

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO
CCCA MP No.374 of 2015 in CCCA No.6 of 1999
and
CCCA No.6 of 1999 and Tr.CCCA No.172 of 2003

COMMON ORDER :
CCCA No.6 of 1999:

This appeal is preferred by the 5 defendants (D.2 to 6) the legal heirs of deceased T.N.Govindaraj(D.1), viz; 1. T.Pravin(D.3), Smt. T.Shanta(D.4), Smt. T.Shobha(D.5), T.Renukain(D.6) and T.N.Mohanraj(D.2) of O.S.No.1538 of 1984. The suit was filed by the two plaintiffs (respondents 1 and 2 herein by names P.Shantha and Tulsibai respectively) seeking of preliminary decree for partition of the plaint schedule property i.e. House bearing No.5-3-325 to 331(Old No.8569) situated at Mahatma Gandhi Road, Secunderabad by metes and bounds and for delivery of separate possession thereof and for costs, on the file of the III Additional Judge, City Civil Court, Secunderabad. The preliminary decree and judgment of the trial Court dated 30.09.1993 reads as follows:-

1. The plaintiffs 1 and 2 are entitled for 1/18th share each in the suit schedule property;
2. That the plaintiff shall also be entitled for future mesne profits from the date of suit till delivery of their respective shares to them, which will be ascertained in final decree proceedings;
3. That the defendants 1 and 2 shall be entitled for 7/18th share each in the suit schedule property;

4. That the defendants 8 and 9 shall be entitled together for $1/18^{\text{th}}$ share(the share of their deceased mother) in the suit schedule property; and
5. That the share of defendant No.1-deceased i.e. $7/18^{\text{th}}$ shall be devolved upon the defendants 3 to 6 his legal heirs equally;
6. That the defendant No.7 shall be entitled for $1/18^{\text{th}}$ share in the suit schedule property; and the preliminary decree shall be drawn accordingly.

2.The contentions of the defendants-appellants supra are that the trial Court ought to have dismissed the suit instead of decreeing the same, including on the ground of the claim is otherwise barred by time, that the trial Court ought to have held that the Court fee paid on the plaint is not sufficient for the plaintiffs are not in possession of the suit property in their very asking for possession, that the trial Court failed to appreciate the documentary evidence filed by the appellants herein, that the trial Court further failed to appreciate that the suit is bad for non-joinder of proper and necessary parties, that the trial Court erred in coming to the conclusion that the suit schedule property is to be treated as joint family property and further failed to come to a conclusion whether the property is self-acquired of late Sri T.A.Natesan, or ancestral property, that the trial Court committed a mistake in finding that the Ex.B.11 requires registration when it is only a family arrangement deed and requires no registration and hence to set aside the decree

and judgment in the suit supra by allowing the appeal as prayed for.

CCCA No.172 of 2003:

3. This appeal is preferred by the 1st plaintiff of the suit supra impugning said preliminary decree and judgment of the trial Court with the contentions that the trial Court should have decreed the suit by granting each of the plaintiffs are entitled to 7/18th share therein and otherwise by holding the plaint schedule property is the self-acquired property for he came to Secunderabad with no property and earned the plaint schedule property while he was working as a contractor at Secunderabad and further there was no any nucleus for him to acquire with that aid the plaint schedule property and as such should have held that each of the plaintiffs therefrom otherwise are entitled to 1/6th share in the plaint schedule property. The other contentions are that the trial Court erred in placing reliance on evidence of P.W.2 who never had any knowledge of the affairs and who even admitted of the property was acquired prior to her marriage itself. The trial Court ought to have noted that the property was acquired by late T.A.Natesan self when the respondents 1 and 2 were not even born. The trial Court erred though having found that the plaintiffs are entitled to a share in the property in not awarding mesne profits by not even giving any reasons. The 2nd plaintiff Smt. Tulasi Bai is stated out of station and could not join this appeal and as

co-respondent No.10 in the appeal. The appellants (Plaintiffs) therefore pray to allow the appeal.

4. Both the appeals are taken up for common disposal and heard both sides and perused the entire material on records.

5. The suit filed by the two daughters of late Natesan was for partition and separate possession of 1/4th share in the plaint schedule house property (5-3-325 to 331 (old No.8569) situated at Mahatma Gandhi Road, Secunderabad. It is with the claim that the plaintiffs and defendants 1 and 2 are the children of Natesan-the owner of the plaint schedule property died intestate on 23.02.1957. The contest of the D.1 and D.2 in opposing the suit claim is that besides plaintiffs there are two more daughters to their father who are not parties to the suit and said T.A.Natesam, two years prior to his death, divided orally the said property which is his ancestral property equally to the plaintiffs and the D.1 and D.2 herein and in acknowledgment of the oral division, subsequently he executed an agreement to execute a deed of partition which is Ex.B.11 dated 30.12.1955 and the claim therefrom is that by virtue of the oral partition prior to the Hindu Succession Act, 1956(for short, 'the HS Act') came into force during lifetime of T.A.Natesam who died later even in the year 1957. The plaintiffs being daughters of late Natesam, cannot even claim any share for the HS Act is not retrospective but

prospective in operation. The other contest is that the plaintiffs being the married daughters of T.A.Natesam in possession and enjoyment of the property and never claimed share after death of T.A.Natesam on 22.03.1957 till date of the suit in the year 1984 for more than 27 years and thereby also they got right by prescription barring any right to claim by the plaintiffs and the suit is thereby liable to be dismissed besides the fixed Court Fees without advolerem Court Fees in plaint is not correct.

6. The trial Court, from the above pleadings and issues settled with reference to it, recorded the evidence of P.W.1-1st plaintiff with reference to Exs.A.1 and A.2 viz; legal notice dated 19.09.1984 issued by the plaintiffs to the defendants demanding for partition prior to suit and the reply of the D.1 and D.2 on 24.09.1984; that of the defendants, D.2(T.N.Mohan Raj) as D.W.1 and D.1's wife (T.Shanta Govindraaj) as D.W.2 by placed reliance on Exs.B.1 to 15 viz; certified copy of release deed dated 06.03.1969 executed by D.1 in favour of D.2 releasing his share which was fallen on him as per Ex.B.11 for a portion of the properties covered by partition list dated 30.01.1955, the tax notice card by MCH, property tax notice, tax bill, tax receipts, property tax notice, form 11 notice by Tahasildar, release deed by 2nd defendant in favour of 1st defendant dated 01.03.1969 (Ex.B.9 similar to Ex.B.1 supra), the plan, agreement to execute a deed of partition and family arrangement dated 30.12.55, Ex.B.12 plan attached to Ex.B.11,Ex.B.13

judgment in M.A.No.290 of 77 on the file of the Chief Judge, City Small Cause Court, dated 12.10.77 and release deeds referred supra covered by Exs.B.1 and B.9 respectively. It is from said evidence and after hearing the trial Court passed preliminary decree and judgment supra.

7. Now in deciding both the appeals the common points that arise for consideration are:

- 1) Whether the plaint schedule property is the self-acquisition of late Natesan and plaintiffs are entitled to what share?
- 2) Whether there is any oral partition or any ouster of plaintiffs to non-suit the plaintiffs therefrom?
- 3) To what extent the decree and judgment of the trial Court is correct and otherwise to what extent this Court while sitting in appeal can interfere and with what observations?
and
- 4) To what relief?

Points 1 to 3:-

8. It is from the said evidence what the defendants claimed are oral partition by the father T.A.Natesan to the D.1 and D.2 in his lifetime in 1955 covered by document as acknowledgment under Ex.B.11 dated 30.12.1955, later they were in possession and enjoyment of the property by payment of tax and subsequently there was release deeds covered by Ex.B.9 executed by D.2 in favour of D.1 dated 01.03.1969 for respective properties in exchange referring to Ex.B.11 dated 30.12.1955 to say the oral partition is true and acted upon and even subsequently, they continued the

enjoyment till the suit is filed and thus about 27 years after the oral partition whatever right of the plaintiffs having claimed (even Ex.B.11 not believed besides acted upon under Exs.B.11 and B.9 in proof of it) they perfected their right by extinguishing right of the plaintiffs-the sisters of the defendants.

9.What the plaintiffs claimed from their oral evidence of 1st plaintiff-P.W.1 and Ex.A.2 reply notice by the D.1 and D.2 is that said contentions are false and their father died intestate and it is the self-acquired property of their father and they being in possession are also as co-sharers with plaintiffs having jointly succeeded after the Hindu Succession Act, and the further contest is after Hindu Succession Amendment Act 39 of 2005 which came into force w.e.f. 09.09.2005, by virtue of the amended section 6 of the Hindu Succession Act, the daughters are on par with sons and coparceners if it is a coparcenary property as contended by the D.1 and D.2 that they are entitled by birth therefrom in the property. In fact, as can be seen from the evidence on record the so called oral partition covered by Ex.B.11 cannot be believed including for its existence all through not shown by any foundation even the same is merely referred subsequently under Exs.B.1 and B.9 respectively in the year 1969 at best in showing to give life to Ex.B.11 brought into existence, by subsequent registered documents in 1961 vide Exs.B.1 and B.9 and mere payment of tax does not cover any right and it is in joint possession

and once it is the coparcenary property of T.A. Natesan, who died intestate, leaving the two sons and 4 daughters and once his date of death is subsequent to the HS Act, 1956 came into force w.e.f. 17.06.56 as died on 23.2.1957. Once such an oral partition set up is not true during life time of their father Natesan, who undisputedly died in the year, 1957; after the HS Act, 1956 came into force, the plaintiffs being daughters along with the defendants 1 and 2 and other sisters of them are the Class I legal heirs of Natesan; once such is the case and there is nothing to believe ouster to the knowledge for the 27 years not partitioned, plaintiffs are entitled to shares. Here whether it is the Natesan's self acquisition or coparcenary with defendants 1 and 2 concerned, there is nothing to show means for acquisition by Natesan that too in the joint family with defendants 1 and 2 in rightly held by the trial court as coparcenary property. Once such is the case, by virtue of Section 6 of the HS Act by virtue of notional partition in the coparcenary property, T.A.Natesan got by virtue of the legal fiction, $\frac{1}{3}^{\text{rd}}$ which is just before his death as if partition taken place and the two other coparceners D.1 and D.2 got remaining $\frac{2}{3}^{\text{rds}}$ to say $\frac{1}{3}^{\text{rd}}$ each and the $\frac{1}{3}^{\text{rd}}$ of T.A.Nagesan as per Section 8 of the H.S.Act in between the two sons and 4 daughters that is Class-1 heirs each entitled to $\frac{1}{6}^{\text{th}}$ to say the plaintiffs each got only $\frac{1}{18}^{\text{th}}$ share out of the plaint schedule property. It is the said findings rightly arrived by the trial court and to impugn the same in the respective two appeals there is no

more basis.

10. It is also to say once Section 6 application is not taken away by the amended Act 39 of 2005 for no such non-obstante clause of non-application of Section 6 for the amended Section 6 like for the word used in the Section 29(A) among 29 A to C of the H.S. A.P. Amendment Act which came into force w.e.f. 05.09.1985 by not 17/86, by virtue of Section 6 of the H.S. Act 1956 from the death of the father by virtue of the legal fixation covered by notional partition, succession opens, as what is referred is daughter of coparcenary and not sister of coparcenary either in the A.P. Amended Act or in the Central Legislation 39/05, through from the succession already opened after death of Natesan, his daughters cannot continue much less to claim to take advantage of the subsequent legislation for partition as coparceners at par with their brothers i.e. sons of T.A.Natesan. Once it is the coparcenary property and succession opens from the death of T.A.Natesan on 23.03.57 by virtue of H.S.Act, 30 of 56 Section 6 in that statute book as on the date of even subsequently the Amendment 39 of 05 came into force, there is for the father T.A.Natesan is into their sons breathed long back, they cannot be coparceners as per settled law. Thereby they cannot claim as coparceners but for in the undivided $\frac{1}{3}$ rd interest of T.A.Natesan as class-1 legal heirs under u/sec. 8 and 9 read with Schedule I of the H.S.Act. Once such is the case, the trial Court is correct in saying the property is the

coparcenary property and as T.A.Natesan died intestate after HS Act 30/56 came into force by virtue of notional partition as on the date of his death as $\frac{1}{3}^{\text{rd}}$ undivided interest of T.A.Natesan for the remaining $\frac{2}{3}^{\text{rd}}$ each of the two sons get, $\frac{1}{3}^{\text{rd}}$ got by succession being the plaintiffs and the other two sisters and the defendants 1 and 2, all the issues on T.A.Natesan as class-1 heirs get each $\frac{1}{18}$ share. Once such is the case, there are no merits in appeal and cross-objections much less to differ with. The trial Court are exercised discretion in not granting any profits from the plea of plaintiffs claim as in joint possession, there is nothing to interfere, but for to say so for as future profits from date of suit, there is no refusal. Hence plaintiffs are at liberty to apply for future profits determination from date of suit in final decree proceedings.

11. Accordingly, both the appeals **CCCA No.6 of 1999 and Tr.CCCA No.172 of 2003** are dismissed Including CCCA MP No.374 of 2015 in CCCA No.6 of 1999. Consequently, miscellaneous petitions, if any, pending in both the appeals shall stand dismissed. There is no order as to costs.

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Dr. JUSTICE B.SIVA SANKARA RAO

Dt.03.06.2016

Vvr.