

SUPREME COURT OF INDIA

Smt.Ajambi (Dead) By Lr.

Vs.

Roshanbi

C.A.No.7237 of 2010

(Dr. Mukundakam Sharma and Anil R. Dave JJ.)

30.08.2010

JUDGEMENT

Dr.Mukundakam Sharma, J.

1. Leave granted.

2. This Special Leave Petition is directed against the judgment and order dated 16.11.2005 passed by the High Court of Karnataka allowing the appeal filed by the respondents herein whereby the High Court has restored the judgment and decree of the trial court. The respondents Nos. 1 to 8 were the plaintiffs before the trial Court and Usmansab Shaikaji Attar was the original defendant in the suit which was filed seeking a decree for partition and separate possession of alleged 7/8 th share in the suit property bearing CTS No. 883/A and 883/B, situated at Aralikatti Deshpande Galli, Belgaum. It was stated in the plaint that Shaikaji Attar, the father of the respondents and the original defendant had two wives, namely Halimabi and Roshanbi who was the plaintiff No. 1.

3. It was submitted in the plaint that Shaikaji Attar died in or around 1969 leaving behind his second wife Roshanbi, i.e. plaintiff No. 1, six sons i.e. plaintiff Nos. 2 to 6. and defendant No. 1 and two daughters i.e. plaintiff Nos. 7 and 8 and heir of pre-deceased son Umarsab.

4. In the said suit, the parties led evidence.

“The plaintiff No. 2 was examined as PW-1 and the original defendant was examined as DW-1. Both the plaintiffs-respondents and the original defendant also produced certain documents which were exhibited in the suit. The trial Court by its judgment and decree dated 27.7.1988 decreed the suit of the plaintiff by awarding 1/8 th share to the plaintiffs 1 to 6 and 1/16th share to plaintiffs 7 and 8 in the suit property and also 1/8th share in favour of the defendant.”

5. Being aggrieved by the aforesaid judgment and decree of the trial Court, the original defendant Usmansab Shaikaji Attar filed a regular appeal before the Court of Civil Judge, Belgaum, Karnataka. During the pendency of the aforesaid appeal, the original defendant produced some additional documents, namely the alleged memorandum of partition by way of additional evidence.

6. The First Appellate Court by its judgment and decree dated 13.11.1995, dismissed the appeal filed by the original defendant.

7. Being aggrieved, the original defendant filed a second appeal before the High Court of Karnataka which was registered as RSA No. 299 of 1996. The High Court by its judgment and decree dated 17.9.1998 allowed the appeal and remanded the matter to the first Appellate Court for fresh disposal with a direction to receive documentary evidence produced before it by the defendant by way of additional evidence.

8. During the pendency of the aforesaid second appeal before the High Court after remand, the original defendant Usmansab died on 7.4.1996. The said defendant left behind his wife Ajambi and she was brought on record as the legal heir of the original defendant. The First Appellate Court thereafter examined Ajambi as AW-1 who was allowed to lead additional evidence and she got the documents exhibited as exhibit (Ex.) D-7 and D-10, which were received as additional documents. The plaintiff No. 2 was examined as RW-1.

9. Thereafter, the Additional Civil Judge (Senior Division) Belgaum by a judgment and decree dated 1.4.2000 allowed the appeal filed by the original defendant, set aside the judgment and decree of the trial court, and consequently dismissed the suit filed by the plaintiffs holding that the additional documents which are produced and exhibited as Ex. D-7 were executed by the predecessor-in-interest, namely Shri Shaikaji during his lifetime and he disposed of the property as per his Will by dividing the property into two parts as claimed by the defendant.

10. The first Appellate Court also held that in view of the pleadings, the documents exhibited as Ex. D-7 is proved, and it is established in terms thereof that there were two divisions effected to the suit property. In arriving at this conclusion, the first Appellate Court also took note of the fact that the names of the persons who were enjoying the aforesaid two divisions had been entered into relevant records concerning the property and the said entries had not been challenged by the plaintiff. In conjunction with the aforementioned facts, since the parties were paying tax to the extent of their property only, it was held that there was a prior partition between the parties and therefore the claim of the plaintiffs was not tenable. Consequently, the appeal was allowed and the suit was dismissed.

11. Being aggrieved by the said judgment and decree, an appeal was filed by the respondents herein and the plaintiffs in the original suit before the High Court of Karnataka which was registered as RSA No. 578 of 2000.

12. The High Court by its impugned judgment and decree dated 16.11.2005 allowed the appeal and set aside the judgment and decree of the first appellate court. In the aforesaid judgment and decree, the High Court held that although the document Ex. D-7, which was executed in 1958, indicates that some of the properties have been shown to have been earmarked and assigned to the plaintiffs and the defendants, the same cannot be treated as a partition deed since it is not registered. It was held that a partition deed is to be compulsorily registered and since Ex. D-7 is not a registered document, it could not be relied upon.

“Furthermore, the High Court took note of the fact that while the suit was filed in the year 1985, the aforesaid documents came to be produced in the year 1994 at the appellate stage after suffering a decree before the trial Court and the same came to be produced nearly after eleven years.”

13. It was also noted that Shaikaji, predecessor-in-interest, had allegedly created the document exhibited as Ex. D-7 died in the year 1969, while the entries in the CTS register came to be made only in the year 1979. The High Court observed that if the 1958 partition had really been acted upon as per Ex. D-7 immediately after the death of Shaikaji, the said entries would have been made within a reasonable time and they would not have waited upto the year 1979, when such entries came to be made.

14. The High Court, therefore, held that Ext. D-7 cannot be acted and relied upon for the purpose of establishing a prior partition of the suit property. Consequently, the appeal was allowed and the judgment and decree of the first appellate court was set aside.

15. Being aggrieved by the judgment and decree, the present appeal was filed in this Court by Smt. Munira, alleged to be the wife of Kesarkhan Pathan, claiming herself to be the beneficiary under the Will executed by Ajambi during her lifetime.

“Smt. Munira claims that Ajambi had bequeathed the property under the Will in favour of Smt. Munira who is allegedly Ajambi's brother-in-law's daughter.”

16. The said Will was purportedly executed on 20.8.2001 and the came to be registered in the office of the Sub-Registrar Belgaum on 29.8.2001. Through the aforesaid Will, Ajambi allegedly bequeathed her property CTS No. 883/A measuring 66.61 sq. meters to the legatee Smt. Munira, wife of Kesarkhan Pathan claiming under title to the aforesaid portion of the property. Smt. Munira filed the aforesaid appeal before this Court alongwith an application praying for bringing on record Munira as the legal representative of the deceased Smt. Ajambi.

17. On presentation of the appeal by her, the same was registered and the application was registered as interlocutory application which came up for consideration before this Court. An order was passed on 3.4.2006 whereby the interlocutory application was allowed and notice was directed to be issued on the special leave petition and also on the prayer for interim relief.

18. The interlocutory application filed by the appellant was allowed by this Court but on perusal of the record, we find that the said order was passed ex-parte and before issuance of notice to the respondent. The right to be impleaded as a party in an appeal could be questioned and challenged and such right to challenge the locus cannot be taken away from the respondents herein without giving them an opportunity of hearing. Therefore, although the aforesaid application was allowed, the same was always subject to any objection that is raised by the respondents herein. In fact, the respondents had raised such an issue immediately upon appearance. Therefore, the aforesaid issue is required to be decided as the same is a disputed question of fact.

19. The respondents having been served in the said appeal, they entered appearance and filed a counter affidavit which is sworn by Smt. Roshanbi who was the second wife of late Shaikaji Attar. In the said counter affidavit, she has stated that in the special leave petition, there is a mention of the purported Will allegedly executed during the pendency of the second appeal and that she challenges the validity and legality of the aforesaid Will. She has also contended that the said purported Will has not been probated. She has also stated in the said counter affidavit that the purported executant has no absolute right to execute the aforesaid Will pending litigation. It has been contended that Smt. Munira cannot claim the property through the purported Will of the first wife, allegedly dated 20.8.2001, claiming herself to be brother in law's daughter and that she has no legal right to the property nor any right to file the appeal before the High Court.

20. When the suit was taken up for hearing, the counsel for the respondent took up the plea that the aforesaid Will propounded by Smt. Munira has not been probated and that the said Will is neither genuine nor valid. It is also alleged that under the Mahomedan Law, no claim for inheritance of the property of a deceased widow could be claimed through an alleged Will which is not proved and even if such Will is found to be legal and valid, such person would be entitled to only 1/3rd of the property and the remaining 2/3rd to be given to the actual heirs of the family.

21. Reference was also made to Mulla, an authority on Mahomedan law, in Chapter IX - "Wills", at paragraphs 118 and 131 of the said treatise, wherein it is laid down that under a will only 1/3rd of the net estate could be bequeathed and that the remaining part of the net estate would be inherited by the legal heirs and legal representatives. Zabar & Ors. reported in (2009) 6 SCC 160 held thus: -

“15. We may notice the definition of gift as contained in various textbooks. In Mulla's Principles of Mohammadan Law the "hiba" is defined as a transfer of property made immediately without any exchange by one person to another and accepted by or on behalf of later (sic latter). A.A.A. Fyzee in his Outlines of Muhammadan Law defined "gift" in the following terms:

"A MAN may lawfully make a gift of his property to another during his lifetime; or he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will."..."

22. The learned Counsel appearing for the parties made their arguments on the merit of their claims of the respective parties, but we are of the considered opinion that before we can address ourselves on the merit of the claims of the parties and determine the respective shares, it would be necessary to determine as to whether or not the aforesaid purported Will propounded by the present appellant herein is a legal and valid document in the eyes of law and if so, to what right, if any, the appellant is entitled to in the said property.

23. In the interlocutory application, the present appellant had stated that she would be entitled to claim on the basis of the Will, the property being CTS No. 883/A measuring 66.61 sq. meters. The following sentence of the application being relevant is extracted below:- 24 "4. It is submitted that Ajambi during her life time executed a `Will' in favour of her brother-in-law's daughter namely, Smt. Munira Wife of Kesarkhan Pathan on 20.8.2001 and it came to be duly registered in the office of the Sub-Registrar, Belgaum on 29.8.2001. By the said Will, Ajambi bequeathed her property C.T.S. No. 883/A measuring 66.61 sq. meters to the legatee Smt. Munira W/o Kesarkhan Pathan. Thus Smt. Munira became the absolute owner of property C.T.S. No. 883/A of Aralikatti Deshoande Galli, Belgaum."

24. Therefore, it is established from the record that her claim is restricted on the basis of the purported Will to the property No. C.T.S. 883/A measuring 66.61 sq. meters only wherein she claimed to be the absolute owner. In case the Will propounded by her is found to be not genuine and valid, in that case her entire claim will have to be rejected and the aforesaid property i.e. C.T.S. No. 883/A would revert back to the actual owners namely the present respondents. If, however, the aforesaid Will is found to be legal and valid, even in that event and as per the pleadings and the contentions of the respondents, she may not be entitled to more than 1/3rd of the said property namely C.T.S. No. 883/A.

25. These are the events which have arisen after delivery of the judgment by the High Court. Therefore, two issues arise for consideration at this stage, which are required to be determined and decided prior to entering into the respective claims of the parties.

26. The first issue is as to whether the Will propounded by the appellant herein namely Smt. Munira, wife of Kesarkhan Pathan allegedly executed on 20.8.2001 and registered in the Office of the sub-Registrar on 29.8.2001, is a legal and valid document in the eyes of law.

27. If the aforesaid issue is answered in favour of the appellant Smt. Munira, the further question that is to be determined is as to whether the appellant herein on the basis of the

aforesaid Will is entitled only to 1/3rd of the said area in terms of the Rules and Principles of Mahomedan Law.

28. Along with the said issues which need to be determined and answered, in our estimation, there is another issue which arises for consideration, which is as to whether the appellant could claim to be a legal representative. Out of the said three issues raised herein, in so far as the question of entitlement of the appellant's share is concerned, the same appears to be a question of law as it forms a part of the principles of Mahomedan Law. There are also some decisions of the Supreme Court touching upon the said issue.

“But the other two issues, namely, the status of the appellant and whether she would claim to be a legal representative along with the question as to whether the will propounded by the appellant is legal and valid and how far the same could be relied upon, are disputed questions of fact which are required to be determined by the court more appropriately by resorting to the provisions of Order XXII Rule 5 of the Code of Civil Procedure, 1908 [for short "CPC"]. The said two issues being questions of fact, the parties must be allowed to lay their evidence in support of their respective cases. In that view of the matter we consider it necessary to issue a direction in the present case to the aforesaid extent in terms of the provisions of Order XXII Rule 5 CPC.”

29. The decision to act on the basis of Order XXII Rule 5 has been taken in consideration of the proposition laid down by this Court in *Singh*¹, in which the Supreme Court has held thus:

“17.The High Court had overlooked this disputed question of fact and held that the three sons had separate business for which they could not fall under the category of "tenant" under the provisions of the Act. Furthermore, this question of fact cannot be decided without permitting the parties to lead evidence in respect of their respective cases and without coming to a finding on such question of fact by the court.”

In paragraph 19, this Court held thus:

"19. Thus considering the ambiguous position regarding the status of the appellants relating to their status as tenants, it was necessary for the High Court to remit the matter to the trial court for a proper determination of the factual aspects whether the appellants were in fact carrying on business with late Santok Singh at the time of his death by taking evidence and thereafter, come to a finding whether the appellants shall be brought on record in the second appeal as the legal representatives of late Santok Singh.”

30. We accordingly direct the trial court to take evidence in the manner indicated above on the two issues, namely: - (1) Whether the appellant could claim to be a legal representative? And (2) Whether or not the will propounded by the appellant herein, namely, Smt. Munira,

wife of Kesarkhan Pathan, allegedly executed on 20.8.2001 and registered in the Office of the sub- Registrar on 29.8.2001 is a legal and valid document in the eyes of law?

31. After completion of the recording of the said evidence, both documentary and oral, brought on record by the parties, the trial court shall record the finding on the status of the appellant and as to whether the Will propounded is legal and valid and how far the same could be relied upon. The trial court shall thereafter send back to this Court the records with findings and evidence that might be adduced and already on record. The aforesaid process shall be completed within a period of four months from the date of receipt of the record from this Court and on completion thereof, the trial court shall transmit the entire records with the findings in terms of this order to this Court, upon which, the appeal shall again be listed for hearing for further determination and orders. Let the original records be sent back to the trial court immediately.

¹(2009) 5 SCC 155