NC: 2023:KHC-D:7274
RSA No. 1467 of 2007

IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 14TH DAY OF JULY, 2023

BEFORE

THE HON'BLE MR JUSTICE V.SRISHANANDA

REGULAR SECOND APPEAL NO. 1467 OF 2007 (DEC/INJ)

BETWEEN:

SRI. NABISAB

...APPELLANT

(BY SRI. SADIQ N.GOODWALA AND
SRI. T.M.NADAF, ADVOCATES)

AND:

HATELSAB S/O

...RESPONDENT

(BY SRI. SURAJ M. KATAGI, ADVOCATE)

THIS REGULAR SECOND APPEAL IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGEMENT & DECREE DATED: 8.1.2007 PASSED IN R.A.NO.68/2003 ON THE FILE OF THE II ADDL.CIVIL JUDGE (SR.DN.), DHARWAD, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGEMENT AND DECREE DATED: 28.1.2003 PASSED IN OS.NO. 52/2001 ON THE FILE OF THE CIVIL JUDE (JR.DN.) & JMFC, KALAGHATGI.

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

Present second appeal is filed by the plaintiff against the defendant.

2. The appeal came to be admitted on the following substantial question of law.

> *"In the light of the finding in the negative over issue No.4 by the trial Court, whether the lower appellate court was justified in reversing the finding, as recorded in para 21 of the judgment and decree of the lower appellate court, so as to dismiss the suit?"*

3. Parties are referred to as plaintiff and defendant for the sake of convenience as per their original ranking in the trial Court.

4. Heard Sri T.M.Nadaf and Sri Sadiq N.Goodwala, learned counsels for the appellant and Sri Suraj M.Katagi, learned counsel for the respondent.

5. Brief facts of the case are as under:

A suit came to be filed by the plaintiff in O.S.No.52/2001 before the Civil Judge (Jr.Dn.),

Kalghatagi for the relief of declaration and permanent injunction against the defendant declaring that plaintiff is the absolute owner of the following properties.

Sl. No.	Sy.No.	Measurement	
1	1/2	6 guntas	Situated at Bogenagarakoppa village
2	30	4 acre 39 guntas	
3	65/1	2 acre 16 guntas	
4	110/1B	26 guntas	

6. It is contended by the plaintiff that the suit properties are ancestral properties which has fallen to the share of the plaintiff at a partition that took place in the year 1999 with his uncle and other relatives. After the partition in the year 1999, the revenue entries were mutated in the name of the plaintiff and he was enjoying the suit property as its owner in possession.

7. When the matter stood thus, defendant who is a stranger to the family of the plaintiff, started interfering with the suit property and laid a

claim over the suit property even though he did not possess right, title and interest over the suit property which constrained the plaintiff to file a suit seeking declaration and injunction.

8. After registration of the suit, suit summons were issued and a detailed written statement came to be filed by the defendant after his appearance.

9. In the written statement, the defendant contended that he is the son of Fakiramma-the second wife of Huchhesad-father of the plaintiff and therefore, he is entitled for half share in the suit property.

10. It is also contended that Fakiramma and Huchchesab had another daughter in their marriage by name Fatubi.

11. Based on the rival contentions, trial Court raised following issues.

(1) Whether plaintiff proves that he is the only son of Huchhesab Sannamani?

(2) Whether plaintiff proves that he has not acquired possession and ownership over the suit property through his father Huchhesab Sannamani?

(3) Whether Plaintiff proves that defendant is not a party to the partition and Varadhi pertaining to M.E.No.817?

(4) Whether defendant proves that the his mother is the 2nd wife of Huchhesab Sannamani?

(5) Whether defendant proves that himself and plaintiff are the joint allotees of the suit properties?

(6) Whether this court is having pecuniary jurisdiction to try this suit?

(7) Whether plaintiff proves his absolute ownership and exclusive possession over the suit properties as on the date of suit?

(8) Whether plaintiff is entitle for the decree of Permanent Injunction as claimed in the suit?

(9) Whether defendant is having half share in the suit properties?

(10) What order or decree?

12. In order to prove the issues, plaintiff got examined himself as PW1 and also three more witnesses as PWs.2 to 4 and relied on 37 documents which were exhibited and marked as Exs.P1 to P37. On behalf of the defendant, defendant got examined as DW1 and he also examined Moulasab and Abdulrazak as DWs.2 and 3 and he also relied on 44 documents which were exhibited and marked as Exs.D1 to D44.

13. Apart from the parties filing the documents, one other document which were available on the Court records was marked as Ex.C1 which is a case file and sub-markings were also made in the said file.

14. On conclusion of the recording of the evidence, the learned trial Judge heard the parties in detail and decreed the suit of the plaintiff as under by recording the findings on issues No.1 to 10:

"Issues No.1: Affirmative.

Issue No.2: Affirmative.

Issue No.3: Affirmative.

Issue No.4: Not the legally wedded second wife

Issue No.5: Negative.

Issue No.6: Affirmative.

Issue No.7: Affirmative.

Issue No.8: Affirmative.

Issue No.9: Negative.

Issue No.10: As per final order for the following reasons."

"This suit is decreed as under:

It is hereby declared that the plaintiff is the absolute owner and exclusive possessor of the suit properties.

The defendant has been permanently restrained from interfering with plaintiffs peaceful possession and enjoyment of the suit properties.

There is no order as to costs.

Draw decree accordingly."

15. Being aggrieved by the same, defendant filed an appeal before the II Addl.Civil Judge (Sr.Dn.), Dharwad which was numbered as

R.A.No.68/2003. The learned Judge in the first appellate Court, secured the records from the trial Court and after hearing the parties in detail, allowed the appeal in toto and set aside the decree and dismissed the suit of the plaintiff.

16. Being aggrieved by the same, the plaintiff has preferred the present second appeal.

17. After hearing the learned counsel for the appellant, this Court admitted the appeal to consider the substantial question of law as referred to supra.

18. Sri Sadiq N.Goodwala and Sri T.M.Nadaf, learned counsel together contended that the first appellate Court had grossly erred in dismissing the suit of the plaintiff especially after recording the finding on Issue No.4 that the marriage of the mother of the defendant is not proved and Smt.Fakiramma is not the second wife of father of the plaintiff.

19. They also contended that the three types of marriage that are recognized under Mohammadan law as per Section 253. Those marriages are considered as valid, irregular and void marriages and the alleged marriage of Fakiramma with father of the plaintiff would fall under the third category and namely 'Batil' marriage and such marriage having been declared as *void-ab-initio*, cannot be considered as a valid marriage and even for the sake of argument, if the defendant is to be accepted as son born to Fakiramma as a second wife of the father of the plaintiff, since it is void marriage, defendant cannot be considered as a sharer as illegitimate son born in 'Batil' marriage. Such illegitimate children do not possess any right of succession under Mohammadan law and therefore, sought for allowing the appeal.

20. *Per contra*, Sri Suraj M.Katagi, learned counsel for the respondent vehemently contended that file from Tahsildar office marked at Ex.C1

sufficiently exposes the hollowness in the case of the plaintiff and therefore, the learned Judge in the first appellate Court rightly re-appreciated the material on record by exercising the power vested in it under Section 96 of the C.P.C. and rightly dismissed the suit of the plaintiff.

21. He also invited the attention of the Court to the deposition of DW1 wherein defendant has unequivocally deposed before the Court that in the wedlock between Huchchesab and Fakiramma, his elder sister Fatubi and defendant were born. To support the same, he has relied on the indirect evidence. The learned judge in the first appellate Court, has appreciated the same and has come to the conclusion that the children born to Fakiramma being the second wife of Huchchesab who is the father of the plaintiff are therefore legitimate children, and therefore, they also have right in the suit property and therefore, suit for declaration by the plaintiff claiming he is the absolute owner and

defendant is a stranger cannot be countenanced in law and therefore, rightly dismissed the suit of the plaintiff and sought for dismissal of the present appeal.

22. In the light of the arguments put forth on behalf of the parties, in respect of the substantial questions of law, this Court perused the material on record meticulously including the trial Court records.

23. In order to appreciate whether the defendant can be termed as legitimate son which is the opinion formed by the first appellate Court while upsetting the decree of the trial Court, it is just and necessary for this Court to cull out Section 253 of the Mohammadan Law which reads as under:

> ***253. Valid, irregular and void marriages:*** *A marriage may be valid (sahih), or irregular (fasid), or void from the beginning (batil).*
>
> *Irregular or invalid marriages: The term "fasid" is translated in Baillie's Digest as "invalid", but as the word "invalid" in the English language also means "void," "irregular" and has been substituted for "invalid" in conformity with*

the usage of modern writers on the subject. As to irregular marriages, see secs. 254 to 259 and sec. 263. As to void marriages, see secs. 260 to 262.

The Marriage of a Shafei virgin girl who has attained puberty if she is given in marriage in a proper form is valid. Muhammad Haji Kammu v. Ethiyamma (1967) Kerala L.T.913.

24. In the case on hand, plaintiff has cross-examined DW1 and his witnesses. In para 23(a) of the deposition of DW1, DW1 has admitted that he is the ignorant about the fact that there is no mention in Ex.D7 as to the fact that the alleged marriage between Huchchesab and Fakiramma is first marriage or not. There is also a suggestion made that Fakiramma had married one Moulasab Menasagi in the year 1996. However, the defendant has denied such a suggestion. It is also suggested that in the year 1980, Fatubi was born to Moulasab Menasagi and Fakiramma and in the year 1981.

25. DW1 has clearly admitted that in the 'varadi' (report) to the revenue authority to change

the entry in respect of the suit lands, including the name of the defendant, one Moulasab Sannamani has signed for and on his behalf of defendant as his elder brother. The same is also found in Ex.C1 series which is marked as Court document.

26. Since defendant DW1 has admitted in clear and categorical terms that one Moulasab Sannamani who is the elder brother of DW1 has signed as a guardian of DW1, it presupposes that Fakiramma must have been married Moulasab Menasagi earlier to her marriage with Huchchesab.

27. Taking note of these aspects of the matter, learned trial Judge while recording the finding on Issue No.4 came to the categorical conclusion that Fakiramma is not the second wife of Huchchesab. The discussion in this regard is found in paragraph 41 which reads as under:

> *"(41) According to Mohammedan Law a woman is not entitle to marry 2nd time during the subsistence of marital relationship with 1st husband, i.e. unless the 1st marriage was*

dissolved either by Talaq.. or by the death of first husband. As already noted above in this case defendant has not produced any type of evidence to show that prior to 14.5.1972 the date on which marriage of Fakeerabi was solemnized with Huchesab Sannamani marital relationship of Fakeerabi and Moulasab Menasagi was dissolved either by way of divorce or by the death of Moulasab Menasage. Hence, I have presumed that the marriage of Fakeerabi D/o Fakrusab Nadaf solemnized with Huchesab s/o Nabisab Sannamani was invalid and void as per Mohammedan Law. As the marriage of Fakeerabi D/o Fakrsuab Nadaf solemnized with Huchesab Nabisab Sannamani was void and invalid the defendant Fatobi who are offsprings of void marriage cannot be considered as a legal representative of Huchesab Sannamani. The material available on record shows that the plaintiff was born after the death of Huchesab Sannamani. It is not the case of the defendant that Huchesab Sannamani has acknowledged him as a son. It is admitted by the defendant that his mother Fakeerabi has got mentioned his name as son of Huchesab Sannamani in the school records. Hence it is to be presumed that the defendant is not a son of Huchesab Sannamani. Under Mohammedan Law the rule of factumulate which is available in Hindu law is not in existence. According to Mommadan law either directly on indirectly it is not possible to

presume that the defendant is a legitimate son of Huchesab Sannamani. Hence without much discussion I came to the conclusion that the plaintiff is the only son of Huchesab Sannamani and marriage of Fakeerabi solemnized with Huchesab Sannamani on 14.5.1972 as mentioned in the documents marked at exhibit D-6 and D-7 is a void marriage as such Fakeerabi is not the legally wedded 2nd wife of Huchesab Nabisab Sannamani. Hence I answer Issue NO.1 in the affirmative. And Issue No.4 in the negative."

28. Since the defendant pleaded that he is the son born to Fakiramma through Huchchesab who is the father of the plaintiff, it was incumbent on the defendant to establish that the marriage of Fakiramma with Huchchesab was a valid marriage.

29. Admittedly, since the elder brother namely Moulasab Sannamani has signed as guardian of the defendant as discussed supra as is found in Ex.C.1, Fakiramma must have been married to Moulasab Menasagi as is suggested to DW.1 by the plaintiff in the year 1966.

30. Unless the first marriage of Fakiramma with Moulasab Menasagi is duly dissolved as per the Mohammadan law, her marriage with Huchchesab should be considered as a 'Batil' marriage.

31. Therefore, even though the defendant is the son of Huchchesab through Fakiramma, he would be considered as an illegitimate son. Therefore, the finding recorded by the First Appellate Court without there being any discussion that the defendant and his sister Fatubi are the legitimate son and daughter of Fakiramma needs interference by this Court in this appeal.

32. In the absence of any plausible evidence placed on behalf of the defendant that Fakiramma was eligible to marry Huchchesab, without there being a decree of divorce or dissolution of marriage in accordance with the Mohammadan law as is discussed by the trial Court in paragraph No.41 referred to supra, this Court is of the considered opinion that contrary finding recorded by the learned Judge in the First Appellate Court holding that the

defendant is a legitimate son and therefore dismissing the suit, in the considered opinion of this Court is a perverse finding.

33. Accordingly, from the above discussion, invariably, the substantial question of law raised above is to be answered in affirmative and accordingly it is answered and following order is passed.

ORDER

The appeal is allowed and the judgment of the First Appellate Court passed in R.A. No.68/2003 dated 08.01.2007 is hereby dismissed and the decree passed by the trial Court in O.S. No.52/2001 dated 28.01.2003 is restored.

In the facts and circumstances of the case, there is no order as to costs.

Sd/-
JUDGE

CLK/SH
List No.: 3 Sl No.: 4