report when both the contesting Defendants had filed objections in writing and had also let their respective evidence?

iv) Whether both the Courts are justified in over looking the principles of equalisation of shares and principles of owelty before confirming the report without examining whether the Commissioner had followed the directions issued by the 1st Appellate Court in R.A.No.51 /83?

4. Notice had been issued to the respondents but the appeal itself has already been dismissed in respect of respondents 1 to 3 who were defendants 1 to 3 respectively in the suit and it is only the purchaser and now his legal heirs who are contesting the suit represented by a counsel and in this appeal Mr. Hanumantha Reddy Sahukar, learned counsel appearing for the respondents 5 to 11 has supported the judgments and decrees passed by the courts below and submits that there is no scope for interference in the second appeal.

5. Provisions of Section 4 of the Act is a statutory recognition of the principle of owelty and incorporated if at all in Section 4 of the Act.

6. Whether it is an on the legal principle oweltic or otherwise, the statutory provision of Section 4 of the Partition Act having force of law is one to be respected and obeyed by the courts and the courts are bound to act in pursuance of this provision, provided the statutory provision is attracted to a fact situation. Section 4 reads as under:

"4. Partition suit by transferee of share in dwelling house -

(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section(2) of the last foregoing section."

7. A reading of Section 4 clearly indicates that this section incorporates in itself the equitable principle of a preemptive right in favour of the members of the family vis-a-vis third party purchasers who if at all have purchased a property transferred to such a person by only some of the family members who have also some share in the property but not with the consent of other co-sharers or other co-parceners and therefore the sale deed assuming valid cannot convey full title to any of the joint family property in favour of the third party transferee and while drawing up the final decree and while family properties are being shared amongst the co-parceners, as far as possible the sharing of the properties is in such a way that no member is adversely affected and as far as possible to respect the sentiments and feelings of the members of the family particularly to retain a family house property within the family even if some members had sold away their share in the particular property but other members sentimentally are not inclined to and therefore offered to buy out the share of such members of the family who have already transferred the subject property in favour of third parties.

8. If the provisions of Section 4 is to be attracted, it is very oblivious a co-sharer or a member of the joint family who is keen in sustaining or retaining the house property within the family or within possession of a member of the family has to make an effort by offering to purchase the share of other members of the family in the particular property and will have to offer the price commensurate to the share of the members of the family who have executed the sale deed or transferred the property in favour of a third party. Until and unless this groundwork is prepared u/s

4 of the Act, it does not get attracted automatically just because it is available on the statute. The present appellants not having made any effort for such a purpose either while taking up any defence before the court below when the suit was being tried nor having made such an effort even during the final decree proceedings, cannot urge that as a ground of appeal in a first appeal muchless in a second appeal as a substantial question of law warranting further examination by this court for disturbing the judgments and decree of the courts below.

9. In fact, the provision is not even attracted to the present situation as the appellants have not raised their little finger in this regard showing their inclination to take advantage or avail of the provisions of Section 4 of the Act by making a commensurate offer. Therefore, the provisions are not attracted and as I do not find any question of law which has been wrongly decided by the courts below in the course of their judgments and decree and muchless a substantial question of law, this second appeal is only to be dismissed. Accordingly, it is dismissed.

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