

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

SECOND APPEAL Nos.757 and 813 of 2016

COMMON JUDGMENT:

In these two Second Appeals, the appellant is one and the same, the 1st respondent in S.A.No.757 of 2016 is 5th respondent in S.A.No.813 of 2016 and 2nd respondent in S.A.No.857 of 2016 is the relative of both the above parties. All parties also belong to the same family. Therefore both the Second Appeals are being disposed of by this common judgment.

2. One Venkata Raju had 3 sons by name Rama Raju, Krishnam Raju and Appala Raju, and had 3 daughters by name Atchamma, Venkayamma and Suryakantamma.

3. Seethamma is the wife of Rama Raju. Venkata Narasimha Raju, Suryakantamma, Annapurna and Vijaya Lakshmi are the children of Rama Raju and Seethamma.

4. Sarada Lakshmi is the daughter of Surykantamma and she was given in marriage to Venkata Narasimha Raju.

5. Prasoon is the daughter of Sarada Lakshmi and Venkata Narasimha Raju.

6. Rama Raju died on 04-03-2000. Venkata Narasimha Raju died on 11-06-1999.

7. Sarada Lakshmi filed a suit O.S.No.134 of 2000 on the file of the Junior Civil Judge, Tanuku impleading her daughter Prasoon as 1st defendant, Rama Raju, her father-in-law/maternal grandfather as 2nd defendant and Seethamma, wife of Rama Raju as 3rd defendant, and sought for partition of 2 items i.e. (1) Ac.0.27 cents in R.S.No.182/23 of Kanchamaru village and (2) tiled house bearing D.No.2-9(1) located in R.S.No.182/5 of the same village in an area of 339 sq. yards.

PLEADINGS IN O.S.No.135 of 2000:

8. In the said suit, Sarada Lakshmi contended that at the time of her marriage to Venkata Narasimha Raju, son of Rama Raju and Seethamma, both the above items of property were allotted exclusively to the share of her husband without Rama Raju retaining any share therein and that her husband thus became the absolute owner of the plaint schedule properties. According to her, her husband went to Gulf and earned substantial amounts, which he invested for improving the house property.

She alleged that after the death of her husband, Rama Raju, with the help of his grandson, beat her on 09-12-1999 and tried to drive her out of the house; that he was making preparations to create some documents claiming that the property is his property and not the property given to her husband; that a Will executed by her husband was stolen by Rama Raju and Seethamma; that in half share of Rama

Raju and Seethamma in the plaint schedule properties, she is entitled to 1/5th share apart from a half share in the half share of her husband; and thus she is entitled to thus 7/10th share in these 2 items of property after evicting the daughters of Rama Raju and Seethamma.

9. Written Statement was filed by Seethamma and her daughter Annapurna opposing the suit claim.

They denied that there was any settlement or agreement through elders at the time of marriage of Sarada Lakshmi with Venkata Narasimha Raju to allot the plaint schedule property as the exclusive share to Venkata Narasimha Raju, that he never enjoyed the property in his own right and interest, and Sarada Lakshmi has no right over the property.

They contended that the plaint schedule properties originally belong to Ramaraju; that they are his absolute property; that Ramaraju and his wife Seethamma were never cared or looked after by Venkata Narasimha Raju; during the lifetime of Ramaraju, they were looked after by their daughters Annapurna and Vijayalakshmi.

They contended that Ramaraju executed a registered Will Ex.B-1 dt.28-12-1989 giving item-1 of plaint schedule property to Annapurna and item-2 house property to Vijayalakshmi; the said Will came into operation after the death of Ramaraju; and that it was acted upon and the properties are being enjoyed by Annapurna and

Vijayalakshmi. They contended that Saradalakshmi has nothing to do with them and she is not in possession of the said properties.

They however admitted that Sarada Lakshmi got the share of her husband to the north of item-1 of the schedule property and she cannot make any claim with her daughter Prasoon over the southern side properties which exclusively belonged to Ramaraju. Other allegations were denied.

PLEADINGS IN O.S.No.216 of 2000:

10. Annapurna filed O.S.No.216 of 2000 for a perpetual injunction restraining K.Ramakrishna Raju and Sarada Lakshmi from interfering with her possession and enjoyment of the plaint schedule property which is an extent of Ac.0.28 ½ cts to the south of Ac.0.56 ½ cts in R.S.No.182/23 of Kanchumarru village. The former is also related to the parties.

She alleged that this property belonged to her father Ramaraju, that it is her absolute property, that he died on 04-03-2000, that during the lifetime of Ramaraju, he was looked after by his daughters and he executed Ex.B-1 Will dt.28-12-1999 in her favour bequeathing this property to her and the house property to Vijayalakshmi.

It is specifically contended that out of total extent of Ac.0.56 ½ cts obtained by Ramaraju in a partition with his brothers in 1960, an

extent of Ac.0.28 $\frac{1}{4}$ cts was given to her (Annapurna) and that Sarada Lakshmi was in possession of the balance extent.

She alleged that Sarada Lakshmi and Ramakrishna Raju were not allowing her to enjoy her property and so she filed the suit.

11. Written Statement was filed by Ramakrishna Raju and Sarada Lakshmi denying the plaint allegations and reiterating the stand taken by Sarada Lakshmi in O.S.No.135 of 2000.

They denied that the plaint schedule property belonged to Ramaraju and he executed the Will Ex.B-1 were denied.

They contended that Ramaraju's father Venkataraju had only Ac.1.62 cts, that he died in 1971 and thereafter his three sons and three daughters partitioned properties and executed a partition list on 11-10-1976, that in the said partition, Ramaraju got only Ac.22.00 cts and so he could not have given Ac.0.28 $\frac{1}{2}$ cts to Annapurna under the Will.

They denied the plaint plan also. They alleged that Sarada Lakshmi was enjoying her husband's share of Ac.0.27 cts and contended that Annapurna was not in possession of the land.

12. Both the suits were clubbed together and the evidence was recorded in O.S.No.135 of 2000.

13. Sarada Lakshmi examined P.Ws.1 to 3 and marked Exs.A-1 to A-3 while Annapurna examined D.Ws.1 to 5 and marked Exs.B-1 to B-6.

14. By common judgment and decree dt.07-03-2011, the trial Court dismissed O.S.No.135 of 2000 and decreed O.S.No.216 of 2000.

15. The trial Court first considered the question whether Ramaraju got Ac.0.56 ½ cts of land or only Ac.0.27 cts. On a consideration of evidence on record, it concluded that Ramaraju got Ac.0.56 ½ cts in the partition between his brothers and not Ac.0.27 cts. as alleged by Sarada Lakshmi. It also held that there was no evidence that the three sisters of Ramaraju laid a claim for an equal share out of Ac.0.56 ½ cts since none of them were examined by Sarada Lakshmi. It held that Venkata Narasimha Raju, the husband of Sarada Lakshmi did not acquire any immovable properties though he went to Dubai, that he alienated Ac.0.50 cts under Ex.B-6 sale deed dt.13-10-1981 which was his exclusive property, that this property must have been given to him by his father Ramaraju. It held that apart from this property, during his lifetime, Venkata Narasimha Raju was also in possession of Ac.0.27 cts and on his death, his wife Sarada Lakshmi is in possession of that land and this bit of land was on the northern side and item-1 is on the southern side. It held that since Venkata Narasimha Raju did not purchase any immovable properties, the Ac.0.27 cts which is in

possession of Sarada Lakshmi must have also been given by Ramaraju to Venkata Narasimha Raju. It held that Ex.B-3 pass book of the Primary Agricultural Cooperative Society showed that Ramaraju had mortgaged Ac.0.56 ½ cts in R.S.No.182/23, and if he had not got this land in the partition with his brothers, he could not have mortgaged it to the Society. It held that Sarada Lakshmi's mother Suryakantham was examined as D.W.1 and she stated that the marriage alliance between Sarada Lakshmi and Venkata Narasimha Raju was fixed so that the properties would not go out of the family and so the theory set up by Sarada Lakshmi that the marriage was performed only after the plaint schedule property was given to her husband, is false. It also noted that Suryakantham admitted that Venkata Narasimha Raju was given Ac.0.27 ½ cts out of Ac.0.56 ½ cts which Ramaraju got in the partition between himself and his brothers and that the suit was filed for Ac.0.27 ½ cts which Ramaraju had given to Annapurna under Ex.B-1. It therefore concluded after considering the evidence of Annapurna (D.W.2) that she is in possession of the land given to her by Ramaraju and that land had nothing to do with the land given to Venkata Narasimha Raju. It also held that Ex.B-1 Will is genuine. It however held that there was no evidence that item-2 house property in O.S.No.130 of 2006 was partitioned between Ramaraju and Venkata Narasimha Raju, that the latter could not have improved the said house property, that since the said item is admittedly joint family property, under Ex.B-1 Will, exclusive rights could not have been

created in favour of Vijayalakshmi for this item and this item requires to be partitioned between Sarada Lakshmi and Prasoon, that half share therein would go to them and the other half can be retained by Vijayalakshmi. It also directed Vijayalakshmi to pay profits to Saradalakshmi to this extent of item-2. It also held that Annapurna is entitled to injunction against Sarada Lakshmi and Ramakrishna Raju.

16. Assailing the judgment and decree in O.S.No.135 of 2000 and O.S.No.216 of 2000, Sarada Lakshmi and Ramakrishna Raju filed A.S.No.15 of 2011 and A.S.No.14 of 2011 respectively before the IV Additional District Judge, Tanuku. He dismissed both appeals by separate orders dt.20-06-2016.

17. Challenging the judgment in A.S.No.14 of 2011, Sarada Lakshmi filed S.A.No.813 of 2016 and as against the judgment in A.S.No.15 of 2011, she filed S.A.No.757 of 2016.

18. Sri C.S.K.V.Ramana Murthy, learned counsel for the appellants contended that both the Courts below ought to have got the property in item-1 of the plaint schedule in O.S.No.135 of 2000 and the property which is subject matter of O.S.No.216 of 2000 localised through an Advocate Commissioner, since there is a dispute as to whether the land claimed by the appellant Sarada Lakshmi in O.S.No.135 of 2000 is the same land which was claimed by Annapurna in her suit O.S.No.216 of 2000, and that a comparison of the boundaries of both the properties as per their description in the

respective schedules seems to suggest that they are same and not different as contended by Annapurna though Annapurna's contention has been accepted by both the Courts below. He wanted this Court allow the Second Appeals and remand the matter back to the trial Court or the lower appellate Court for getting the land localised to do justice between the parties.

19. I am not able to agree to this contention. It is not in dispute that the appellant Sarada Lakshmi had taken no steps in both the trial Court as well as lower appellate Court to get the above properties claimed by her and Annapurna localized by seeking appointment of an Advocate Commissioner. A remand cannot be ordered to enable a party to lead evidence on a point which the said party, having had opportunity to lead such evidence, has failed to do so. Moreover the point urged by the counsel is in the realm of fact and in exercise of jurisdiction under Section 100 CPC, pure questions of fact cannot be gone into unlike an appeal under Section 96 CPC.

20. Though Sarada Lakshmi stated that item No.1 was given to her husband at the time of her marriage, there is no document filed to prove the said fact. Her own mother Suryakantham did not support her case.

21. Counsel for appellants further contended that even though Vijayalakshmi/6th respondent in S.A.No.813 of 2006 had not even filed a written statement in the trial Court in O.S.No.135 of 2000, she

has been given a share in the item-2 house property in the said suit and this is impermissible in law.

22. O.S.No.135 of 2000 is a suit for partition. It is settled law that in such suits, position of plaintiffs and defendants is interchangeable (**Bhagwan Swaroop v. Mool Chand**¹).

23. If the Court on appreciation of evidence has found Vijayalakshmi, who was 6th defendant in O.S.No.135 of 2000 to be entitled to share in such property, it was therefore certainly entitled to grant such relief.

24. Moreover, a reading of the lower appellate Court order in A.S.Nos.14 and 15 of 2011 does not indicate that this point was canvassed before the lower appellate Court by the appellant.

25. There is no mention in the Memorandum of Grounds of Second Appeal that such a point was raised by the counsel for the appellant and that the lower appellate Court did not deal with it. There is no affidavit of the advocate who appeared for the appellant in the lower appellate Court that in spite of urging this point, the said Court did not decide it.

26. When this was pointed out to the counsel for the appellant, he sought time to raise such a ground in the Second Appeal and also file an affidavit of the advocate for the appellant in the trial Court. Since

¹ (1983) 2 SCC 132

such a course of action cannot be permitted, the Court declined the request of the counsel for the appellant.

27. In this view of the matter, it has to be taken that the appellant had given up this point in the lower appellate Court. Having done so, she cannot be allowed to raise that point in the Second Appeal.

28. For the aforesaid reasons, I do not find any substantial question of law arising for consideration in the Second Appeals. They are accordingly dismissed at the admission stage. No costs.

29. As a sequel, miscellaneous petitions, if any pending, in these Appeals shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 28-03-2017
Vsv/Kvr

