

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 5th DAY OF AUGUST 1998

BEFORE

THE HON'BLE MR. JUSTICE T.N. WALLINAYAGAM

REGULAR SECOND APPEAL No. 1078/1995

Between

Manjunath Narayan Naik,

Age: Major, Occ: Agriculture,
Resident of Susgadi, Bhatkal Tq.

Appellant

(By Sri M. Ram Bhat)

And:

1. Jatti @ Jattamma Erappa Naik,
Age: Major, Resident of
Susgadi, Bhatkal Taluk.

2. Shreedher Erappa Naik,
Age: Major, Resident of
Susgadi, Bhatkal Taluk.

3. Jattappa Erappa Naik,
Age: Major, Resident of
Susgadi, Bhatkal Taluk.

Respondents

(By Sri Ravi G. Sabhahit for R-1 to 3)

Regular Second Appeal is filed U/s. 100 of C.P.C. against the Judgment and Decree dated 21-7-1995 passed in R.A. No. 41/1995 on the file of the District Judge, Karwar, dismissing the appeal and confirming the Judgment and decree passed by the Munsiff, Bhatkal in O.S. No. 102/89 dated 9-9-1991.

This Regular Second Appeal coming on for hearing this day, the Court delivered the following: -

J_U_D_G_M_E_N_T_

The defendant is the appellant. The suit for declaration that the alleged Will dated 27-9-1986 is bogus and for injunction restraining the defendant from interfering with the possession of the plaintiffs, was decreed by the trial Court and the decree came to be confirmed by the first appellate Court and hence ^{the} second appeal.

2. The case of the plaintiffs in brief is to the effect that the suit properties are the ancestral properties of the plaintiffs and they are in possession of the same. The defendant appears to have fraudulently got a Will stated to have been executed by Smt. Jattamma on 27-9-1986 and the said Will cannot confer any title to the defendant in respect of the suit properties. Smt. Jattamma had no right to execute any Will. The defendant on the basis of the alleged Will has been making attempts to deprive the plaintiffs of their rights to the suit properties. Hence, the suit

had been filed for the relief of declaration that the alleged Will is void and bogus, not binding on the plaintiffs and for the relief of permanent injunction restraining the defendant from interfering with the plaintiff's peaceful possession and enjoyment of the suit properties.

3. The defendant had resisted the suit claim by denying the material averments therein. It was specifically contended that the plaintiff's suit is void, vexatious, mischievous and unsustainable in law and the plaintiff's have no locus standi either to file or to maintain the suit. Smt. Jattamma, the legally wedded wife of Erappa, during her life time on 27-9-1986 had executed a Will in favour of the defendant bequeathing the suit properties in his favour. The plaintiff's are not in possession of the suit properties. There is no cordial relationship between the first plaintiff and the deceased Erappa. For these reasons, the suit was sought to be dismissed.

4. Accepting the case of the plaintiffs and rejecting the defendant the suit came to be decreed by the trial Court and the same came to be confirmed by the first appellate Court. Though no question of Law was framed at the time of admission, appropriate question to be decided is "Whether the approach of the Courts below to the facts of the case is erroneous and misconceived?" This litigation is long drawn and the 1st defendant ^{is} determine the 2nd wife of Erappa Naik and the plaintiffs 2 and 3 are her sons. The 1st defendant ^{is} claims to be a legatee under the Will executed by the 1st wife who was also known as Jattamma. The real fighting is therefore between two wives of Erappa Naik. The first plaintiff and her children claim to be entitled to entire property. While the defendant claims that his testators are entitled to the share of the property. The marriage of the 2nd wife is disputed. So also the Will in favour of 1st wife is also equally ^{is} disputed. Instead of going on merits, in my

opinion justice will be rendered if the property of Errappa Naik is divided into three parts 1/3rd share will be given to both the wives and the remaining 1/3rd to be given to the both issues of Errappa. In that event the defendant legatee will get 1/6th share, therefore I hold that 1st plaintiff is entitled to 1/6th share, 2nd and 3rd plaintiffs are entitled to 1/3 each and the defendant is entitled to 1/6th share. The Judgment and decree of the Court below ~~is~~ is set aside and the preliminary decree for partition shall follow in the suit as indicated above and it is open for the parties to apply for final decree. With these ^{directions} observations the second appeal is allowed.

Sd/-
Judge

Lr/-