

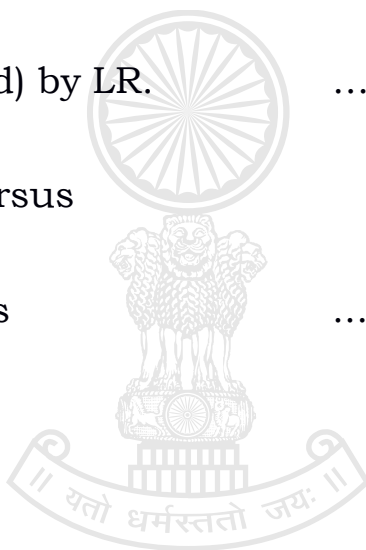
Smt. Ajambi (Dead) by LR.

.....Appellant(s)

Versus

Roshanbi & Others

.....Respondent(s)



J U D G M E N T

ANIL R. DAVE, J.

1 This appeal has been filed against the judgment delivered
on 16th November, 2005 in R.S.A. No.578 of 2000 by the High
Court of Karnataka at Bangalore.

2. The facts giving rise to the present Appeal, in a nutshell, are as under:

The appellant is the original defendant in the Suit. The plaintiffs, who are respondents herein, had filed a Suit for partition and separate possession of the 7/8th share in the Suit property. The property in question originally belonged to late Shaikaji, whose first wife Halimabi had died and thereafter he had married Roshanbi. Out of the first marriage with Halimabi, late Shaikaji had two children and one of them had died whereas he had six children through his second marriage with Roshanbi. The Suit was filed by the second wife and her children against the defendant, who is the heir of the first wife. 3. The Suit was in respect of property which was purchased by Shaikaji and the suit property was in occupation of all the family members.

4. The Suit, being O.S.No.153 of 1985 was decreed on 27th July, 1988.

5. The said judgment and decree had been challenged by way of an appeal and the said appeal was dismissed on 13th November, 1995 by the first Appellate Court. Being aggrieved by the said judgment, an appeal was filed in the High Court. The High Court had allowed the appeal by remanding the matter to the first Appellate Court for its fresh disposal with a direction to permit the parties to lead documentary evidence in relation to a memorandum of partition dated 12th August, 1958.

6. In pursuance of the order of the High Court, the first Appellate Court had permitted production of the aforestated document Ex.D7 dated 12th August, 1958, which is in a nature of a memorandum of partition, whereby, during the lifetime of Shaikaji, the property in question had been divided among the children of the first wife and the second wife. In pursuance of the aforestated document, necessary revenue entries were made, whereby the property bearing CTS NO.883 was divided into CTS No.883/A and CTS No.883/B. The aforestated facts are not in dispute and it is also an admitted fact that the

eastern part of the property, CTS No.883/B, was in possession of the plaintiffs *i.e.* the children of the second wife as well as late Shaikaji, whereas the western part of the property, CTS No.883/A, was in occupation of the son of the first wife. The first Appellate Court considered the validity of the aforestated document dated 12th August, 1958 and came to the conclusion that the property had been divided earlier, which was recorded under a document dated 12 August, 1958, which was duly signed by late Shri Shaikaji and the document had also been attested by two independent witnesses. Unfortunately neither Shaikaji nor the attesting witnesses were alive at the time when the said document was exhibited as Ex.D7. The said document was believed by the lower Appellate Court and on the basis of the evidence which had been adduced in addition to the aforestated document, the first Appellate Court had set aside the decree passed by the Trial Court and held that the property had been divided during the lifetime of late Shaikaji and therefore, the plaintiffs were not entitled to 7/8th share in the Suit premises which consisted of CTS No.883/A and CTS

No.883/B. According to the lower Appellate Court, the property had been duly divided and was in occupation of the respective parties even during the lifetime of late Shaikaji.

7. The said judgment dated 1st April, 2000 delivered by the lower Appellate Court in Regular Appeal No.75/1998 had been challenged before the High Court in Regular Second Appeal No.578/2000, which had been allowed by the High Court and therefore, this appeal has been filed. The High Court did not agree with the view expressed by the lower Appellate Court mainly on the ground that Ex.D7 had not been registered as it ought to have been registered as it was compulsorily registerable. The High Court was also of the view that Ex. D7 was not produced at the time when the trial was conducted and the said document had not been relied upon by the defendant at the time of the trial though he was in possession of the said document. Moreover, the High Court was of the view that there is no concept of joint family in Muslims and therefore, there could not have been any partition or joint

family property among the plaintiffs and the defendant, who belong to the family of Shaikaji.

8. The learned counsel appearing for the appellant i.e. the original defendant submitted that the High Court committed an error by not relying upon the document Ex.D7 dated 12th August, 1958. He submitted that the said document was executed by Shaikaji giving details with regard to his family and giving a portion of his property bearing No.CTS 883 to the son of his first wife and another portion of the property to the children of his second wife. Late Shaikaji had continued to stay with his second wife and children of the second wife in the property which was subsequently numbered as CTS 883/B.

9. He also submitted that division of the property among the children of two wives was duly recorded in Ex.D7, which was executed by late Shaikaji and the said document, which was presented after 30 years, was admissible as per the provisions of the Indian Evidence Act and there was no reason

to disbelieve the said document. Moreover, the learned counsel drew our attention to certain admitted facts pertaining to admission by the plaintiffs with regard to their approaching independent persons when a dispute had been raised with regard to possession of the Suit property. There was an evidence to show that some understanding was arrived at earlier among the family members, which was reflected in Ex.D7, which was duly acted upon and therefore, it was submitted by the learned counsel that there was no reason for the High Court to take a different view than the one which was taken by the lower Appellate Court.

10. On the other hand, the learned counsel appearing for the respondents/original plaintiffs submitted that the document Ex.D7 had not been produced by the defendant at the time of the trial though he was in possession thereof and there was no justifiable reason for not producing the said document at the time of the trial. Moreover, he submitted that the said document ought to have been registered but since it was not registered, it ought not to have been relied upon by the lower

Appellate Court and the High Court was justified in ignoring the said document.

11. No other submission was made by the learned counsel.

We have heard the learned counsel and have perused the impugned judgment and the evidence recorded by the courts below.

12. Upon perusal of the evidence, we are of the view that the lower Appellate Court was correct in its conclusion that late Shaikaji had made arrangements with regard to his property during his lifetime and the said arrangements had been subsequently recorded in Ex.D7, which had been duly acted upon by the revenue authorities by dividing the suit property into two different parts namely, CTS No.883/A and CTS No.883/B. It is not in dispute that the property which had been divided by late Shaikaji was in occupation of the respective parties and the said fact has also been recorded in the revenue record.

13. It is true that there is no concept of joint family in Muslims but it was open to late Shri Shaikaji to give his property to his children in a particular manner during his lifetime, which he rightly did, so as to avoid any dispute which could have arisen after his death. The arrangement so made was duly accepted by the family members and it was also acted upon. Only thereafter a formal record of the said fact was made by late Shaikaji in Ex. D.7.

14. In our opinion, genuineness of Ex.D7 was rightly not questioned by the lower Appellate Court and the High Court was not correct when it questioned its legality and validity, especially when the plaintiffs had filed a suit after more than 25 years of the aforestated understanding, which had taken place during or prior to 1958.

15. For the reasons stated hereinabove and more particularly those stated by the lower Appellate Court, we allow the appeal and set aside the judgment delivered by the High Court so as

to give effect to the judgment and decree passed by the lower Appellate Court.

16 Thus, the appeal stands disposed of as allowed with no orders as to costs.

.....J.
(ANIL R. DAVE)

...
.....J.
(ADARSH KUMAR GOEL)

New Delhi
June 29, 2016.

JUDGMENT