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DYANESHWAR RAMACHANDRA RAO PATANGE

v.

BHAGIRATHIBAI

AUGUST 18, 2006

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[ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

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Suit for specific performance of contract—Maintainability—Contract entered into by deceased brother of plaintiff—Suit filed by sister as legal heir—Wife of deceased surviving—Decree of suit on the ground of admission of execution of the document by defendant—First appellate court held that since the widow was surviving and her remarriage was not established, suit by plaintiff not maintainable; and that the document was also not genuine—High Court held that in view of alleged remarriage of widow, the suit was maintainable and that document was valid in view of admission of its execution—On appeal, held: In view of uncontroverted evidence that the wife of the deceased had not remarried, the wife being Class I heir of the deceased, the suit by plaintiff was not maintainable—The finding of High Court that execution of the document was admitted is abrupt as against reasoned finding of first appellate court that the document was not genuine—Hindu Succession Act, 1956—Section 8—Code of Civil Procedure, 1908.

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Plaintiff-respondent filed suit for specific performance of contract of sale of a house property, against defendant-appellant. According to plaintiff the property was agreed to be sold to her brother, who died leaving behind his three sisters including plaintiff and his wife. Defendant though admitted execution of the document (Exbt. P-1) but contended that it was a nominal sale agreement. During trial, he stated that wife of the deceased had not remarried. Trial Court decreed the suit, finding that the agreement was valid. First appellate Court allowed the appeal holding that the plaintiff was not competent to bring the suit as a legal heir of her brother; that remarriage of the wife of the deceased was not established; and that Exbt. P-1 was not a genuine document.

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In second appeal, High Court held that in view of alleged remarriage of the widow, the plaintiff was entitled to maintain the suit; and that since the execution of the document was admitted by the defendant, the agreement was

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valid. Hence the present appeal.

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Allowing the appeal, the Court

HELD: 1. High Court was in error in holding that in view of the alleged remarriage of the widow, the plaintiff was entitled to maintain a suit. The defendant who was examined as DW-1 clearly stated that wife of deceased had not re-married and was staying in another village with her uncle and she is the legal heir of the deceased. DW-1's evidence was not challenged in cross examination. There was even no suggestion given refuting the statement that the second wife had not re-married. Thus, the evidence of DW-1 had remained uncontroverted. The wife is Class I legal heir of the deceased in terms of the Schedule referred to in Section 8 of the Hindu Succession Act, 1956.

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[632-A-C]

2. The First Appellate Court had indicated the reasons as to how it found Exhibit P-1 was not a genuine document. It analysed the factual position and held that execution of Ex.P-1 was not established and it was not a genuine document. The High Court's abrupt reasoning that the defendant appears to have accepted execution of the document is indefensible. [632-D-E]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 66 of 2000.

From the Judgment and Order dated 15.6.1989 of the High Court of Karnataka at Bangalore in R.S.A. No. 677/1992.

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Girish Ananthamurthy and P.P. Singh for the Appellant.

S.K. Kulkarni, Tiresesh Kumar and Sangeeta Kumar for the Respondent.

The Judgment of the Court was delivered by

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ARIJIT PASAYAT, J. Challenge in this appeal is to the judgment of a learned Single Judge of the Karnataka High Court allowing the Second Appeal filed by the respondent.

By the impugned judgment, the High Court held that the respondent was competent to file the suit and that the Courts below were not justified in holding that Exhibit P-I was not proved though execution of the same was admitted by the defendant.

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The factual position in a nutshell is as follows:

The plaintiff is the respondent herein. The suit is for specific performance

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A of contract of sale of a house property situated in Gabbut Oni, Hubli, bearing CTS No.3119/B in Ward No. III.

B According to plaintiff, the above property was agreed to be sold to the brother of the plaintiff under an agreement of sale dated 26.11.1974. The brother of the plaintiff Keshavarao Mahadevappa died on 10.1.1976 leaving behind him three sisters including the plaintiff-respondent and his second wife Shantabai @ Ansuyabai as his legal heirs. The plaintiff-sister of Keshavarao filed a suit for specific performance. Though the defendant admitted the execution of the document but contended that it is a nominal sale agreement. The trial Court found the agreement as valid and granted the decree for specific performance. The appellate Court differed from the findings and proceeded to examine whether the plaintiff is competent to bring the suit for specific performance as a legal heir of Keshavarao. This issue was held vital as legal heir of the original agreement holder is entitled to purchase the property. Accordingly, the appeal was allowed. Second Appeal was filed before the High Court. Primary stand was that so long as the plaintiff is represented, the court is not concerned with who the legal heir is or are and it is for them to settle the issue between them. On the question of agreement of sale the appellate Court has come to a different conclusion without justifiable reasons. It was submitted that the appellate Court had embarked upon unnecessary investigations and has come to a wrong conclusion. The second appeal was admitted on the following questions of law:

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1. Whether the Court below was right in holding that the plaintiff is not competent to file a suit as she is not a legal heir of deceased Keshavarao Sadare?

F 2. Whether the Court below was justified in holding that Ex.P.1 is not proved though the execution of the same is admitted by the defendant?

G So far as the first question is concerned the High Court held that the view of the first Appellate Court was not justified. The wife of the deceased had re-married thereby losing her right over the property. Further, two of the three sisters had relinquished their shares in favour of the plaintiff. So far as the second question is concerned the High Court held that since execution of the document was admitted by the defendant, the first Appellate Court could not have given a different conclusion from that of the trial Court. Both the questions were therefore answered in favour of the plaintiff by setting aside the judgment and decree of the First Appellate Court and restoring those of the trial Court.

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Learned counsel for the appellant submitted that the learned Single Judge has not indicated any reason as to how and why he came to the conclusion that the wife of the deceased brother had re-married. On the contrary, the evidence was to the contrary and the first Appellate Court had after analyzing the evidence on record come to the conclusion that re-marriage was not established.

In response, learned counsel for the respondent submitted that the First Appellate Court had failed to notice the true essence of the matter and, therefore, the judgment of the First Appellate Court has rightly been set aside by the High Court.

Before dealing with the merits, it would be proper to take note of the procedure adopted by the High Court in dealing with the Second Appeal.

It was brought to the notice of the Bench hearing the matter by an office note that the lawyer who was appearing for the appellant had died. Direction was given to issue notice to the appellant to engage another counsel. But in spite of service of notice no counsel was engaged. The office report dated 30.5.1998 indicates that the paper books were not filed as no counsel was engaged after death of the previous counsel and the matter was listed for direction for filing the paper books. Strangely, no order regarding filing of the paper books was passed and on 4.6.1998 the Court passed the order directing Sri Raghavachari to appear and argue the same as *amicus curiae*. As the appellant had not appeared in spite of service of notice, office was directed to give papers to him. To say the least, the procedure adopted is clearly inappropriate. Be that as it may, we will now deal with the merits.

The First Appellate Court analysed the evidence of record and noted that the suit for specific performance was filed by the respondent in respect of the agreement purported to have been entered into by her brother with the present appellant. Her brother Keshavarao Sadare died on 10.1.1976. According to plaintiff he left behind three sisters including the plaintiff-respondent and the second wife Shantabai @ Anusuyabai. Though the trial Court held that the plaintiff who was the sister of the deceased Keshavarao had filed the suit being his legal heir, the first Appellate Court found that there was no material brought on record to establish that the widow of the deceased had re-married. In fact, Shantabai @ Anusuyabai was not examined as a witness. The defendant who was examined as DW-1 clearly stated that Keshavarao Sadare had re-married Smt. Anusuyabai as second wife after the death of his first wife and said Anusuyabai had not re-married and was staying in another

A village with her uncle and she is the legal heir of Keshavarao Sadare. Thus, DW-1's evidence was not challenged in cross examination. There was even no suggestion given refuting the statement that Smt. Anusuyabai, the second wife of Keshavarao Sadare had not re-married. Thus, the evidence of DW-1 had remained uncontroverted. In view of this position, the First Appellate Court held that the alleged second marriage of Anusuyabai had not been established. Unfortunately, the High Court proceeded on the basis as if it was the accepted position that Smt. Anusuyabai had remarried. That is really not so. She is Class I legal heir of deceased Keshavarao Sadare in terms of the Schedule referred to in Section 8 of the Hindu Succession Act, 1956 (in short the 'Succession Act'). Therefore, above being the position, the High Court was clearly in error in holding that in view of the alleged remarriage of the widow, the plaintiff was entitled to maintain a suit. But the factual position is clearly to the contrary, as brought on record. On that score alone, the appeal deserves to succeed. However, there is another aspect which needs to be highlighted. The First Appellate Court had indicated the reasons as to how it found Exhibit P-1 was not a genuine document. It analysed the factual position and held that execution of Ex.P-I was not established and it was not a genuine document. The High Court's abrupt reasoning that the defendant appears to have accepted execution of the document is indefensible. In view of the conclusion as noted above to the effect that the plaintiff-respondent is not competent to file the suit, it is really not necessary to deal with the other question about the genuineness of the document in detail.

The appeal is allowed to the extent indicated above. There will be no order as to costs.

K.K.T.

Appeal allowed.