R

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 12TH DAY OF AUGUST, 2022

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

R.F.A.No.1979/2005 (DEC. & INJ.)

BETWEEN:

1. HUSAINSAB
S/O JANDISAB KADAMPUR,
AGED ABOUT 58 YEARS,

2. MOHAMMADASAB
S/O JANDISAB KADAMPUR,
AGED ABOUT 44 YEARS,

BOTH ARE AGRICULTURISTS,
R/AT LAKKUNDI, TQ;GADAG. …APPELLANTS

(BY SHRI.J.S.SHETTY, ADV.)

AND:

J MAMATHA
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Location: Dharwad
Date: 2022.08.16 12:50:24 +0530

SMT MODINABI @ FAKRUBI
W/O MUKTUMSAB DADAPPANAVAR
AGED ABOUT 44 YEARS,
OCC;HOUSEHOLD,
R/AT LAKKUNDI,TQ;GADAG. …RESPONDENT

(BY SHRI.S.P.KULKARNI, ADV.)

THIS RFA IS FILED U/S.96 OF CPC AGAINST THE JUDGMENT AND DECREE DT.28.10.2005 PASSED IN O.S.NO.117/2002 ON THE FILE OF THE CIVIL JUDGE

(SR.DN) AND CJM, GADAG, DECREEING THE SUIT FOR DECLARATION AND CONSEQUENTIAL RELIEF OF PERMANENT INJUNCTION.

THIS APPEAL COMING ON FOR FINAL HEARING ON 02.08.2022 AND THE SAME HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed challenging the judgment and decree passed in O.S.No.117/2002 on the file of the Civil Judge (Sr.Dn.) and CJM, Gadag, dated 28.10.2005 and praying this Court to set aside the judgment and decree.

2. The parties are referred in the original rank of the plaintiff and defendants to suit the convenience of the Court.

3. The factual matrix of the case of the plaintiff before the trial Court while seeking relief of declaration is that plaintiff is in possession of the suit schedule properties and for injunction restraining the defendants from interfering with her peaceful possession and enjoyment of the suit schedule properties and contended that the suit schedule properties consists of land bearing

R.S.No.93/1A+1B measuring 14 acres and also house properties bearing gram panchayat No.1070, 1067 and open site bearing Gram Panchayat No.994 which are situated at Lakkundi village in Gadag taluk. It is the claim of the plaintiff that her father Alisab Dubalesab Kadampur was the owner and in possession of the suit schedule properties. He was in lawful possession along with plaintiff and her husband Maktumsab. It is also her claim that she is the only daughter of the said Alisab and father had performed the marriage of the plaintiff assuring that the property will devolve upon the plaintiff. It is also contended that an agreement letter to this effect was executed on 14.05.1973 before the elders of the Society and with this understanding, the marriage of the plaintiff was solemnized with Maktumsab. It is also contended that even otherwise the plaintiff succeeded to the suit property by inheritance. Even after her marriage, plaintiff along with her husband was residing with Alisab and Husainbi and their names are also jointly shown in ration card, voters' list and they are paying the taxes. The plaintiff

alone looked after her parents during their life time. The father of the plaintiff died on 24.09.2001 and the mother died two years prior to the death of Alisab and the plaintiff alone met all the medical and funeral expenses.

4. It is further pleaded in the plaint that the defendants are the sons of the plaintiff's mother's elder sister Davalbi. Defendants in order to grab the suit schedule properties have indulged in creating forged, fabricated, illegal and bogus documents such as Will etc., on the pretext that deceased Alisab had executed such documents in their favour. The defendants are not the heirs of Alisab and they are unconnected to the suit schedule properties. But an attempt was made before the Tahsildar to get the property transferred based on the Wardi and having come to know about the same, the plaintiff filed her objections and dispute was pending before the Deputy Tahsildar, Dambal vide RTS DSR.14/00 and made an attempt to disturb the peaceful possession and enjoyment and hence, the suit was filed.

5. In pursuance of the notice, the defendants entered appearance and filed their statement of objections. They claimed that they were in possession of the suit schedule properties along with deceased Alisab. They admit that the plaintiff is the only daughter of Alisab and the said Alisab had no sons but claims that after the marriage, plaintiff had gone to her husband's house situated at Majjigudda village and lived there and the parents of the plaintiff used to live with the defendants and the suit schedule properties were cultivated by defendants along with Alisab and defendants alone looked after the plaintiff's father and met the expenses for the treatment of Alisab and his wife. It is contended that defendants' father and Alisab were cousins. Plaintiff's mother was married to Alisab and plaintiff's mother's younger sister was married to the father of the defendants. It is the contention of the defendants that they have taken care of said Alisab and hence, Alisab had executed two Wills; one in favour of the plaintiff and the other in favour of the defendants bifurcating these properties and both the Wills are

registered. During the execution of the Will, Alisab was in good conscious and the plaintiff had also consented in this regard before the elders.

6. Based on the pleadings of the plaintiff and the defendants, the trial Court has framed the following issues:

i) Whether the plaintiff proves that she has inherited the suit properties as pleaded in para -3 of plaint?

ii) Whether the plaintiff is in lawful possession of suit properties on the date of suit?

iii) Whether the defendants prove the execution and validity of Will dt.12.01.2000 executed by Alisab as pleaded in para - 6 of WS?

iv) Whether the plaintiff proves cause of action?

v) What order/decree?

7. The plaintiff in order to substantiate her claim examined her husband who is the Power of Attorney Holder as PW-1 and also examined two witnesses as PWs-2 and 3 and got marked documents Ex.P.1 to Ex.P.14. On

the other hand, the 1st defendant got examined himself as DW-1 and examined DWs-2 to 5 and got marked two documents. The trial Court after considering both oral and documentary evidence answered issue Nos.1 and 2 in the negative and came to the conclusion that the plaintiff has proved that she has inherited to the suit schedule properties and she is in lawful possession and answered issue No.3 as negative in coming to the conclusion that defendants have not proved the execution of the Will dated 12.01.2000 and decreed the suit in favour of the plaintiff and hence, present appeal is filed by the defendants.

8. The main contention of Shri J.S.Shetty, learned counsel for the appellants/defendants is that the trial Court has not appreciated the evidence of DWs-1 to 5 and apart from that even though the Will were marked as Ex.D.1 and Ex.D.2 and the said Wills are signed by the said Alisab and attesting witnesses and the scribe were also examined, their evidence has not been considered by the trial Court in a proper perspective. The trial Court mistook the evidence

of DW-4 and gave a finding which is contrary to the documentary and oral evidence and hence it requires interference of this Court. He also sought to set aside the finding with regard to issue No.3 and submits that if Will is accepted, the plaintiff cannot claim any right in respect of the properties which have been bequeathed in favour of the defendants. The counsel also vehemently contended that defendants' father has taken care of father of the plaintiff and hence two Wills are executed; one in favour of the plaintiff and the other in favour of the defendants. But, the trial Court committed an error in coming to the conclusion that the Will has not been proved and the same came in existence in suspicious circumstances. The counsel also contended that even assuming in the absence of the said Will, the daughter would get only 1/2 share when admittedly Alisab had no son and defendants come within the residuaries since there were no other heirs. He would also submit that the relationship between the plaintiff's father and defendants' father are brothers and the defendants being the sons of brother of Alisab, they

are entitled for a share in the property as residuaries. In support of his case, the learned counsel relying on the judgment in the case of ***NEWANNESS ALIAS MEWAJANNESSA VS. SHAIKH MOHAMAD AND OTHERS*** reported in 1995 Supp (2) SCC 529 submits that the plaintiff being the sharer gets half of the share and remaining half of the share goes to residuaries which would go to the legal heirs of the brother of the said Alisab and hence, the defendants are entitled for a share in the property left behind by Alisab as residue.

9. This Court had issued notice against the respondent but the respondent has remained unrepresented. Having heard the counsel for the appellants/defendants and also on perusal of the material on record, the points that arise for consideration of this Court are:

i) Whether the trial Court has committed an error in coming to the conclusion that defendants have not proved the execution of Will dated 12.01.2000?

ii) Whether the trial Court has committed an error in decreeing the suit in favour of the plaintiff without considering the rights of the defendants as residuaries?

iii) What order?

Reg: Point No.1:

10. Having heard the learned counsel appearing for the appellants and also on perusal of the material on record, it is seen that admittedly suit schedule properties belongs to Alisab who is the father of the plaintiff and there is no dispute with regard to the said fact. It is the contention of the plaintiff that defendants are not the heirs of Alisab and they are unconcerned with the suit schedule properties. It is also the specific case of the plaintiff that defendants are the sons of the plaintiff's mother's elder sister Davalbi. The same is not disputed by the defendants. But, they claim that defendants' father and Alisab were cousins and also they have not disputed the fact that the plaintiff's mother's younger sister was married to the father of the defendants and there is no

dispute with regard to the said fact between the parties. But, the only dispute is with regard to the claim of the defendants that defendants' father and Alisab were brothers.

11. The very contention of the defendants that the said Alisab had executed two Wills; one in favour of the plaintiff who is the daughter of Alisab and another in favour of the defendants and admittedly, these two documents are registered documents. The said documents are marked as Ex.D.1 and Ex.D.2. The 1st defendant is examined as DW-1 and he reiterates his evidence with regard to the defence which they have taken in the written statement and in the cross-examination he admits that the mother of the plaintiff and the mother of the defendants are sisters. But, in the cross-examination denied that there was an agreement to the effect that all the properties of Alisab were to be given to the plaintiff prior to the marriage of the plaintiff. But he admits that in the voter's list the names of the plaintiff, her husband and

parents are shown as living together for the last 30 years but it is the contention of the defendants that they alone have taken care of the plaintiff's father after the marriage of plaintiff and said admission takes away the contention of the defendants.

12. With regard to proof of execution of Ex.D.1 and Ex.D.2, the witness examined as DW-2 says that Alisab was healthy and he was having sound disposing state of mind and thus Alisab called him and others on the evening of 11.01.2000 and expressed his intention to execute documents Ex.D.1 and Ex.D.2. But he says that on 12.01.2001 Alisab called all of them to his house and also called the scribe to write Ex.D.1 and Ex.D.2 and that after the contents were read over and after understanding Alisab put his thumb impression. But, during the cross-examination, a question was put to him whether there is a recital in Ex.D.1 regarding the care taken by the plaintiff to her father etc., and in the evidence replied that the same has not been mentioned but he says that Will deeds were

written on white papers but he does not remember the numbers assigned to the properties. But he claims that plaintiff and her husband knew about the execution of Ex.D.1 and Ex.D.2. But he says they refused to come to Gadag and they were not taken to Gadag. He also admits that father of the plaintiff and father of the defendants are not real brothers.

13. The defendants have also examined another witness DW-3 and he claims that he was also present during the talks held on 11.01.2000 and he identified the thumb impression of Alisab but in the cross-examination he admits that the plaintiff was residing with Alisab for 30 years. But, he claims that Will was written on 11.01.2000 and on the same day signatures were obtained and this evidence is contrary to the evidence of DW-2. Though this witness also says that the plaintiff, husband of the plaintiff and her mother were present but he had not seen them having signed Ex.D.1 and Ex.D.2.

14. The other witness DW-4 is the scribe of the Will. According to him, Ex.D.1 and Ex.D.2 were written on the next day but talks were held on 11.01.2000 and read over the contents to the plaintiff and her husband and thereafter to Alisab. Then Alisab had signed the Will but he claims that when he wrote Ex.D.1 and Ex.D.2, wife of Alisab, plaintiff and her husband were present and the wife of Alisab had also given consent and that all the three above persons had signed on the Will but they had not come to the office of the Sub-Registrar.

15. The other witness is DW-5. He also supported the case of the defendants and in the cross-examination, he also admits that during the execution of Ex.D.1 and Ex.D.2, the plaintiff, her husband and her mother were present. But, he does not know whether they have signed the said document.

16. The main contention of the appellants/defendants' counsel is that the evidence of these witnesses i.e., DWs-1 to 5 has not been considered

by the trial Court and keeping in mind the said contention, this Court has to re-appreciate the material available on record and in case of proving a Will, it is the duty cast upon the Propounder of the Will to remove all suspicious circumstances.

17. Admittedly, DW-1 is an interested person since in terms of the Will he is the beneficiary. According to DW-1 the Will was executed on 12.01.2000 and talks were held on the said day evening. But, both the Wills were executed on the next date and registered and on the previous day, only talks were held but the document was registered and written on next day. Hence, the trial Court found the discrepancy when the talks were held on 12.01.2000, registration ought to have been on 13.01.2000 in terms of the evidence of DW-1 and having taken care of the evidence of DWs-2, 3 and 5, who claim that they were present on the date of execution of the document and they put the signatures after Alisab had signed the said document and their evidence is not specific

that Alisab had put his signature in their presence. But DW-2 claims that talks were held on 11.01.2000 and the document was wrote on 11.01.2000 but the documents were registered on the next day. The evidence of DW-2 is also contrary to the evidence of DW-1. The other witness DW-3 also deposes that talks were held on 11.01.2000 and the documents were wrote on the same day and persons present had signed on the same day and the evidence of DW-3 is also contrary to the evidence of DW-1 and DW-2.

18. But, DW-4 the scribe in his evidence says that talks were held on 11.01.2000 and the same was signed on the next day. In the cross-examination he admits that Will deeds were written on 11.01.2000 and on the same day, Alisab and witnesses have signed the same. In the cross-examination, it is elicited that Ex.D.1 and Ex.D.2 were written by one Jeevanappa. According to DWs-1 to 3 and 5 both the Will deeds were written by DW-4 but DW-4 has denied and no proper explanation is given by the witnesses as to who was the scribe of Ex.D.1 and Ex.D.2.

The evidence varies with regard to the date, writing of the Wills and also contra evidence emerged during the course of cross-examination between the evidence of DWs-1, 2, 3 and 5 and having taken note of these contradictions, the defendants who claim that two Wills came into existence have not proved the same and there are suspicious circumstances with regard to the execution of the two Wills. The witness also categorically admitted in the cross-examination that the defendants were residing along with the plaintiff for a period of more than 30 years but in the cross-examination categorically admitted that voter's list and Aadhar card discloses that plaintiff and her father and her husband all of them were residing together and all the documents stand that they were residing together for a period of 30 years and when such being the case, the very claim of defendants that they were taking care of the executant of the Will, is falsified.

19. The trial Court has also taken note of mentioning in document Ex.D.1 that the said Will is the

last Will of the executant and there is no such reference in Ex.D.2 which allegedly came into existence on the very same day and also what made them to execute two separate Wills has also not been explained by the defendants and the other suspicious circumstances is not explained by the propounder of the Wills. The trial court has taken note of the material evidence on record and particularly in paragraphs 20 to 26 has discussed the same in detail and has rightly come to the conclusion that the alleged Will Ex.D.1 and Ex.D.2 came into existence in a suspicious circumstances and having taken note of the said fact and also the reasoning given by the trial Court that when the plaintiff is the only daughter and there were no other children and when the wife of Alisab was also alive at the time of execution of the document, nothing has been given to the wife and only in terms of Ex.D.1 and Ex.D.2 made provision to the daughter as well as the defendants and the same is also another suspicious circumstances. Having taken note of these facts into consideration, the trial Court has rightly come to the conclusion that

defendants have failed to prove the factum of the very execution of document by the executant and merely because the documents are registered, the Court cannot come to the conclusion that the same is executed by Alisab. Hence, I do not find any error committed by the trial Court in coming to the conclusion that Ex.D.1 and Ex.D.2 came into existence in suspicious circumstances and hence, I answer point No.1 as negative.

Reg:Point No.2:

20. The other contention of the learned counsel appearing for the appellants/defendants that the daughter is entitled for 1/2 share and remaining property goes to the residuaries and the defendants are the residuaries. In keeping the said contention, this Court has to consider the material on record and it is an undisputed fact that plaintiff is the only daughter to the deceased Alisab and he had no son. If there are no sharers or if there are sharers but there is residue left after satisfying their claims, the whole inheritance or the residue as the case may be, devolves

upon residuaries in the order set-forth in terms of Section 65 of the Mulla's Principles of Mohammedan Law and nodoubt daughter is a sharer but in the case on hand, admittedly both in the plaint pleadings and in the written statement, it is emerged that the plaintiff's mother and defendants' mother are sisters but an attempt was made by adopting ingenious method during the course of cross-examination of PW-1 that the plaintiff's father and defendants' father are the brothers and the same was denied by PW-1 and also it is elicited that plaintiff is the only daughter to Alisab. An attempt was made in the cross-examination to elicit the answer that plaintiff's father and defendants' father are brothers and the same was denied. But in the written statement it is contended that both of them are cousins and the same is also denied by PW-1 and hence it is clear that defendants' father is not real brother of the plaintiff's father but only admitted relationship is that the plaintiff and defendants are cousins since the plaintiff's mother and defendants' mother are sisters and hence the very contention of the plaintiff's

counsel that the defendants come within Section 65 of the Mohammedan Law cannot be accepted and they cannot claim as residuaries. No doubt, the Mulla's Principles of Mohammedan Law postulates three clauses of heirs, namely i) sharers ii) residuaries and iii) distant kindred. Sharers are those who are entitled to a prescribed share in inheritance; residuaries are those who take no prescribed share, but succeed to the 'residue' after the claims of the sharers are satisfied; and distant kindred are all those relations by blood who are neither sharers nor residuaries.

21. In the present case, as I have already pointed out that the plaintiff is the only daughter to her father Alisab and as I have already pointed out that in terms of the admission of both the parties that the respective mothers are the sisters and the very contention of the defendants' counsel that defendants' father was brother of the plaintiff's father cannot be accepted and the same has been denied by PW-1 during the cross-examination. It is also made to know that in the written statement no such

claim was made but it is contended that plaintiff's father and defendants' father are cousins but during the course of cross-examination of PW-1 took a different stand that plaintiff's father and defendants' father are brothers. The same was categorically denied. The trial Court also while giving the finding with regard to whether they are residuaries taken note of Section 63 of the Mulla's Principles of Mohammedan Law and the plaintiff is the only daughter and he had no sons. If they are residuaries in terms of Section 65, then they would get the right. But having taken note of the relationship between the parties and given the definite finding that the defendants are not included in the category of residuaries in paragraph 27 of the judgment of the trial Court and when such being the material available on record, the defendants are not the residuaries and though different stand are taken during the cross-examination and also in the written statement and in terms of the written statement it is admitted fact that the plaintiff's mother and defendants' mother are the sisters and there is no dispute to the said fact but an attempt was

made that the father of the plaintiff and defendants' father are cousins and the same has been categorically denied and also during the course of cross-examination an attempt was made that plaintiff's father and defendants' father are brothers and the same is also categorically denied in the cross-examination. When such being the material available before the Court, the very contention of the appellants counsel that defendants come within the category of residuaries cannot be accepted.

22. The judgment relied by the learned counsel for the appellants is not applicable to the facts of the present case because the Hon'ble Apex Court has held that full sister who is a residue is entitled for share. But in the present case, the plaintiff is not a full sister and not a residue who is entitled for a share. Hence, the above judgment is not applicable to the facts of the case.

23. Considering the material available on record, the trial Court has rightly come to the conclusion that the defendants are not included in the category of residuaries

and I do not find any error committed by the trial Court in considering both the facts as well as the question of law. Since this Court being the first appellate Court has to consider both the question of fact and question of law and when there are no error with regard to consideration of question of facts and question of law, question of interference of this Court by exercising the appellate jurisdiction does not arise and the finding given by the trial Court both in respect of the facts as well as question of law does not require any interference. Hence, I answer point No.2 as negative.

24. In view of the above discussions, I pass the following:

ORDER

i) The appeal is dismissed. No costs.

[Sd/-]
JUDGE

Jm/-