

HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL Nos.229 and 230 of 2009

COMMON JUDGMENT:

Respondent Nos.4 to 6 in E.A. No.846 of 2005 in E.P. No.47 of 1999 in O.S. No.275 of 1994, filed Second Appeal No.229 of 2009 challenging the decree and judgment in A.S. No.37 of 2006 passed by the Senior Civil Judge, Gudivada, dated 02.06.2007, affirming the order and decretal order passed by the Principal Junior Civil Judge, Gudivada, in EA No.846 of 2005 in E.P. No.47 of 1999 in O.S. No.275 of 1994, on his file allowing the claim petition filed by respondent Nos.1 and 2, under Order XXI Rule 58 of CPC.

Respondent No.3 in EA No.574 of 2005 in EP No.247 of 2004 - plaintiff in O.S. No.199 1999, filed Second Appeal No.230 of 2009 challenging the decree and judgment in A.S. No.55 of 2006 passed by the Senior Civil Judge, Gudivada, dated 02.06.2007, affirming the order and decretal order passed by the Principal Junior Civil Judge, Gudivada, in EA No.574 of 2005 in E.P. No.247 of 2004 in O.S. No.199 of 1999 on his file allowing the claim petition filed by the respondents 1 and 2, under order XXI Rule 58 of CPC.

The parties to the appeal hereinafter referred as arrayed before the Principal Junior Civil Judge's Court in EP No.574 of 2005, for convenience and to avoid confusion.

The petitioner Nos.1 and 2 filed a petition under Order-XXI Rule-58 of CPC to raise attachment over the schedule property recognizing their claim. The petitioners are brothers, and sons of one Mahesh Babu. The E.P. schedule property belongs to one Bandaru Venkateswara Rao,

the grand father of the petitioners. The said Venkateswara Rao blessed with seven sons, by name, Vital Rao (first respondent), Mahesh Babu (father of the petitioners), Babu Rao, Ramana Murthy, Ramesh Babu, Madhusudhana Rao and Hari Babu and a daughter Kolli Jayalakshmi. He died intestate on 09.03.1982 leaving behind his wife, seven sons and the married daughter Kolli Jayalakshmi, to succeed his property including petition schedule property. Consequent upon his death, his wife, married daughter and seven sons of late Venkateswara Rao are entitled to equal right in the property since it is ancestral property of Mahesh Babu. The petitioners came to know that their father Mahesh Babu and his brothers executed a relinquishment, dated 27.02.1992 in favour of the respondents 1 and 2 relinquishing their share in the schedule property as if they are absolute owners of the same, including the rights of their children though they are exclusive owners of the schedule property and not competent to relinquish the share of their children as such the relinquishment deed executed in favour of the respondents 1 and 2 does not bind the petitioners.

When the respondents 1 and 2 made an attempt to alienate the schedule property covered by relinquishment deed, the petitioners filed O.S No.41 of 2003 on the file of the Senior Civil Judge, Gudivada, for cancellation of relinquishment, dated 27.02.1992, and for consequential permanent injunction against the respondents 1 and 2 from alienating the property and obtained decree, dated 22.12.2003, canceling the relinquishment deed, dated 27.02.1992, the said decree attained finality and thereby the respondents 1 and 2 have no exclusive title or right over the schedule property, and similarly, the 3rd respondent also has no right to bring the property for sale. As the petitioners are also entitled to

equal share in the property, consequently, prayed to raise attachment over the EP schedule property.

The 3rd respondent alone has filed counter while the respondents 1 and 2, who obtained relinquishment deed, remained *ex parte*.

The main contention raised by the 3rd respondent before the executing Court i.e. the Principal Junior Civil Judge's Court is that the EP schedule property is the exclusive property of late Venkateswara Rao and he purchased the same with his own earnings on 16.06.1961 and as such the petitioners cannot acquire any right in the schedule property. She further contended that father of the petitioners along with his brothers, mother and sister executed a relinquishment deed, dated 27.02.1992 conferring absolute title and right in favour of the respondents 1 and 2 and after a long time the petitioners filed O.S. No.41 of 2003 for cancellation of relinquishment deed and obtained a decree in collusion with respondents 1 and 2. Therefore, the decree in O.S No.41 of 2003 is not binding. The decree in O.S. No.41 of 2003 is invalid since the suit was not filed within three years on attaining majority by the petitioners and it is barred by limitation. Therefore, the 3rd respondent is entitled to bring the property for sale and thereby, the attachment cannot be raised over the property and finally prayed for dismissal of the petition.

During enquiry, on behalf of the petitioners, PW.1 was examined and Exs.P1 to P5 were marked. On behalf of the respondents, RW.1 was examined, but marked no documents. Upon hearing the argument of both the counsel, the Principal Junior Civil Judge held that the petitioners were entitled to claim 1/9th undivided share in the property of their father Mahesh Babu and raised attachment to an extent of 2/3rd

of undivided share in the property on the ground that the property originally belongs to the grand father of the petitioners and after his death, along with other sons, father of the petitioners succeeded the schedule property and other properties and thereby, the property devolved upon the father of the petitioners is an ancestral property and consequently, the petitioners are entitled for the share referred above.

Aggrieved by order and decreetal order in EA No.574 of 2005 in EP No.247 of 2004 in O.S No.199 of 1999, the 3rd respondent L.Sri Lakshmi Bharathi Kumari, who is plaintiff in O.S No.199 of 1999 filed an appeal. The Senior Civil Judge, Gudivada, upheld the decree and order of the trial Court by a common judgment, dated 02.06.2007, in ASNos.55 of 2006 and 58 of 2006.

Aggrieved by order and decreetal order in EA No.846 of 2015 in EP No.47 of 97 in O.S No.275 of 1994, the respondents 4 to 6 filed an appeal. The Senior Civil Judge, Gudivada, upheld the decree and order of the trial Court by a common judgment, dated 02.06.2007, in AS Nos.37 and 38 of 2006.

Second Appeal Nos.229 and 230 of 2009 are filed, challenging the concurrent findings recorded by both the execution Court and the appellate Court, by the 3rd respondent in EA No.574 of 2005 in EP No.247 of 2004 in O.S No.199 of 1999 and respondents 4 to 6 in EA No.846 of 2005 in EP No.47 of 1999 in O.S No.275 of 1994 on various grounds. The first and foremost contention raised in the appeal is that the EP schedule property was the self-acquired property of late Venkateswara Rao (grand father of the petitioners) and after the death of Venkateswara Rao, father of the petitioners and respondents 1 and 2 and other children succeeded the estate of deceased Venkateswara Rao by

virtue of Section 8 of the Hindu Succession Act (for short 'the Act') and it is not an ancestral property and thereby, the orders and the decreetal orders passed by the Executing Court holding that the EP schedule property is ancestral property of the petitioners, is erroneous. It is further contended that raising of attachment at this stage without filing the suit for partition or for declaration of their share in the property, in a petition filed under Order-XXI Rule 58 CPC, is erroneous thereby the order and decreetal order passed by the Executing Court cannot be upheld and prayed to set aside the concurrent findings recorded by both the Executing Court and the appellate Court by allowing this appeal.

During hearing, Sri B. Nalin Kumar, learned counsel for the appellant – 3rd respondent mainly contended that the property was the self acquired property of the grand father of the petitioner i.e. Venkateswara Rao, who died intestate leaving behind him, his wife, seven sons and one married daughter and the property devolved upon the sons is governed by the Rules of Succession under Section 8 of the Hindu Succession Act and Section 6 of the Act has no application, therefore, the concurrent findings recorded by the executing Court and the appellate Court are erroneous and prays to set aside the same. In support of his contentions, he placed reliance on the judgments of the Apex Court reported in Commissioner of Wealth Tax, Kanpur and others v. Chander Sen and others¹, Yudhishter v. Ashok Kumar², P.M. Mani v. P.S. Mohankumar and others³ and R. Viswanathan and others v. Rukn-ul-Mulk Syed Abdul Wajid⁴.

¹ 1986 (3) Supreme Court Cases 567

² AIR 1987 Supreme Court 558

³ AIR 2002 Madras 402

⁴ AIR 1963 Supreme Court 1

Whereas, counsel for the petitioners Sri V.V.L.N. Sarma would contend that the decree obtained for cancellation of the relinquishment deed in O.S.No.No.41 of 2003 is binding on the 3rd respondent (appellant herein) and by virtue of the decree, the petitioners are entitled to a share in the property since the succession is governed by Section 6 of the Hindu Succession Act and consequently, the decreetal order passed by the trial Court cannot be set aside. He placed reliance on the judgments of the Apex Court in Raj Kumar v. Sardari Lal and others⁵, Dr.M. Parvathi and others v. Penumatcha Satyanarayana Raju and others⁶ and Mandapalu Ramaiah v. Contdrathi Ramanarayana and others⁷ and contended that the property is the ancestral property, and prayed for dismissal of the appeals.

The counsel for the appellant – 3rd respondent in EA No.574 of 2005 in EP No.247 of 2004 in O.S. No.199 of 1999 formulated three substantial questions of law, but the only substantial question of law that arise for consideration is:

“whether Section 8 of the Hindu Succession Act is applicable when the property was purchased by late Venkateswara Rao (grand father of the petitioners) during his lifetime and thereby the property succeeded by father of the petitioners Mahesh Babu shall be treated as self-acquired property, if so whether raising of attachment is in accordance with law?

POINT: The relationship between Venkateswara Rao, Mahesh Babu and the petitioners before the Executing Court is not in dispute. Similarly, obtaining a decree by the 3rd respondent –appellant herein, in O.S. No.199 of 1999 on the file of the Junior Civil Judge, Gudivada, respondents 4 to 6 in O.S No.275 of 1994 is not in quarrel. From the beginning, the petitioners’ contention before the executing Court was

⁵ 2004 (2) ALT 1 (SC)

⁶ 2013 (5) ALT 184 (D.B.)

⁷ 2013 (6) ALD 108

that the EP schedule property and other properties belong to late Venkateswara Rao (grand father of the petitioners). They did not disclose whether said Venkateswara Rao inherited the property from his ancestors or acquired the same with his self-exertions, but contended that the property belongs to him, without disclosing the nature of devolution on Venkateswara Rao. At the same time, the 3rd respondent contended that the property was the self acquired of Venkateswar Rao and the father of the petitioners and other six sons, wife of Venkatswara Rao and daughter Kolli Vijayalakshmi, succeeded the property by devolution thereby, the succession is governed by Section 8, but not 6 of the Act. The executing Court and the appellate Court concluded that the property originally belongs to Venkateswara Rao and it devolved on his seven sons including father of the petitioners Mahesh Babu, thereby, it is the ancestral property of the petitioners and hence, they are entitled to claim 2/3rd undivided share in the property.

The short question to be decided by this Court is totally based on Sections 6 and 8 of the Act. Section 6 deals with devolution of interest in co-parcenary property. A Hindu Male dies after commencement of the Act, having at the time of his death an interest in Mitakshara co-parcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with the provisions of the Act, provided that if the deceased had left behind him surviving a female relative specified in Class-I of the Schedule or a male specified in that clause, who claims through such female relative, the interest of the deceased in Mitakshara co-parcenary property shall devolve by testamentary or intestate succession, as the case may be under the Act and not by survivorship.

Taking advantage of Section 6 of the Act, counsel for the petitioners before the executing Court contended that the property was devolved upon Venkateswara Rao who died by leaving his seven sons and wife, in such case wife is specified as class-I heir in the schedule annexed to the Act. Section 8 of the Act specified the heirs in two classes i.e. class-I and class-II. As per schedule, class-I heirs are son, daughter, widow, mother, son of the pre-deceased son, daughter of pre-deceased son, son of a predeceased daughter, daughter of a pre-deceased daughter, widow of a pre-deceased son, son of pre-deceased son of a pre-deceased son, daughter of a pre-deceased son of a pre-deceased son, widow of a pre-deceased son of pre-deceased son.

Bandaru Venkateswara Rao died leaving behind him a female relative specified in class-I, in such case the property shall devolve on the heirs either by testamentary or intestate succession under the provisions of the Act, but not by survivorship in view of provision to Section 6 of the Act. Here, admittedly, Venakteswara Rao died leaving behind him his seven sons, whose names are referred in the earlier paras, one married daughter i.e. Kolli Vijayalakshmi and his wife. In such case, the proviso annexed to Section 6 applies and in view of proviso, the succession is governed by Section 8 of the Act, i.e. under the provisions of Hindu Succession Act, but not by survivorship.

The Madras High Court in P.M. Mani's case (supra 3), discussed about burden of proof when a property is claimed to be the joint family property and held that when a person claiming that a particular property was ancestral or it belonged to the joint family, the burden of proving the same lies on him. He must show initially that there was sufficient nucleus. A presumption that a property in the hands of an individual

coparcener was joint family property can be drawn only if it is shown that there was nucleus of the joint family property, from which it might fairly be said to have grown. If such nucleus is proved by sufficient evidence or admitted by the opposite party, only then, the onus of proving separate acquisition shifts on to the coparcener who is alleging the same, would arise. In view of the principle laid down in the above judgment, initially the onus of proof lies on the person, who is claiming that the property is ancestral property or acquired with the ancestral nucleus. In the present case, the petitioner asserted that the schedule property is ancestral property and therefore, the burden squarely lies on them to establish that the property is the hindu undivided co-parcenary property to claim benefit under Section 6 of the Act.

Here, PW.1 was examined, marked Ex.P2 to establish that the schedule property was purchased by Venkateswara Rao, grand father of the petitioners, under registered sale deed, dated 16.06.1961. The original of Ex.P2 itself suffice to establish that the property was the self-acquired property of Venkateswar Rao. When he died leaving behind his seven sons, a married daughter and wife, who are classified as relatives of Class-I heirs in the schedule under Section 8 of the Act, the proviso to Section 6 is applicable to the present facts of the case. In view of undisputed fact that the property was purchased by Venkateswara Rao under the original of Ex.P2, Section 8 of the Act governs the succession of the property of a male Hindu, who died intestate.

Section 8 of the Act deals with general rules of succession in the case of males, when hindu male dying intestate, his property shall devolve according to the provision of Chapter; firstly upon heirs being the relatives specified in Class-I of the schedule; secondly if there is no

heir of Class-I, then upon heirs being the relatives specified in Class-II of the Schedule; thirdly if there is no heir of any of the two classes then upon the agnates of the deceased and lastly if there is no agnates, then upon the cognates of the deceased. Thus Section 8 of the Act applies to the property of a male hindu dying intestate after the commencement of the Hindu Succession Act. Section 6 of the Act, however, permits co-parcenary property would devolve on heir by survivorship subject to proviso. Hence, where Section 6 of the Act applies, Section 8 would have no application. If, however, the deceased was a sole surviving coparcenar at the time of his death, there being no other surviving member of the co-parcenary, Section 6 of the Act would not apply. In such case, Section 8 of the Act would apply. Undisputedly, in the present case, Venkateswara Rao died leaving his seven sons and one married daughter and wife, on account of such intervention of female relative specified in Class-I, Section 6 of the Act has no application to the present facts of the case and Section 8 of the Act alone govern such succession.

Under Hindu Law, the moment a son is born, he gets a share in the father's property and becomes part of the co-parcenary. The rights accrued to him not on the death of the father or inheritance from the father but with the very fact of his birth, normally, therefore, whenever if the father gets the property from whatever source, from the grand father or from any other source, be it a separate property or not, his son should have a share in that and it will become part of the joint family of his son and grand son and other members, who form joint hindu family with him. But this position has since been affected by Section 8 of the Act. The preamble of the Act reiterates that the Act is to amend and codify the law and Section 4 thereof, makes it clear that one should look

to the Act in case of doubt and not to the pre-existing Hindu Law, the express words in Section 8 of the Act would prevail over the aforesaid general law. When therefore, the son inherits the property in a situation contemplated by Section 8 of the Act, he does not take it as Kartha of his own undivided family, but takes it in his individual capacity. The schedule to the Act referred to Section 8(a) of the Act indicates the heir in class-I and only includes son and does not include son's son but does include son of pre-deceased son as held in Commissioner of Wealth Taxes, Kanpur's case (supra 1). Similarly, in Yudhister's case (supra 2) the same was reiterated.

In view of the law declared in the above judgments of the Apex Court, succession is governed by Section 8 of the Act, but not by Section 6 of the Act, more particularly, in view of the proviso to Section 6 of the Act. Therefore, the property was devolved upon Mahesh Babu and his brothers, including the mother and married sister by devolution under Section 8 of the Act, but not by survivorship under Section 6 of the Act.

In the present facts of the case, the deceased Venkateswara Rao acquired property, which is the subject matter of both E.Ps. and the same has been devolved upon the father of the claimants, his brothers, sister and mother. Therefore, due to intervention of female class – I heir the succession is governed by Section 8 of Hindu Succession Act and it was the separate property of the father of the claimants, competent to execute a document in favour of the J.Drs. and thereby the cancellation of document by filing a suit without impleading the appellants herein and obtaining a decree is of no use, more particularly when attachment was subsisting on the property and such decree passed by the Court will not take away the right of the appellants to proceed against the

property in execution of the decree obtained against the J.Drs. Though the judgment and decree are relevant in view of Section 41 of the Evidence Act, the same will not bind the persons who are not the parties to the said judgment and decree. In the present case, the appellants were not made parties to the said decree, therefore, it is not binding on the appellants in the present appeals in view of the law declared by the Apex Court referred supra. Hence, the claimants are not entitled to claim any relief in E.A.No.846 of 2005 in E.P.No.47 of 1999 in O.S.No.275 of 1994 and E.A.No.574 of 2005 in E.P.No.247 of 2004 in O.S.No.199 of 1999 on the file of Senior Civil Judge, Gudivada.

One of the major ground urged before this Court by the counsel for the petitioners is that the petitioners filed O.S No.41 of 2003 to cancel the relinquishment deed, dated 27.02.1992 and obtained a decree and thereby, on the ground that the petitioners are also entitled to claim share along with their father Mahesh Babu and when decree was passed canceling the relinquishment deed, the decree is binding on the petitioners and the 3rd respondent, and he placed reliance on the judgments of this Court in Mandapalu Ramaiah's case (supra 7) and Dr.M.Parvathi's case (supra 6). In Mandapalu Ramaiah's case in paragraph-16, a single Judge of this Court held as follows:

“A party upon whom the interest in the immoveable property, which is the subject matter of a suit, has devolved all because of the purchase of the said property during pendency of the suit has every right to seek the leave of the court for prosecuting the case independently by him. He has the locus standi to move the matter. But, if he does not chose to do so by applying for the leave of the court, he will have to suffer for the default committed by him. The purport of Rule 10 of Order XXIII CPC is that it is not obligatory upon a party to seek leave. It is, therefore, by option, one exercises to prosecute the cause properly and safeguard his own interest. A party on whom such

an interest in the immoveable property has devolved is also entitled to maintain an application under Order IX Rule 13 CPC seeking setting aside of the decree passed for the default of his predecessor-in-interest in the suit. But, however, he cannot maintain such an application without seeking leave of the court in accordance with Order XXII Rule 10 CPC. Imagine a situation where an application moved by a party under Order IX Rule 13 is allowed, but he does not follow it up by moving an application, to be brought on record in accordance with Rule 10 of Order XXII CPC, as moving any such application is purely voluntary act or optional and the court cannot insist upon or compel such an application to be moved. The court will be left with no meaningful steps to be taken in the pending proceedings thereafter. The decree passed earlier having been set aside and the original party continues to lack interest to contest the same, the court will be forced to repeat the same step again viz., passing an *ex parte* decree. No application therefore shall be maintained to secure such a result. Every application must be intended for furthering the cause of justice. The very philosophy behind providing an opportunity to a defaulting party enabling him to move an application under Rule 13 of Order IX CPC is only to provide once more an opportunity to contest the suit properly. It is not meant to leave the court high and dry. It is, therefore, imperative for the party before moving an application under Order IX Rule 13 to know as to the next step it has to undertake. Therefore, while moving an application under Order XXII Rule 10, simultaneously application under Order IX Rule 13 becomes maintainable. If no application under Order XXII Rule 10 is moved by a party, out of a choice left to him, he has to suffer the consequences of his default as enunciated in Shankar Chaudhari's case (supra) and Dhurandhar Prasad Singh's case (supra).” (emphasis supplied)

In another judgment i.e. Dr. M.Parvathi's case (supra 7), a Division Bench of this Court held that in a claim petition filed in execution petition, the claimant must be able to establish a semblance of title though not so perfect one over the property claim which has acceptable in law, mere raising a plea in a claim petition that the decree obtained by the other party from the Court is collusive or

fraudulent would not sub-serve the purpose and it must be established by filing a separate suit.

The principle laid down in the above judgment is of no avail to the petitioners, but on the other hand it would assist the 3rd respondent in EA No.574 of 2005 in EP No.247 of 2004 in OS No.199 of 1999 and respondents 4 to 6 in EA No.846 of 2005 in EP No.47 of 1999 in O.S No.275 of 1994 in claiming relief in the petition for the reason that the petitioners themselves filed a suit in O.S No.41 of 2003 for cancellation of relinquishment deed and permanent injunction. Even otherwise, when Mahesh Babu executed a relinquishment deed in favour of petitioners 2 and 3, Mahesh Babu (father of the petitioners) is entitled to relinquish only to the extent of his interest in the undivided property, thus he relinquished his entire rights in the entire property. But by a decree, the relinquishment deed was set aside, more over, when the decree was set aside, the 3rd respondent is not entitled to challenge the same but on the contrary, in R. Viswanath's case (supra 4) in paragraph-149, a full bench of the Supreme Court held as follows:

“From the above, it follows that conclusiveness, from the point of view of the law of evidence, will attach to a judgment, order or decree, only if it falls within the categories mentioned in s. 41. Once a judgment etc. falls within it, the law dispenses with the proof of the fact and the conclusion of the former judgment etc., about the legal character which it confers or declares, together with the declarations of property arising from that legal character, is final. In my opinion, the conclusiveness under s. 41 of the Indian Evidence Act cannot be claimed in this case for the Mysore judgment in view of the enumeration of certain jurisdictions in the section, because the status of being joint or separate in relation to a Hindu coparcenary property is not one of the legal characters mentioned in it.” (emphasis supplied)

The Apex Court discussed about the finality of the judgment with reference to Section 41 of the Indian Evidence Act. Even assuming for a moment when the relinquishment deed is set a side and the decree passed in O.S No.41 of 2003 has attained finality, still in view of the original of Ex.P2 and oral evidence of PW.1, the property was purchased by Venkatswara Rao (grand father of the petitioners), who died intestate after commencement of Hindu Succession Act, leaving behind him his seven sons wife and a married daughter, on account of intervention of a female relative specified in class-I heirs of schedule under Section 8 of the Act, the succession is governed by Section 8 and not by Section 6 of the Act. Therefore, the decree and judgment obtained in O.S No.41 of 2003 by the petitioners bind the inter-parties i.e. the parties to the suit and not the third parties. The 3rd respondent in EA No.574 of 2005 in EP No.247 of 2004 in OS No.199 of 1999 and respondents 4 to 6 in EA No.846 of 2005 in EP No.47 of 1999 in O.S. No.275 of 1994 (appellants herein) are third party to the decree for the purpose of Section 41 of the Indian Evidence Act, though it is final but not binding on the 3rd respondent in EA No.574 of 2005 in EP No.247 of 2004 in OS No.199 of 1999 and respondents 4 to 6 in EA No.846 of 2005 in EP No.47 of 1999 in O.S. No.275 of 1994.

Learned counsel for the petitioners further contended that when a transaction took place during pendency of the legal proceedings, it is hit by Section 52 of the Transfer of Property Act and even third party can file an application to set aside such decree, but the 3rd respondent in EA No.574 of 2005 in EP No.247 of 2004 in OS No.199 of 1999 and respondents 4 to 6 in EA No.846 of 2005 in EP No.47 of 1999 in O.S. No.275 of 1994 did not take any steps to get the decree set aside and consequently not entitled to claim any benefit, by placing reliance on

Raj Kumar's case (supra 5). The Apex Court while deciding the doctrine of transfer *pendente lite* held that the doctrine of *lis pendens* expressed in the maxim '*ut lite pendente nihil innoventur*' (*during a litigation nothing new should be introduced*) has been statutorily incorporated in Section 52 of the Transfer of Property Act 1882. A defendant cannot, by alienating property during the pendency of litigation, venture into depriving the successful plaintiff of the fruits of the decree. The transferee *pendente lite* is treated in the eye of law as a representative-in-interest of the judgment-debtor and held bound by the decree passed against the judgment-debtor though neither the defendant has chosen to bring transferee on record by apprising his opponent and the Court of the transfer made by him nor the transferee has chosen to come on record by taking recourse to Order 22 Rule 10 of the C.P.C. In case of an assignment creating or devolution of any interest during the pendency of any suit, Order 22 Rule 10 of the C.P.C. confers a discretion on the court hearing the suit to grant leave for the person in or upon whom such interest has come to vest or devolve to be brought on record. Bringing of a *lis pendens* transferee on record is not as of right but in the discretion of the court. Though not brought on record the *lis pendens* transferee remains bound by the decree.

In the present case, no transfer took place during pendency of the proceedings to claim benefit under Section 52 of the Transfer of property Act based on the doctrine of *lis pendens*. The 3rd respondent is only a decree holder who instituted execution proceedings for realization of the decree, therefore, the principle laid down is not relevant to the present situation. Consequently, it is of no assistance to the petitioners before the executing Court.

In any view of the matter it is an undisputed fact that the schedule property was purchased by Venkateswara Rao under the original of Ex.P2. The oral evidence adduced by PW.1 is in support of the purchase of the property under the original of Ex.P2. The property was the self acquired property of Venkateswara Rao, who died intestate leaving behind a female relative classified as class-I heir in the schedule, the succession is governed by the provisions of Section 6 of the Hindu Succession Act and not by survivorship. Thus, the property devolved upon Mahesh Babu is only a separate property of Mahesh babu and the petitioners before the trial Court are not entitled to claim any share in the property by birth as co-parcenars. The executing Court and appellate Court did not advert to rules governing the succession of a property of deceased Venkateswara Rao in total ignorance of proviso to Section 6 of the Act and concluded that the schedule property is the undivided hindu co-parcenary property, the petitioners by birth became co-parcenars and entitled to claim a share therein and committed a grave error in allowing the claim petition.

In view of my discussion, in the earlier paras, the findings recorded by the trial Court raising attachment to the extent of the share of the petitioners before the Executing Court is erroneous and the same is liable to be set a side. Accordingly I hold that Mahesh Babu (father of the petitioners) became the absolute owner of the property as the property was devolved upon him under Section 8 of the Hindu Succession Act in view of the law declared by the Apex Court in Commissioner of Wealth Tax, Kanpur's case (supra 1).

Hence, the Second Appeals are allowed setting aside the concurrent findings recorded by both the executing Court and the

appellate Court in E.A. No.846 of 2005 in E.P. No.47 of 1999 in O.S. No.275 of 1994 and also in EA No.574 of 2005 in EP No.247 of 2004 - plaintiff in O.S. No.199 1999, dismissing the claim petitions.

No order as to costs. Miscellaneous petitions pending if any, shall stand closed.

M. SATYANARAYANA MURTHY, J

March 13, 2017.
KTL

