IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF APRIL, 2019

BEFORE

THE HON'BLE MR. JUSTICE N.K. SUDHINDRARAO

R.S.A.No.1316/2004

Parvathamma
v/s.
Govindappa

JUDGMENT

This regular second appeal is filed by the Plaintiffs challenging the Judgment and decree dated 10.11.2004 passed by the learned Additional District and Sessions Judge, Chickmagalur, in RA No.38/2002, reversing the Judgment and decree dated 28.10.2002 passed by the Civil Judge (Senior Division) at Kadur, in O.S. No.125/2001 and consequently dismissed the suit filed by the plaintiffs.

2. In order to avoid confusion and overlapping, the parties are addressed in terms with the ranks held by them before the Trial Court.

3. Basically, the 1st plaintiff Parvathamma and 2nd Plaintiff Lokesha.H, being the wife and son of

Hanumanna filed a suit for setting aside the exparte decree passed in O.S.No.515/1992 dated 15.12.1994, on the file of the Munsiff at Kadur and also for declaration that the plaintiffs are the absolute owner of the suit property, comprised in Survey No.10 of Melanahalli village, Hirenallur Hobli, Kadur Taluk, to an extent of 24 acres 19 guntas.

4. The substance of the claim is that Plaintiff No.1 Smt. Parvathamma is the wife of Hanumanna and plaintiff No.2 Lokesha.H is the son of Hanumanna. Defendant No.1 Govindappa is the younger brother of Hanumanna and defendant No.2 Kariyappa is the son of 1st defendant Govindappa. Defendant No.3 M.B. Kalleshappa is stated to be the purchaser of the suit property from Govindappa, the defendant No.1 and Kariayappa.

5. The contention of the defendants No.1 and 2 is that the plaintiffs do not have any right, title or possession over the suit property and that they are not the family members of either Hanumanna or the

defendants. It is also stated that plaintiffs have filed the present suit stating that the 1st plaintiff is the wife of Hanumanna and the plaintiff No.2 is her son. The defendants No.1 and 2 stoutly deny the relationship, both marital and paternal of the plaintiffs No.1 and 2 with the said Hanumanna.

6. The said Hanumanna is dead. The plaintiffs and defendants do not dispute the ownership of Hanumanna in whose favour the suit property was granted during his life time. Defendant No.1, being the younger brother of Hanumanna, inherited the suit property from Hanumanna. The plaintiffs also admitted the ownership of Hanumanna over the suit property. The claim of the plaintiffs is that plaintiff No.1 being the widow and plaintiff No.2 being the son of Hanumanna have inherited to the suit property. The substance of the dispute is that it is a rival claim of plaintiffs No.1 and 2 who claim as the wife and son and defendant No.1 who claims as the brother of Hanumanna. Regard being had to the fact that defendant No.2 is the son of defendant No.1.

7. Insofar as defendant No.3 is concerned, he is stated to be the purchaser of the suit property from defendants No.1 and 2.

8. The learned Judge of the trial Court was accommodated with oral evidence of PW.1. Lokesha, PW.2.Lakshmamma, PW.3. Hanumappa and documentary evidence in the form of Exhibits P.1 to P.16 and oral evidence of DWs.1 to 3 and documentary evidence in the form of Ex.D.1 to D.34.

9. On evaluation the oral and documentary evidence available before him and after hearing counsel for both the parties by the impugned Judgment dated 28.10.2002 passed in O.S.No.125/2001, learned trial Judge decreed the suit and declared that plaintiff No.1 Parvathamma and plaintiff No.2 Lokesha.H are the wife and son of deceased Hanumanna. Further, the trial Judge set aside the judgment and decree passed in the earlier suit in O.S.No.515/1992 dated 15.12.1994 by holding that it is not binding on the plaintiffs.

10. By the impugned judgment dated 10.11.2004, passed in R.A.No.38/2002, the learned Additional District Judge, Chikamagaluru, allowed the appeal filed by the defendants-1 & 2, set aside the judgment decree passed by the trial Court and consequently, dismissed the suit O.S.No. 125/2001 filed by the plaintiffs.

11. Being aggrieved by the above divergent findings recorded by the Courts below, the plaintiffs are before this Court.

12. While admitting the above appeal for consideration on 25.01.2005, this Court formulated the following substantial questions of law:

> "i) Whether the finding of the first appellate Court reversing the Judgment and decree passed by the trial Court is perverse and arbitrary being discarding the evidence of PWs 1 and 2 and being based upon the ground that no application had been filed for change of entry in the name of the appellant?

Additional questions of law framed by this Court on 25.4.2019

ii) Whether the marital relationship, as claimed by the plaintiff No.1 as the wife of Hanumanna is corroborated by the evidence, inspiring the confidence of the Court, by independent circumstances?

ii) Whether the plaintiffs are entitled to exclude the defendants 1 & 2 from succeeding to the suit schedule property?

iii) Whether the un-challenged ex-parte decree passed in the earlier suit in O.S.No.515/1992 operates as *res-judicata?*

iv) Whether the trial Court was estopped from entertaining the present suit, when the matter was adjudicated in the earlier suit in O.S.No.515/1992 and the trial Court was justified in setting aside the judgment passed in O.S.No.515/1992.

v) Whether the judgment and decree passed by the learned trial Judge is an embargo against the enforceability of the judgment and decree passed in the earlier suit in O.S.No.515/1992?"

Though the points of additional question of law No.ii is spread over question of law Nos.iii, iv and v. In the circumstances, they are split in the context.

13. Sri.G.S.Balagangadhar, learned counsel appearing for the plaintiff-appellants would submit that the oral and documentary evidence adduced by the plaintiffs 1 & 2 is sufficient to inspire the confidence of the Court and on appreciation of their evidence, the trial Court rightly decreed the suit. However, the first appellate Court committed grave error in setting aside the said judgment, because of which plaintiffs were compelled to come before this Court.

14. In order to deprive the right and succession of the plaintiffs over the suit property, the defendants No.1 and 2 have stooped to the level of suspecting/disputing the marital and paternal relationship of plaintiff No.1 and Plaintiff No.2

respectively, with reference to Hanumanna. The voter identity card marked as Ex.P.11 would unequivocally prove that Plaintiff No.2 Lokesha.H is the son of Hanumanna and plaintiff No.1 is the wife of Hanumanna. There was no reason for the first appellate Court to disbelieve the said documentary evidence.

15. Sri.K.Srihari, learned counsel for defendants No.1 and 2 would submit that the primary question as regards the marital and paternal relationship of the 1st plaintiff & 2nd plaintiff with Hanumanna has already been adjudicated in the earlier suit O.S.No.515/1992 filed by Kariyappa (defendant No.2 who is the son of defendant No.1) against Parvatamma & Lokesha. He would further submit that even the question of title and possession was adjudicated against Parvatamma and Lokesh and infavour of the defendant No.2 in the said earlier suit. Further since, the plaintiffs-appellants herein did not choose to file any appeal against the said judgment, the same has attained finality and hence, the present

suit filed by the plaintiffs-appellants was not at all maintainable, under doctrine of res-judicata. No documents are produced by the plaintiffs, reflecting the marital relationship of plaintiff-1 and Hanumanna and paternal relationship between plaintiff No.2 Lokesha.H and Hanumanna.

16. It is necessary to note that in the earlier proceedings in O.S.No.515/1992, the defendants therein who are the Plaintiffs in the present suit alleged that were prevented from contesting the case and the said judgment was passed behind the back of the plaintiffs and hence, there was no binding effect of the judgment and decreed in O.S.No.515/1992. They filed the present suit wherein prayer included to set aside the judgment passed in the earlier suit in O.S.No. 515/1992.

17. At the time of filing of the present suit in O.S.No.125/2001, the plaintiffs were aware about that the judgment and decree passed in O.S.No.515/1992 was in force, but however, the same was not binding on them.

18. There was no application filed by the Plaintiffs under Order IX Rule 13 of CPC., for setting aside the said judgment and decree dated passed in O.S. No.515/1992, or under Order XLI of CPC was invoked to prefer an appeal.

19. The plaintiffs filed the present suit for declaration and injunction and also with an additional prayer for declaring that the earlier proceedings in O.S.No. 515/1992 was nullity in law.

20. The learned counsel for plaintiffs would submits that application under Order IX Rule 13 of CPC., for setting aside exparte decree passed in OS. 515/1992 has not been filed by the plaintiffs, because they were prevented from conducting their case in OS. No.515/1992 effectively.

21. There is no difference between exparte decree and the regular decree. The only procedural difference are that right for invoking the provisions of Order IX Rule 13 is for recalling of the exparte decree and filing of an appeal is a right conferred on the parties.

22. In the case on hand, the plaintiffs in the present case who were defendants in the earlier suit have not invoked both the provisions. Insofar as the date of disposal of the suit in O.S.No.515/1992 was concerned, the same was disposed of on 15.12.1994 and indisputably, the aggrieved parties viz., the plaintiffs herein have not filed any appeal against the said exparte judgment and decree. But, they chosen to file fresh suit in O.S.No.125/2001 on 21.03.1996.

23. Now the plaintiffs are required to prove two aspects viz (1) the judgment and decree passed in the earlier suit in O.S.No.515/1992 was a result of fraud played by the defendants in the present suit, (2) the plaintiffs were prevented by the defendants from contesting the earlier suit in O.S.No.515/1992, regardless of the summons being served on them and when they engaged counsel to prosecute the matter.

24. Firstly, in the circumstances and facts of the case, the entitlement for decree for declaration of title over the schedule property to these plaintiffs

depends on their relation with the deceased Hanumanna in the capacity of legal representatives as widow and son. In the earlier round of proceedings, the suit O.S.No.515/1992 filed by one Kariyappa, who is the second respondent in the present proceedings, came to be decreed. Secondly, the title of Hanumanna is not disputed by either of the parties. Thirdly, whether there was a bar for instituting present suit by the plaintiffs and whether the suit is hit by the Doctrine of *res-judicata* under Section 11 of the Code of Civil Procedure.

25. It is necessary to mention Ex.D2-School Endorsement dated 22.7.92 issued by the Head Master of Lower Primary School, Medihalli, to the second defendant-Lokesh H., wherein his father's name is mentioned as 'Siddappa' and not 'Hanumanna' and the Date of Birth is mentioned as '24.09.1968' and his admission number is mentioned as '12/75-76' and his caste is mentioned as 'A.K. (Adi Karnataka)'.

26. Learned counsel for defendants would also submit that Ex.D31-Voters List wherein the name of plaintiff No.2 is shown as Lokeshappa Siddappa instead of Lokesh Hanumanna and the name of plaintiff No.1 is shown as Parvathamma Siddappa instead of Parvathamma Hanumanna. As against this, learned counsel for the plaintiffs would submit that the Voters Identity Card –ExP11 of plaintiff No.2 is mentioned as Lokeshappa S/o Hanumappa.

27. Insofar as the proceedings in O.S.No.515/1992 is concerned, the claim of the plaintiffs is that they were prevented from participating in the proceedings and they were placed *exparte* and the second defendant obtained decree behind the back of the plaintiffs. Hence, they were constrained to file O.S.No.125/2001.

28. In the context and circumstances of the case, it cannot be brushed aside that the suit in O.S.No.515/1992 was not fully contested. Having regard to the contention that the defendants in the

said suit were prevented by the plaintiffs therein by playing fraud on them to obtain decree, no proceedings were initiated and at the second instance it was not only the schedule property was the subject matter of the suit. But, in the peculiar circumstances, the description of name in the cause title is variant wherein first defendant's husband name and second defendant's father's name is shown as 'Siddappa' instead of 'Hanumanna'. This could have been done in order to drop them out of the family for the purpose of knocking away the property. Having regard to the fact that O.S.No.515/1992 was disposed of on 15.12.1994 and O.S.No.125/2001(O.S.18/96) came to be filed by the defendants on 21.03.1996. The lucid interval between the disposal date of O.S.No.515/1992 and institution date of present suit demands answer from the plaintiffs however, it did not happen.

29. Learned counsel for the plaintiffs would submit that the Voters List cannot be considered as conclusive document to establish their relationship. It

cannot be forgotten for a while that even the plaintiffs also depends on Ex.P11-Voter Identity Card. No doubt whether Voters List or the Voters Identity Card are to be strongly corroborated by independent evidence in the context or circumstance of the case. In other words, fact of living together known to the Society identifying themselves as spouses, participation in various functions are the factors required for evidence which establishes the marriage. If the Marriage Certificate alone is required to be the conclusive evidence of the Hindu Marriage, then more than 50% of the marriages are unregistered. The evidence of PW2 who is the sister of Parvathamma-plaintiff No.1 certifies that Parvathamma is the wife of late Hanumanna does not inspire confidence because she is a lady who is having personal interest with parvathamma. School Certificate and Voters List in respect of O.S.No.515/1992 squarely demolishes the contentions of the plaintiffs. At this juncture, it is seen that though being a non-relative of late Hanumanna, in the sense, either to figure as close

heirs or member of the family both the plaintiffs are excluded.

30. The plaintiffs have not satisfied the Court that they established that they were prevented from contesting O.S.No.515/1992, by a circumstance because of which they are entitled to agitate by bringing a separate suit. It is necessary to place on record that whatever is not legally provided in the statute, cannot be made provided through circumventing the same by twisting the facts. Further, it is a fact that the ownership and possessions of Hanumanna is not disputed. He is dead and was the owner of the schedule property till the moment of his death. The next question is, inheritance of the schedule property as the legal heirs. The plaintiffs claim that they are respectively wife and son of Hanumanna. But they failed in their attempt to establish the same.

31. The second prayer in the plaint is to set aside the decree passed in O.S.No.515/1992. By not contesting and establishing their right in particular in

the capacity of defendants-1 and 2 in O.S.No.515/1992, they ought to have exhausted the remedy and they are estopped from agitating right from Hanumanna being the husband of PW1 and father of PW2. Insofar as proceedings are concerned, the matter and the parties are substantially are same and the said matter was adjudicated before the competent Court. Here, it is necessary to mention Section 11 of the Code of Civil Procedure, 1908 which is as under:

> *"11. Res judicata – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between arties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."*

Thus what is barred under law by Section 11 of the Code of Civil Procedure cannot be done through

short cut method in gross violation of the said provision of law. This is what exactly contended by the plaintiffs though they are not entitled.

32. In the circumstances, the plaintiffs sought for declaration of title over the suit schedule property on the basis of relationship with Hanumanna without participating in the proceedings in O.S.No.515/1992. On the file of the Learned Munsiff and JMFC, Kadur. Learned Civil Judge (Senior Division) Kadur, has seriously erred in decreeing the suit O.S.No.125/2001. However, learned Additional District Judge, Chickmagalur in R.A.No.38/2002 through his sound reasoning has set aside the judgment and decree.

33. I do not find any infirmity, illegality or lapse in the judgment and decree passed by the learned Additional District Judge, Chickmagalur in R.A.No.38/2002. The substantial questions of law are answered accordingly.

34. In the result, appeal fails and the same is accordingly dismissed.