

HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.718 OF 2005

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C.R.P.No.2508 OF 2005

Dated 20-3-2015

SECOND APPEAL No.718 OF 2005.

Between:

Chinthakula Lakshmana Rao and others.

...Appellants.

And:

Bhupathi Raju Suryanarayana Raju (died) and others.

...Respondents.

C.R.P.No.2508 OF 2005

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COMMON JUDGMENT:

These two matters arise out of common judgment dated 22-12-2004 in A.S.No.147 of 2002 and C.M.A.No.54 of 2002.

Appellants and revision petitioners are plaintiffs in O.S.No.244 of 1997 which is filed for partition and they are also petitioners in E.A.No.234 of 1996 in E.P.No.103 of 1998 in O.S.No.517 of 1980 on the file of Principal Senior Civil Judge, Kakinada and learned trial judge disposed of these two matters by a common judgment dated 21-6-2002.

Parties herein are referred as plaintiffs and defendants as arrayed in the suit for convenience and better understanding.

Advocate for appellants represented on 22-1-2015 that the second respondent in the Second Appeal and also in the Civil Revision Petition, is no more and requested for time to take necessary steps but subsequently on 10-3-2015, he filed a memo stating that due to miscommunication, such a representation is made but in both the matters, in fact, second respondent is alive and as such, no steps are necessary.

According to the plaintiffs, they, D.1 and G.Bojjamma are children of Ch.Appanna and they constitute a Hindu undivided joint family. They contended that late Appanna used to manage joint family and ancestral property. Late Appanna and D.1 were addicted to bad vices such as drinking, gambling and womanizing and for their vices, they contacted "AVYAVAHARIKA DEBTS" and they are not binding on the plaintiffs. Late Appanna and D.1 colluded with D.2 and created sale agreement without the knowledge of plaintiffs and on knowing that they demanded partition of the properties but late Appanna postponed the same during his life time and thereafter, D.1 also did not cooperate for partition and therefore, they are constrained to seek for partition of the plaint schedule property which is an extent of Ac.0-44 cents in S.No.25 of 1 situated at Madhavapatnam village.

Plaintiffs also filed E.A.No.609 of 1997 in E.P.No.95 of 1997 in O.S.No.517 of 1980 on the file of IV Additional District Munsif Court, Kakinada to declare them as co-owners of E.P.schedule property and to dismiss the execution proceeding.

According to plaintiffs, one Bhupathiraju Suryanarayana i.e., second defendant filed O.S.No.517 of 1980 before IV Additional Munsif Court, Kakinada for specific performance of contract of sale dated 17-2-1978 in respect of schedule property and the said suit was dismissed by the trial court through judgment dated 29-4-1985 and the second defendant who is the plaintiff in O.S.No.517 of 1980 carried on the matter in appeal in A.S.No.47 of 1985 and the appeal was allowed and a decree was passed in favour of D.2 on 5-11-1990 and in pursuance of the said decree, he filed E.P.No.43 of 1991 before II Additional District Munsif, Kakinada (presently 2nd Additional Junior Civil Judge) and obtained a sale deed through court and thereafter

filed E.P.No.95 of 1997 before First Additional District Munsif (Presently First Additional Junior Civil Judge) for delivery of property and as they are co-owners of the same property, the execution petition filed by D.2 is not maintainable.

Learned Principal Senior Civil Judge, Kakinada examined five witnesses and marked 17 documents on behalf of plaintiffs and examined two witnesses and marked four documents on behalf of defendants and on an overall consideration of oral and documentary evidence, decreed the suit of plaintiffs for partition and also allowed the claim petition of plaintiffs in E.P. filed by D.2. Aggrieved by the said order, D.2 preferred A.S.No.147 of 2002 against the decree in O.S.No.244 of 1997 and preferred C.M.A.No.54 of 2002 against orders in E.A.No.234 of 1998 and the appellate judge allowed both appeal and C.M.A. and reversed findings of trial court. Aggrieved by the same, present second appeal and revision are preferred.

The following are the substantial questions of law that are raised in the grounds of appeal.

- 1. Whether the Lower Appellate Court is right in holding that even though the property is thrown into the common hotch pot and even though it was treated as joint family property, it does not belong to the joint family and it is not liable for partition?*
- 2. Whether the lower appellate court is right in holding that Ex.A.2 registered sale deed executed by the members of the joint family cannot be acted upon in the absence of any challenge to the said document by way of a suit?*
- 3. Whether the lower appellate court is right in being influenced by the judgment in the appeal A.S.No.47 of 1985 and the execution proceedings pursuant thereto when the very same proceedings are under challenge in the present suit?*
- 4. Whether an abated debt or time barred debt is a "debt" in the eye of law and is enforceable?*
- 5. Whether the lower appellate court is right in thinking that the trial court is in error in considering the applicability of the provisions of Act 7 of 1977 as executed by Act 45 of 1987 in the present case even though they are purely legal issues?*
- 6. Whether the lower appellate court is right in simply scanning and reversing the judgment of the trial court without considering the pleadings and evidence on record?*
- 7. Whether the lower appellate court is right in not formulating the appropriate points that arise for consideration before pronouncing the judgment under appeal?*

Considering these grounds, this court admitted the appeal on 22-7-2005.

Heard arguments.

Advocate for plaintiffs submitted that plaintiffs' father and their elder brother sold away suit schedule property without their knowledge and the lower court on an elaborate discussion and consideration held that suit property is a joint family property and D.1 and their father have no right to sell away the same. He further submitted that the trial court granted a decree for partition on the condition of paying back the sale consideration paid by D.2 for purchase of the suit schedule property with interest but the appellate court without any valid grounds reversed the findings of the trial court.

He submitted that the findings of the lower appellate court with regard to the nature of the suit schedule property are erroneous and that lower appellate court grossly erred in holding that the suit schedule property does not belong to the joint-family and failed to notice the fact that this property was thrown into a common hatch pot.

He further submitted that the lower appellate court erred in holding that Ex.A.2 sale deed executed by members of the joint family cannot be acted upon and that the lower appellate authority reversed well considered judgment of the trial court without any valid reasons.

Learned advocate for plaintiffs has drawn my attention to the judgments of both trial court and lower appellate court to substantiate his contention.

On the other hand, advocate for second defendant and respondent herein submitted that so far as nature of property is concerned, it is the concurrent findings of both the courts that it is self acquisition of late Appanna. He further submitted that both courts concurrently held that the sale of property is only for benefit of family and to meet the family expenses but not for discharging "AVYAVAHARIKA DEBTS".

He submitted that the theory propounded by plaintiffs that this property is thrown into the common hotch pot cannot be accepted because unless there is a joint nucleus, inference cannot be drawn with regard to blending of separate property into co-pacenary property.

Now the points that would arise for my consideration are:

1. Whether there is any substantial question of law involved in

this Second Appeal?

(2) Whether the judgments of the trial court as well as appellate court are legal, correct and proper?

POINTS 1 and 2:

There is no dispute with regard to relationship between the parties, so also, about the identity of the property. As already referred, suit is filed for partition whereas E.A. is filed to declare that the plaintiffs are the co-owners of the E.P. schedule property and the sale in favour of decree holder therein is void abinitio.

From the evidence, it is clear that late Appanna and first defendant borrowed Rs.2,000/- from one Penumatcha Srinivasa Raju son of Durga Raju and the title deeds of the property were also mortgaged to the said Srinivasa Raju. It is also clear from the evidence that second defendant after purchasing property under agreement of sale dated 17-2-1978 paid back the debt due to Srinivasa Raju and collected back the promissory note and also the title deeds.

As seen from the material, Maharaja of Pithapuram gave some property to late Chintakula Appanna and one Ramanna and subsequently, the said Ramanna sold his part to Chintakula Appanna. So from Exs.B.2 and B.3, this property is self acquisition of late Chintakula Appanna. In fact, this is the concurrent finding of both trial court and appellate court. Though it is contended that late Appanna and D.1 borrowed money for their vices and for their Avyavaharika Debts, the evidence disclosed that the money was borrowed for the benefit of family and to discharge such debt, the property was sold to D.2 and considering the same, both trial court and first appellate court concurrently disbelieved the plea of Avyavaharika debts.

I have gone through the judgments of both trial court and lower appellate court. Learned trial judge having accepted that the debt was for the family benefit and that the property was self acquisition of late Appanna and that there is no Avyavaharika debt, erroneously held that the debt in favour of Penumatcha Srinivasa Raju is deemed to have waived in view of the provisions of Act 7 of 1987 and Act 45 of 1987 without there being a pleading and "without issue and without evidence." The lower appellate court rightly noticed this mistake and held that trial court has no right to give such a finding. Lower appellate court also noticed that the trial court by relying on admission made by second defendant as P.W.1 in his suit O.S.No.517 of 1980 gave such a finding. But as rightly observed by lower appellate court, that deposition cannot be acted on because it

was not put to D.2 and that deposition was marked without following established procedure. As verified from the record, it appears to me that trial court gave inconsistent finding on the same evidence which was rightly set side by the lower appellate court.

As rightly pointed out by advocate for respondent-second defendant, inference can not be drawn for blending without proving existence of co-pacenery property and the lower appellate court rightly noticed this defect in the findings of the trial court. One of the arguments of advocate for appellant is that since plaintiffs also joined in execution of Ex.A.2, it has to be presumed that property is a joint family property but this argument cannot be accepted for the reason simply plaintiff joined in execution of particular document, it cannot be presumed that the property is a joint family property, particularly, when the positive evidence is to the effect that it is the self acquired property and findings are also in those lines.

On a scrutiny of the entire material, I am of the view that the lower appellate court has rightly reversed findings of trial court which are not in accordance with law. First appellate court corrected the findings of trial court which are contrary to material on record, therefore, no question of law is involved, much less, substantial question of law and that there are no grounds to interfere with the well considered judgment of the lower appellate court.

So also, the lower appellate court rightly set aside the orders of the trial court in the claim petition and lower appellate court has not committed any error, illegality and that there are no grounds to interfere with its order.

For these reasons, I am of the view that both Second Appeal and C.R.P. are devoid of merits and liable to be dismissed.

Accordingly, both this Second Appeal and Civil Revision Petition are dismissed. No costs.

As a sequel to the disposal of this appeal, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE S.RAVI KUMAR

Dated 20-3-2015.

Dvs

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