2019 INSC 79

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.7092 OF 2010

RADHAMMA & ORS. ...APPELLANT(S)

VERSUS

H.N. MUDDUKRISHNA & ORS. ...RESPONDENT(S)

J U D G M E N T

Rastogi, J.

1. The instant appeal is directed against the judgment of the High Court of Karnataka dismissing RFA No. 347/1998 holding that the appellants are not entitled to claim any share in the joint family properties. The appellants/plaintiffs filed a suit on 16.1.1976 for 1/10th share in the suit properties described in the schedule to the plaint as 'A' to 'H'. The learned trial Court decreed the suit declaring that the second plaintiff (since first plaintiff died on 7.7.1978 leaving behind daughter) Smt. Nagamma is entitled for 1/10th share of joint family properties in the plaint which are scheduled properties 'A' to 'E' and the properties in the plaint scheduled 'F' & 'G' were held to be the self-acquired properties of the

testator, and property 'H' was declared as the exclusive property of the Smt. K.C. Saroja. The judgment and decree of the trial Court came to be challenged in the regular first appeal before the High Court by the present appellants in RFA No. 347/1998 and RFA No. 922/2001 was filed by the defendants-respondents against the self-same impugned judgment. The High Court after hearing the parties and on reappraisal of the evidence while affirming the finding of fact in reference to the registered Will Exhibit-D2 dated 16.6.1962 of the testator held that the respondents have established the due execution of the Will as required under Section 68 of the Evidence Act. But while answering the question in reference to the 1/10th share of the plaintiff no.2 in the undivided share of the testator in the joint family properties schedule 'A' to 'E', took note of Section 30 read with explanation of the Hindu Succession Act, 1956 and held that a coparcener derives a right to dispose of his undivided share in Mitakshara joint family property by "Will" or any testamentary disposition i.e. by virtue of law and accordingly reversed the finding recorded by the learned trial Court holding 1/10th share of the

appellants/plaintiffs in the schedule of the properties referred in 'A' to 'E'.

2. Mr. Girish Ananthamurthy, learned counsel for the appellants has tried to persuade this Court that the finding which has been recorded in reference to execution of the Will of the testator Exhibit-D2 dated 16.6.1962 appears to be suspicious for the reasons that the testator Patel Hanume Gowda died on 6.2.1965 and the registered Will Exhibit-D2 dated 16.6.1962 has not seen the light of the day until filing of the suit by the present appellants/plaintiffs on 16.1.1976 and the testator was unwell during the period the Exhibit-D2 was scribed and further submitted that there appears no reason/justification for the testator to have a complete exclusion of one branch of the family i.e. the daughter from his second marriage from the schedule of properties of the testator falling in schedule 'A' to 'H' which indisputedly was either the joint family property or the self-acquired property of the testator.

3. Learned counsel for the appellants further submits that even if the testator could have bequeathed his share in the undivided joint family properties through a registered Will

dated 16.6.1962 still the independent share of the appellants/plaintiffs as a member of the family in the joint family properties could not have been divested and that is an apparent error which has been committed by the High Court and needs interference of this Court.

4. None appeared for the respondents despite service.

5. We have heard the Counsel for the appellants and with his assistance perused the record and we find no error in the concurrent finding of fact as recorded by the learned trial Court and affirmed by the High Court holding the properties schedule 'A' to 'E' belong to joint family properties and property 'F' & 'G' are self-acquired properties of the testator and property schedule 'H' was exclusively of Smt. K.C. Saroja. The suspicious circumstances highlighted by the appellants with reference to the Will Exhibit-D2 dated 16-6-1962, a concurrent finding of fact has been recorded holding that the defendants were able to establish due execution of the Will as required under Section 68 of the Evidence Act and we find no reason to disturb the same.

6. The submission of the learned counsel in reference to 1/10th share of the appellants/plaintiffs in the undivided

share of the testator in joint family properties identified as schedule 'A' to 'E', we are unable to accept the contention for the reason that the Will Exhibit D-2 was executed on 16.6.1962 and the testator died on 6.2.1965, subsequent to the coming into force of the Act, 1956. It is true that prior to coming into force of the Hindu Succession Act, no coparcener could dispose of whole or any portion of his undivided coparcenary interest by Will but by virtue of Section 30 of the Act read with explanation, a coparcener derives his right to dispose of his undivided share in Mitakshara joint family property by Will or any testamentary disposition i.e. by virtue of law. The said provision reads thus:-

> **"Testamentary succession**
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> **30.(1)** Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.
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> **Explanation:** The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this sub-section.
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> (2) For the removal of doubts it is hereby declared that nothing contained in sub-section (1) shall affect the right to maintenance of any heir specified in the Schedule by reason only of the fact that under a will or other testamentary disposition made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under this Act if the deceased had died intestate."

7. Section 30 of the Act, the extract of which has been referred to above, permits the disposition by way of Will of a male Hindu in a Mitakshara coparcenary property. The significant fact which may be noticed is that while the legislature was aware of the strict rule against alienation by way of gift, it only relaxed the rule in favour of disposition by way of a Will of a male Hindu in a Mitakshara coparcenary property. Therefore, the law insofar as it applies to joint family property governed by the Mitakshara school, prior to the amendment of 2005, when a male Hindu dies after the commencement of the Hindu Succession Act, 1956 leaving at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary. An exception is contained in the explanation to Section 30 of the Act making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property can be disposed of by him by Will or any other testamentary disposition and in the given facts and circumstances, the testator Patel Hanume Gowda was indeed qualified to execute a Will bequeathing his

undivided share in the joint family properties by a Will Exhibit D-2 dated 16.6.1962.

8. The submission of the learned counsel for the appellants in claiming independent share as a member of the family in the joint family properties is without substance for the reason that the appellants have no independent share in the joint family properties and their share could be devolved in the undivided share of the testator in the joint family properties and since the testator has bequeathed his share/his undivided coparcenary interest by Will dated 16.6.1962, no further independent share could be claimed by the appellants in the ancestral properties as a member of the family as prayed for.

9. We find no error in the judgment of the High Court which may call for interference, consequently the appeal fails and is hereby dismissed. No costs.

10. Pending application(s), if any, stand disposed of.

.....J.
(A.M. KHANWILKAR)

.....J.
(AJAY RASTOGI)

NEW DELHI
January 23, 2019.