

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21<sup>ST</sup> DAY OF JULY 2017

BEFORE

THE HON'BLE MR. JUSTICE B. VEERAPPA

REGULAR FIRST APPEAL NO.1440/2016(DEC)

**BETWEEN:**

SRI K R MOHAN KUMAR  
S/O LATE K V RAJAGOPAL SETTY  
AGED ABOUT 62 YEARS  
C/O K M RAJESH, INDIGO NATION,  
SC COLLECTIONS, NO.2955/E, SERVICE ROAD  
OPP. MARUTHI MANDIR, VIJAYANAGAR  
BENGALURU-560 040.

**ADDL. ADDRESS**

SRI K R MOHAN KUMAR  
UPSTAIRS NO.100, 10<sup>TH</sup> D MAIN  
JAYANAGAR 1<sup>ST</sup> BLOCK,  
BENGALURU-560 007. .. APPELLANT

(BY SRI MAHESH C M, ADV. FOR SRI JAYARAJ D S, ADV.)

**AND:**

SRI K R JAGANNATH SETTY  
S/O LATE K V RAJGOPAL SETTY  
AGED ABOUT 59 YEARS  
R/AT NO.502/1, GROUND FLOOR  
ASWATHAKATTE ROAD, VISVESWARAPURA  
BENGALURU-560 004. ..RESPONDENT

(BY SRI V B SHIVAKUMAR, ADV. FOR C/R)

THIS REGULAR FIRST APPEAL IS FILED UNDER  
ORDER SECTION 96 OF CPC, AGAINST THE JUDGMENT  
AND DECREE DATED 11.07.2016 PASSED IN  
O.S.NO.8543/2012 ON THE FILE OF THE IX ADDL. CITY  
CIVIL AND SESSIONS JUDGE, BENGALURU (CCH 5),  
DECREETING THE SUIT FOR EVICTION.

THIS REGULAR FIRST APPEAL COMING ON FOR ORDERS THIS DAY, THE COURT DELIVERED THE FOLLOWING:

**JUDGMENT**

The defendant filed the present appeal against the judgment and decree dated 11.7.2016 made in O.S.No.8543/2012 on the file of the IX Addl. City and Sessions Judge, Bangalore decreeing the suit of the plaintiff holding that the plaintiff is entitled for the decree to evict the defendant from the premises and Rs.5000/- per month towards occupancy rights from the date of suit till the date of handing over possession of the premises.

2. The parties in this appeal are referred to as they are arrayed in the suit before the Trial Court.

**Facts of the case**

3. The respondent/plaintiff filed the suit directing the defendant/appellant to quit and hand over vacant possession of the schedule premises and pay occupancy charges of Rs.5,000/- p.m. till the date of handing over possession of the premises contending that the plaintiff

has acquired right, title, interest and possession of the suit schedule property morefully described in the schedule based on a registered will dated 21.3.1999 executed by one Sri.K.V.Rajagopal Setty, father of the plaintiff and the defendant. It was further contended that the defendant was in occupation of ground floor premises measuring east to west 15 ft., north south 52 ft. consisting of one verandah, 2 rooms, 1 hall, kitchen , bathroom and toilet on the basis of the permission given by their father. The defendant has locked the premises, left it and residing at No.100, 10<sup>th</sup> D Main Jayanagar I Block Bengaluru. His son is gainfully employed. It is only to cause inconvenience and harassment to the plaintiff, possession of the premises has not been handed over to the plaintiff. Therefore, the plaintiff got issued the notice calling upon the defendant for handing over possession. Despite the same he has neither vacated nor paid occupancy charges to the plaintiff. Therefore, the plaintiff was constrained to file the suit.

4. The first defendant filed the written statement denied the plaint averments and contended that he was in possession of the premises belonging to one Smt.Gangamma on monthly tenancy. It is the father of the defendant and plaintiff came forward to accommodate defendant and the defendant occupied the premises in the year 2001. The description of the property is not correct. The total extent of the property is measuring 28 x 70 sq.ft. and he is in occupation of the portion of 10' x 40'. The fact that the property belongs to their father and who also allowed the defendant to occupy the same is admitted etc. and sought for dismissal of the suit.

5. On the basis of the pleadings the trial Court framed the following issues :-

1. Whether the plaintiff proves that he became the owner of suit schedule property by virtue of the will executed by his father Sri.K.V.Rajagopala Setty dated 21.3.1999, as such, he is entitled for possession of the suit schedule property?

2. Whether the plaintiff proves that the defendant is in permissive possession over the suit schedule property?
3. Whether the defendant proves that he has also got equal share in the suit schedule property?
4. Whether the plaintiff is entitled for occupancy charges at the rate of Rs.5,000/- p.m.
5. What order or decree?

6. In order to establish the case of the plaintiff, he has examined PW1 and marked the documents Exhibits P1 to P38. The defendant was examined as DW1. No documents were got marked.

7. After considering the oral and documentary evidence on record, the trial Court recorded a finding that the plaintiff proved that he became the owner of the suit schedule property by virtue of the will and also proved that the defendant is in permissive possession over the suit schedule property and that the plaintiff is entitled for occupancy charges at the rate of Rs.5,000/-

p.m. and further recorded that the defendant failed to prove that he has got equal share in the property. Accordingly, by the impugned judgment and decree the Trial Court decreed the suit directing the defendant to vacate and hand over vacant possession of the premises and that the plaintiff is entitled to recover Rs.5,000/- p.m. towards occupancy charges. Hence, the present appeal is filed by the defendant.

8. I have heard the learned counsel for the parties to the *lis*.

9. Sri.Mahesh, the counsel representing Sri. Jayaraj D.S., the learned counsel for the appellant, vehemently contended that the Trial Court has passed the impugned judgment and decree without recording any finding on the issue framed with regard to the will and in the absence of any finding on issue No.1, the impugned judgment and decree passed by the Trial Court cannot be sustained. He further specifically contended that the plaintiff claimed right over the suit

property based on the will dated 21.3.1999 and it is the specific case of the defendant that he was put in permissive possession by his father. Defendant is disputing the will said to have been executed by their father in favour of the plaintiff bequeathing the schedule property. The genuineness of the will is not only questioned, but also contended the same is concocted and created. The circumstance under which the will has been executed has not been proved in accordance with law.

10. The learned counsel further contended that the plaintiff is the propounder of the will and has to prove the same when once its genuineness is not only questioned but also challenged. The plaintiff is not entitled to institute the suit. Further, the right title and interest of the plaintiff is not established. Burden was on the plaintiff to prove the will and that the same is not proved. Therefore the Trial Court is not justified in decreeing the suit without considering the provisions of Section 63 of the Indian Succession Act and Section 68

of the Indian Evidence Act. Therefore, he sought to set aside the impugned judgment and decree passed by the court below.

11. Per contra Sri.V.B.Shivakumar, learned counsel for the plaintiff, sought to justify the impugned judgment and decree but is unable to justify the fact that the Trial Court has not recorded any finding on issue No.1. Therefore, he sought to dismiss the appeal.

12. In view of the rival contentions urged by the learned counsel for the parties, the only point that arises for consideration is :-

*“Whether the impugned judgment and decree passed by the trial Court granting decree in favour of the plaintiff is justified without recording any finding on issue No.1 in the facts and circumstances of the present case?”*

13. It is the specific case of the plaintiff that he is in possession and enjoyment of the suit schedule



property based on the will executed by his father K.V.Rajagopala Setty on 21.3.1999. The same is denied by the defendant by filing written statement and contended that they both (plaintiff and the defendant) are sons of K.V. Rajagopala Setty. The plaintiff and the father together have given permissive possession to the defendant and he is in possession of the suit schedule property on the basis of the permission granted by his father.

14. It is also not in dispute that the trial Court framed 5 issues. The plaintiff was examined as PW1 and produced documents exhibits P1 to P38. Defendant was examined as DW1. The first issue before the Trial Court was, whether the plaintiff proved that he became the owner of the suit schedule property by virtue of the will executed by his father Sri.K.V.Rajagopala Setty dated 21.3.1999 and whether he is entitled for possession of the suit schedule property.

15. The Trial Court while considering issue Nos.1 to 3 together has not recorded any finding with regard to the proof of the will in terms of the provisions of Section 63 of the Indian Succession Act and the provisions of Section 68 of the Indian Evidence Act.

16. It is well settled that any person claiming right, title and interest on the basis of the will has to prove the same as contemplated under the provisions of Section 63 of the Indian Succession Act and the provisions of Section 68 of the Indian Evidence Act. The same has not been recorded by the Trial Court in the impugned judgment and decree. The specific grounds urged by the learned counsel for the defendant/ appellant is with regard to the non-consideration of the provisions of Section 63 of the Indian Succession Act and the provisions of Section 68 of the Indian Evidence Act. The fact of not recording any finding on the will with regard to its proof is not disputed by the learned counsel for the plaintiff.

17. In view of the above, the trial Court is not justified in granting decree in favour of the plaintiff without recording any finding on issue No.1 with regard to the will. On that short ground alone, the impugned judgment and decree of the Trial Court is liable to be set aside. Accordingly, the issue raised in the present appeal has to be answered in the negative holding that the trial Court is not justified in decreeing the suit without considering issue No.1 and recording any finding with regard to proof of the will dated 21.3.1999.

18. For the reasons stated above, the appeal is allowed. The impugned judgment and decree dated 11.6.2016 made in O.S.No.8543/2012 on the file of the IX Addl. City Civil & Sessions Judge, Bangalore is set aside. The matter is remanded to the Trial Court for fresh consideration on issue No.1 and the Trial Court is directed to decide the suit afresh after providing opportunity to both the parties and pass judgment and decree in accordance with law.

The parties are directed to appear before the Trial Court on **16.8.2017** without waiting for any notice from the trial Court.

Ordered accordingly.

Sd/-  
JUDGE

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