Drakshayanavva and Others Vs Gadigevva and Others

Court: KARNATAKA HIGH COURT (DHARWAD BENCH)

Date of Decision: Jan. 5, 2016

Acts Referred: Hindu Succession Act, 1956 - Section 6

Hon'ble Judges: B.V. Nagarathna, J.

Bench: Single Bench

Advocate: Mahesh Wodeyar, Advocate, for the Appellant; Vidyashankar G. Dalwai, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

B.V. Nagarathna, J.

1. The defendants in O.S. No. 35/2008 have preferred this Second Appeal, assailing judgment and decree passed in

R.A. No. 23/2010 dated 10.10.2011 by the Addl. Senior Civil Judge, Haveri, confirming the judgment and decree dated 22.4.2010 by the Civil

Judge and JMFC, Savanur, passed in O.S. No. 35/2008.

2. For the sake of convenience, parties shall be referred to, in terms of their status before the trial court.

3. The plaintiff filed the suit, seeking 1/3rd share in the suit properties. The suit properties consist of three items of agricultural lands measuring

5.05, 3.29 and 3.29 acres respectively in Sy. Nos. 46/7A, 46/7B and Sy. No. 15/2+1+B/3A/2. Suit schedule items are as under:

Plaintiff and defendants belong to Hindu joint family. One Shivamurtayya Mathad was the propositus of the family. He had three children, namely,

Gadigevva-plaintiff, Subhadravva-defendnat No. 3 and Huchchayya. Gadigevva, the plaintiff is the eldest daughter. Subhadravva is the second

daughter and Huchchayya was the only son who died leaving behind his five children, namely, defendants 2 to 6. His widow is defendant No. 1.

According to the plaintiff, the suit properties are ancestral properties out of which, Sy. No. 46/7B measuring 3.29 acres was gifted by one

Eeerabhadrayya Hiremath in favour of plaintiff"s father. The suit properties are in joint family possession and enjoyment of the plaintiff and

defendants as no partition has been effected on the demise of Shivamurtayya. After the death of Shivamurtayya, Huchchayya his son used to

manage the affairs of the family and therefore, his name was entered as Khatadar of the suit property. Huchchayya died on 23.07.2007 leaving

behind his legal heirs who are defendants 1 to 5. Without the knowledge of the plaintiff, defendants 1 to 5 got their names entered in the revenue

records. Coming to know of this, the plaintiff sought partition of the suit properties. But the defendants did not accede to her request. Therefore,

she filed the suit.

4. After receipt of suit summons and notices from the trial court, defendants 1 to 6 appeared through their advocate and defendant No. 1 filed her

written statement and the written statement filed by defendant 1 was adopted by defendants 2 to 5. They contended that the suit properties are not

ancestral properties of plaintiff and defendants. That, Shivamurtayya did not have any property on the date of his death and therefore, the plaintiff

has no share in the suit properties. The marriage of plaintiff took place in the year 1994 and she is not entitled to any share in the suit properties.

Therefore, the suit is not maintainable. It is also averred that one Eeerabhadrayya Irayya Hiremath was the absolute owner in possession and

enjoyment of land bearing R.S. No. 46/7B measuring 3 acres 29 guntas and he had agreed to bequeath the same in favour of father of defendants

2 to 5 by name Huchchayya and that in pursuance of the Will of late Huchchayya, defendants 1 to 5 have become owners of the suit property.

Therefore, neither the plaintiff nor defendant No. 6 is concerned with the said item of land. Therefore, they sought for dismissal of the suit.

5. On the basis of the aforesaid pleadings, the trial court framed the following issues for its consideration:

1. Whether the plaintiff proves that the suit properties are the ancestral and joint family properties of plaintiff and defendants?

2. What share each of the parties is entitled to?

3. What order and decree?

In support of her case, plaintiff let in her evidence as P.W. 1 and that of one Shankrayya Baslingayya Gourimath as P.W. 2. She produced four

documents which were marked as Ex. P. 1 to Ex. P. 4. While the defendant let in her evidence as D.W. 1 and evidence of one Bheemappa

Hanamantappa Teggihalli as D.W. 2. They produced 28 documents which were marked as Ex. D. 1 to D. 28.

6. On the basis of the said evidence, the trial court answered Issue No. 1 partly in the affirmative and held that the plaintiff and defendant No. 6 are

entitled to 1/6th share each in the suit item Nos. 1 and 3 and accordingly decreed the suit in-part. The suit of the plaintiff in respect of item No. 2

was dismissed.

7. Being aggrieved by the said judgment and decree of the trial court, defendants 1 to 6 filed R.A. No. 23/2010. While the plaintiff filed R.A. No.

27/2010 in respect of item No. 2 property. Both the appeals were heard by the First Appellate Court which framed the following points for its

consideration.

1. Whether the plaintiff proves that, item No. 2 of suit schedule properties i.e. R.S. No. 46/7B measuring 3 acres 29 guntas of village Challal was

gifted to the Shivamurtayya by one Veerabhadrayya?

2. Whether plaintiff proves that, suit schedule properties are ancestral and joint family properties and plaintiff is entitled for relief of partition and

separate possession and she is entitled 1/3rd share in the suit schedule properties?

3. Whether defendant No. 1 proves that, deceased Veerabhadrayya had bequeathed item No. 2 of suit schedule property i.e. R.S. No. 46/7B

measuring 3 acres 29 gunta of village Challal in favour of deceased Huchchayya?

4. Whether judgment and decree passed by Civil Judge, Savanur, in O.S. No. 35/2008 dated 22.4.2010 is against the material available on

records and require interference by this Court?

5. What order?

It answered point Nos. 1, 3 and 4 in the negative, point No. 2 partly in affirmative and both the appeals filed by defendants and plaintiff were

dismissed. The plaintiff has not preferred any Second Appeal against the judgment and decree of the First appellate Court in R.A. No. 27/2010.

But the defendants 1 to 5 have preferred this Second appeal, assailing he judgment and decree passed in R.A. No. 23/2010 by the First Appellate

Court.

8. I have heard learned Counsel for appellants and learned Counsel for respondent No. 1 and perused the material on record. Respondent No. 2

is served and unrepresented.

9. It is contended on behalf of the appellants that the propositus, Shivamurtayya died prior to 1994 and by then both Gadigevva and Subhadravva

were married and in terms of the amended provision of Hindu Succession Act, the said daughters are not entitled to any share in the suit

properties. It is also contended that in view of the latest decision of this Court the daughters of Shivamurtayya cannot be considered to be

coparceners as Shivamurtayya had died prior to the year 1994 and the amendment to Hindu Succession Act, 1956, is effected from 09.09.2005

and therefore, in terms of the judgment of the Hon''ble Supreme Court in the case of Prakash and Others vs. Phulavathi and Others, reported in ,

2015 (4) KCCR 3265 (SC), the plaintiff cannot be granted any share in the suit properties. He, therefore, submitted that the substantial questions

of law would arise in the appeal which would call for a detailed hearing on admission of the same.

10. Per contra, learned Counsel for the respondent-1 supporting the judgment and decree of the First Appellate Court, contended that though the

plaintiff had sought for 1/3rd share in the suit properties, the trial court as well as the first appellate court have granted only 1/6th share. Both the

courts have not applied the amended provision of Section 6 of the Hindu Succession Act. Plaintiff is not seeking 1/3rd share as a female

coparcener on par with the son. Plaintiff is seeking application of law as it stood prior to 09.09.2005, in which event, notional partition of the suit

properties have to be made and the courts below have applied the law as it stood prior to 09.09.2005 and has granted only 1/6th share to the

plaintiff and defendant No. 6 and not 1/3rd share as claimed by plaintiff and therefore, the judgment and decrees of the courts below do not call

for any interference and that no substantial question of law arises in the matter.

11. Having heard the learned Counsel for the parties and on perusal of the material on record it is noted that the relationship between the parties

are not in dispute. Shivamurtayya, the propositus died prior to the enforcement of the amendment to Section 6 of the Hindu Succession Act, 1956,

which came into effect on 09.09.2005. He died leaving behind two daughters and a son. The son, Huchchayya died on 23.07.2007, leaving

behind his widow and four children. On the death of Shivamurthayya succession opened. In view of the latest decision of the Hon''ble Supreme

Court in Prakash and Others vs. Phulavathi and Others, reported in , 2015 (4) KCCR 3265 (SC), for applicability of the amended Section 6 of

the Act, both the coparcener and his daughter must be living as on 09.09.2005. In the instant case, it is not in dispute that Shivamurtayya died prior

to 1994. Therefore, the amended Section 6 of the Act is not applicable to plaintiff. The plaintiff cannot claim a share equal to that of the son or her

brother, namely 1/3rd share. Both the courts below have, therefore, applied the law as it stood prior to 09.09.2005. Notional partition on the

demise of Shivamurthayya has been made. At the first instance, the properties have been divided between Shivamurtayya and Huchchayya, male

heir, to an extent of 1/2 share each then 1/2 share of Shivamurthayya has been re-divided between his two daughters and son, which would be

1/6th share each. Consequently, the plaintiff is allotted 1/6th share. Defendant No. 6 is allotted 1/6th share and Huchchayya now represented by

his legal representatives would get 1/2 share + 1/6th share i.e. 4/6th share or 2/3rd share in the suit properties at item Nos. 1 and 3.

Paragraph 23 of the judgment of the Apex Court in the case of Prakash and Others vs. Phulavathi and Others, reported in , 2015 (4) KCCR

3265 (SC), reads as under:

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005

irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December,

2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the

Explanation.

The said judgment is squarely applicable to the present case. In the circumstances, plaintiff and defendant No. 6 are entitled to 1/6th share each in

the suit items, i.e. item Nos. 1 and 3. As far as item No. 2 is concerned, the trial court dismissed the suit of the plaintiff which dismissal was

affirmed by the First Appellate Court, against which no Second Appeal has been preferred. Therefore, that aspect of the matter has attained

finality. As far as item No. 2 is concerned, the said item belongs exclusively to the legal representatives of Huchchayya. Thus, no substantial

question of law arises in the appeal.

The appeal is dismissed.

Parties to bear their respective costs.