* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE ANIS

+ APPEAL SUIT No.349 of 2016

% Date: 27-04-2017

Between:

Smt. R. Seethamma @ Seetha Lakshmi,
W/o. Sri R.Vema Reddy,
R/o. Door No.134, CIEFL Colony,
East Anand Bagh, Safilguda,
Malkajgiri, Hyderabad.

…Petitioner

And

M. Thimma Reddy,
S/o. Late M. Satyanarayana Reddy
Occ: Advocate/Ryot,
R/o. Gudur Village, Kurnool District.

…Respondent

! Counsel for the Appellant : Mr. Ch. Ramesh Babu

^ Counsel for the Respondent : Mr. K.S. Gopalakrishnan

< GIST:

> HEAD NOTE:

? Cases referred

1. (2016) 2 SCC 36
2. (1991) 3 SCC 647
3. (1993) 4 SCC 392
4. AIR 2012 SC 169

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

Delivered on :27-04-2017

Coram :

HONOURABLE MR. JUSTICE V.RAMASUBRAMANIAN
And
HON'BLE SMT JUSTICE ANIS

A.S.No.349 of 2016

Smt. R. Seethamma @ Seetha Lakshmi,
W/o. Sri R.Vema Reddy,
R/o. Door No.134, CIEFL Colony,
East Anand Bagh, Safilguda,
Malkajgiri, Hyderabad.

… Petitioner

Vs.

M. Thimma Reddy,
S/o. Late M. Satyanarayana Reddy
Occ: Advocate/Ryot,
R/o. Gudur Village, Kurnool District.

… Respondent

For the Appellant : Mr. Ch. Ramesh Babu

For Respondent : Mr. K.S. Gopalakrishnan

Court made the following Judgment

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE ANIS

A.S.No.349 of 2016

JUDGMENT: (per V. Ramasubramanian, J.)

Aggrieved by the dismissal of her suit for partition, the unsuccessful plaintiff has come up with this regular appeal.

2. Heard Sri Ch. Ramesh Babu, learned counsel for the appellant and Sri K. Gopalakrishnan, learned counsel for the respondent.

3. The appellant herein filed a suit in O.S.No.71 of 2011 on the file of the IV Additional District Judge, Kurnool, seeking partition and separate possession of her half share in the properties described in the schedule to the plaint. The case of the appellant in her plaint, inter alia was: that the respondent herein is her elder brother; that the father of the appellant and the respondent by name M. Satyanarayana Reddy died at Gudur, Kurnool District on 27.04.2006; that the suit properties are ancestral properties; that on 04.08.1954, the appellant's grandfather by name M. Venkatarami Reddy and his two sons Satyanarayana Reddy and Chandrasekhar Reddy partitioned the ancestral properties; that while the properties described in Schedule-A fell to the share of the appellant's grandfather, the properties described in B-schedule fell to the share of the appellant's father and the properties described in C-schedule fell to the share of the appellant's paternal uncle; that after the death of the appellant's grandfather, A-schedule properties devolved upon the appellant's father; that after the death of their father on 27.04.2006 followed by the death of their mother on 09.05.2011, the properties devolved upon her and the respondent.

4. The respondent herein filed a written statement contending *inter alia*, that the appellant could not be termed as a coparcener; that she was not entitled to the benefit of the amended provisions of the Hindu Succession Act, 2005; that the respondent/defendant and the father Satyanarayana Reddy got all the suit schedule properties, except two items in a partition that took place between his father, his grandfather and paternal uncle; that the father of the appellant and the respondent executed a registered Will on 20.04.1990 bequeathing his half share in the ancestral properties in favour of the respondent and his two sons; that the Will was also registered; that after the demise of their father on 27.04.2006, the defendant and his sons acquired absolute title to the suit properties; that insofar as the land in Survey No.906/3 and 850/1 measuring about Ac.1.25 cents is concerned, the respondent acquired the same under the Gift deed from his maternal aunt; that therefore the land in these 2 Survey Numbers was not the ancestral property, but a self-acquisition by the respondent; that the entire land except an extent of Ac.13½ cents in Survey No.765/1/B had already been sold; that the land in Survey No.763/1 measuring about Ac.0.24 cents was also alienated, leaving behind only Ac.0.03 cents; that the land in Survey No.315 and Survey No.775 was acquired by the Government of Andhra Pradesh for the purpose of providing house sites to persons belonging to the Scheduled Caste in the year 1999 and an award has also been passed; that the father of the appellant and the respondent, was an employee of Andhra Bank and was staying only at Hyderabad; that therefore the defendant was in possession of the land and cultivating the same; that during his retired life the father came to Gudur and settled there in 1997; that the appellant/plaintiff is not entitled to any share in the suit

properties; that even during the life time of the father, the respondent got patta passbook in his favour with the consent of the father in the year 1996 itself; that the father gave consent for effecting mutation in the revenue records even during his lifetime; and that therefore the appellant/plaintiff was not entitled to partition.

5. After three years of the filing of the written statement, the respondent/defendant got the written statement amended, so as to include a paragraph dealing with what happened during the proceedings under the Land Reforms Act in the year 1976. It was averred in the said paragraph, numbered as para 8 (a) of the written statement that the defendant and the father submitted separate declarations under the Land Reforms Act claiming half share in the properties and that the Land Reforms Tribunal also accepted the same and passed orders showing thereby that the properties already got partitioned.

6. The appellant/plaintiff filed a reply to the amended written statement. In response to the averments in newly added paragraph of the written statement, it was stated by the plaintiff in her reply that the declaration made by her father and her brother under the Land Reforms Act was wrong, untrue and contrary to Hindu Succession Act and that no partition was valid without the involvement of the plaintiff..

7. The Court below framed the following issues for consideration:

1. Whether the plaintiff is not coparcener and not entitled to claim for the benefit of amended provisions of Hindu Succession Act to claim for her share in the joint family properties?
2. Whether the registered will dated 20.04.1990 executed by late M. Satyanarayana Reddy father of Plaintiff and defendant is genuine valid under law and binding on the plaintiff?
3. Whether the land in Item No.9 and 17 of schedule properties were acquired by the defendant by the gift deed executed by her maternal aunt and not the ancestral properties?
4. Whether the plaintiff is entitled for half share in the plaint schedule properties and so for partition and to allot separate possession of her half share?

5. Whether the plaintiff is entitled for the preliminary decree or final decree as prayed for?
6. To what relief?

8. The appellant/plaintiff examined herself as PW.1 and examined her aunt by name P. Seethamma, who gifted the land in Survey Nos.906 and 850/1 to the defendant, as PW.2. The partition deed dated 04.08.1954 was marked as Ex.A.1 and the death certificate of the father M. Satyanarayana Reddy dated 27.04.2006 was marked as Ex.A.2.

9. The defendant examined himself as DW.1. He also examined one of the attestors of the Will dated 20.04.1990 as DW.2. The original registered Will executed by the father was marked as Ex.B.1, the original Gift deed executed by PW.2 was marked as Ex.B.2, the original pattadar pass book was marked as Ex.B.3, the original pattadar pass books issued in favour of the respondent's son were marked as Exs.B.4 and B.5, the registered Will dated 20.04.1990 of the mother of the parties hereto was marked as Ex.B.6 and the orders passed by the Land Reforms Tribunal were marked as Ex.B.7.

10. By a judgment and decree dated 10.02.2016, the trial Court held on issues 1 and 2 that Ex.B.1-registered Will dated 20.04.1990 was a genuine document and that there was a partition long prior to the Hindu Succession (amendment) Act, 2005. On Issue No.3 the Court below held that Item Nos.9 and 17 of the plaint schedule properties were not ancestral properties and that they were gifted to the defendant under Ex.B.2 by the maternal aunt.

11. As a consequence of the findings on issues 1, 2 and 3, the trial Court held that the appellant/plaintiff was not entitled to a half share in the plaint schedule properties and that the suit was liable to be dismissed. Aggrieved by the said judgment and decree, the plaintiff is before us.

12. The main grounds on which the judgment and decree of the trial Court are assailed by the appellant are:

i) that the orders passed by the Land Reforms Tribunal on 23.01.1976 marked as Ex.B.7 considering the father and the respondent /defendant as independent holders of lands cannot be treated as evidence of partition in view of the Explanation to Section 6 (5) of the Hindu Succession (Amendment) Act, 2005;

ii) that the Court below ought not to have looked into Ex.B.7, since in the original written statement, there was no pleading about the same and that it was only after the evidence on the side of the plaintiff was closed, and the evidence of DW.1 had commenced that the defendant sought amendment of written statement, so as to incorporate a pleading relating to land reforms proceedings;

iii) that if there had been a partition as claimed by the defendant, which led to the order of the Land Reforms Tribunal in 1976, there could have been no occasion for the father to execute a Will on 20.04.1990 bequeathing his half share;

iv) that the paternal aunt Smt. Seethamma examined as PW.2 categorically stated that there was neither a partition nor a Will, but her evidence was overlooked; and

v) that the execution of Will in 1990 may not tantamount to “disposition” of property within the meaning of the proviso to sub-section (1) of Section 6 of the Hindu Succession (Amendment) Act, 2005.

13. In response to the above contentions it is submitted by the learned counsel for the respondent that the provisions of Section 6(1) of the Hindu Succession (Amendment) Act, 2005 would not have any application to a disposition including a testamentary disposition

of property which had taken place before 20.12.2014; that the Will-Ex.B.1 dated 20.04.1990 was not seriously disputed by the appellant, and the defendant proved the Will by examining one of the attestors of the Will as DW.2; that once it is concluded that the Will, a registered one, was proved in accordance with law to be a genuine document, the proviso to Section 6(1) comes into play and that therefore the plaintiff cannot seek the benefit of Section 6(1).

14. We have carefully considered the above submissions.

15. From the rival contentions it appears to us that the following points arise for determination in the above appeal:

1. Whether the Will-Ex.B.1 dated 20.04.1990 was duly proved by the defendant?
2. Whether the execution of Will before 20th day of December, 2004 was sufficient, to make a Will come within the purview of the expression "disposition" under the proviso to Section 6(1) of the Hindu Succession (Amendment) Act, 2005, especially when the testator was alive on the crucial date?
3. Whether the declarations filed by the respondent and the father before the Land Reforms Tribunal, as evidenced by Ex.B.7 are sufficient to hold that there was a valid partition before the commencement of the Hindu Succession (Amendment) Act, 2005?
4. Whether the properties at Sl.Nos.9 & 17 of the schedule to the plaint are liable to be partitioned, in the event of the above questions being decided in favour of the appellant?
5. Whether the properties described in Items 8, 11, 12 and 21 of the plaint schedule are liable to be partitioned, in the event of questions 1 to 3 being decided in favour of the appellant/plaintiff?
6. Whether the appellant is entitled to any relief?

<u>POINT No.1</u>

16. The first point for determination is as to whether the defendant could prove Ex.B.1-Will dated 20.04.1990 in a manner known to law or not?

17. A bare look at Ex.B.1-Will dated 20.04.1990 shows that the same was registered as document No.93 of 1990 in the office of the Registrar, Hyderabad. The signature of M. Satyanarayana Reddy, the father of the parties hereto in the Will is not disputed by the appellant

herein. It is stated in the Will that the testator was 65 years of age and was making the Will in a sound and disposing state of mind. The testator has disclosed in the Will that he was having a wife, a son, a daughter and two grandsons (both majors) through the son. He had claimed in the Will that he possessed about 24 items of ancestral properties at Guduru Village and Mandal, Kurnool District and that half undivided share of those properties belonged to him and the remaining half undivided share belonged to his son. By the said Will the testator bequeathed his half share in the 24 items of ancestral properties, in favour of his only son (defendant in the suit) and two grandsons through the son.

18. The Will was attested by two persons, both of whom were officers of Andhra Bank in which the testator himself was employed earlier. One of those attestors by name A. Narasimha was examined as DW.2. He stated in his affidavit in lieu of chief examination that the testator executed a Will in his presence and in the presence of the other attestor V. B. Ram Murthy. DW.2 further stated that the testator dictated the contents of the Will to the typist in the presence of the attestors and that after it was typed the testator went through the same and thereafter signed it in the presence of the attestors. DW.2 also stated that both the attestors attested the Will in the presence of each other and in the presence of the testator and that the testator was in a sound and disposing state of mind.

19. As a matter of fact, two Wills came to be executed and registered on the same day, viz., 20.04.1990. One was by M. Satyanarayana Reddy, the father of the plaintiff and the defendant. It was marked as Ex.B.1. The other Will was executed by the mother of the parties hereto and it was marked as Ex.B.6. The Will of the mother was

also attested by the very same attestors and DW.1, the attestor identified his signatures in both the Wills.

20. In addition, there is a reference in the last Will and testament executed by the father (Ex.B.1) to the Will executed by the mother (Ex.B.6). Ex.B.6 was registered as document No.92/1990 and Ex.B.1 was registered as document No.93/1990. Therefore, it is clear that the mother's Will was executed and registered prior in point of time to the father's Will, though on the same day. Therefore, the father's Will contains a reference to the mother's Will.

21. Though in the Will executed by the father, he has not stated any justification for not providing anything to the daughter, the Will executed by the mother contains a reason as to why the daughter was excluded. It is stated in the mother's Will as follows:

> "We performed the marriage of our daughter according to our family traditions and customs and commensurate with our academic status. She is well settled in life and we have no obligation towards her."

22. A cumulative consideration of all the above would show that the execution of the Will by both the parents of the parties on the same day is true. There are also no suspicious circumstances surrounding the execution of the Wills. Though no reasons are stated in the father's Will, for excluding the daughter, the mother's Will contains some reasons, weak or strong. In the father's Will the properties are stated to be ancestral and what was bequeathed was only the father's half share.

23. Therefore, we are of the considered view that the defendant proved Ex.B.1-Will, in accordance with the provisions of Section 68 of the Indian Evidence Act.

24. As a matter of fact, the truth and the genuineness of Ex.B.1-Will was not even challenged by the appellant/plaintiff. This could be seen from the fact that the defendant specifically pleaded the execution of the Will by his father in para-4 of the written statement. The written statement was subsequently amended to include additional pleadings. Thereafter, the appellant/plaintiff filed a rejoinder to the amended written statement. In paragraph-4 of the rejoinder, the appellant/plaintiff merely claimed that the Will was null and void and cannot be operative. In other words what was challenged by the appellant/plaintiff was not the truth and genuineness of Ex.B.1, but only its validity under the Hindu law of Succession.

25. Even in this appeal, the appellant has not raised any grounds challenging the truth and genuineness of the Will. Therefore, on Point No.1 arising for our determination in this appeal, we hold that the defendant proved Ex.B.1-Will dated 20.04.1990 in a manner prescribed by law.

<u>POINT No.2</u>

26. The second point arising for determination is as to *whether mere execution of the Will prior to 20.12.2004 was sufficient to make a Will come within the purview of the expression "disposition" under the proviso to Section 6(1) of the Hindu Succession (Amendment) Act, 2005, especially when the testator admittedly died only after 20.12.2004.*

27. Section 6(1) of the Hindu Succession Act, 1956 reads as follows:

> "Devolution of interest in coparcenary property.– (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall:

> (a) by birth become a coparcener in her own right in the same manner as the son;
> (b) have the same rights in the coparcenary property as she would have had if she had been a son;
> (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:
>
> Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004."

28. A careful look at Section 6(1) would show that by the amendment brought forth by Central Act No.39/2005, the daughter of a coparcener in a joint Hindu family governed by the Mitakshara law was made a coparcener by birth, in the same manner as the son and was vested with the same rights and obligations in respect of the coparcenery property, as a son would have. But the proviso to sub-section (1) makes it clear that nothing therein would affect or invalidate any disposition or alienation including any partition or testamentary disposition which had taken place before 20.12.2004.

29. Two expressions appearing in the proviso to sub-section (1) of Section 6 are of significance. They are (1) *disposition* and (2) *alienation*. These two expressions are followed by a rider to the effect that any partition or testamentary disposition is also included within the purview of these two expressions.

30. While we would have no difficulty in understanding the purport of the expression "alienation", there is some difficulty in expounding the meaning of the expression "disposition". This difficulty is compounded by the inclusion of "testamentary disposition", within the meaning of the expression "disposition". Normally one would understand the expression "testamentary disposition" to mean the execution of a testamentary instrument, the bequest under which is to take effect in future, while

alienation takes place *in praesenti*. Therefore *the confusion or difficulty posed by the proviso to Section 6(1) is as to whether it includes a testamentary disposition that has come into effect due the death of the testator before the crucial date or a bequest which has not yet come into effect, due to the testator being alive as on the crucial date.*

31. The question as to whether, the Hindu Succession (Amendment) Act, 2005 will have retrospective effect or not, has been answered by the Supreme Court in Prakash v. Phulavati[1]. The Supreme Court held therein that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters were born. The Supreme Court further held that disposition or alienation including partition, which may have taken place before 20.12.2004 as per the law applicable prior to the said date, will remain unaffected.

32. In *Prakash*, the Supreme Court considered some of its earlier decisions in which a tricky question similar to the one arising in the present case came up for consideration. For instance, in S. Sai Reddy v. S. Narayana Reddy[2], a preliminary decree for partition was passed in favour of a son against his father. But before a final decree could be passed, an amendment was introduced by the State of Andhra Pradesh under Hindu Succession (A.P. Amendment) Act, 1986, allowing a share to the unmarried daughters. Therefore, a question arose as to whether the share allotted to the son under the preliminary decree would undergo a change or not. The Court upheld the right of the unmarried daughters on the ground that the rights of the son had not crystallized. But the

[1] (2016) 2 SCC 36
[2] (1991) 3 SCC 647

Supreme Court pointed out in *Prakash* that the decision in *S. Sai Reddy* did not arise out of a case where the shares of the parties stood already crystallized by operation of law. Moreover, the A.P. amendment Act did not include under Section 29-A, a provision similar to the proviso to Section 6(1), introduced by the 2005 Central Amendment. Clause (iv) of Section 29A merely covered, marriage or partition effected before the commencement of the A.P. Amendment Act, 1986. There was no inclusion of "testamentary disposition" under the exclusion clause, in the A.P. Amendment Act.

33. Heavy reliance is placed by the learned counsel for the respondent/defendant on the judgment of the Supreme Court in Pavitri Devi v. Darbari Singh[3], in support of his contention that the expression 'testamentary disposition' includes the mere execution of a Will. In the said case before the Supreme Court, what was in question was only a gift deed and not a Will. Therefore the expression "testamentary disposition" appearing in Section 30(1) of the Hindu Succession Act, 1956 had no application to the case before the Supreme Court. But nevertheless, the Supreme Court referred to the expression "testamentary disposition" appearing in Section 30 (1) and went into the scope and ambit of the said expression in paragraph 3. Paragraph-3 of the said decision reads as follows:

> "Webster in Comprehensive' Dictionary in international edition at page 1298, stated the meaning of the word 'testamentary' thus: (i) derived from, bequeathed by, or set forth in a will; (ii) appointed or provided by, or done in accordance with, a will; (iii) pertaining to a will, or to the administration or settlement of a will, testamental. In the Law Lexicon by P. Ramanatha Aiyar, reprint edition 1987 at P. 1271 testamentary instrument was defined to mean a "testamentary instrument" is one which declares the present will of the maker as to the disposal of his property after death, without attempting to declare or create any rights therein prior to such event. Black's Law Dictionary [6th

[3] (1993) 4 SCC 392

> Ed. 1991] defines "testamentary disposition" at page 1475 thus - "the passing of property to another upon the death of the owner. A disposition of property by way of a gift, Will or deed which is not to take effect unless the grantor dies or until that event." Section 123 of the Transfer of Property Act provides disposition by a gift which takes effect even during the lifetime of the donor and effective as soon as it is registered and normally given possession of the property therein. Section 30 of the Act is merely declaratory of the law not only as it stood before the Act, but as it now stands modified by the provisions of the Act. It declares that any Hindu may dispose of by a will or other testamentary disposition his property or interest in coparcenary which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force applicable to the Hindus. Its explanation is really material. The testamentary disposition, therefore, would mean disposition of the property which would take effect after the death, instead of co-instentine on the execution of the document. A testamentary disposition is generally effected by a will or by a codicil which means an instrument made in relation to a will extending, altering or adding to its disposition arid is to be deemed to form part of the will. Will as defined in Section 2(h) of the Indian Succession Act, 1925 means legal declaration of the intention of the testator with respect to his property which he desired to carry into effect after his demise. It limits alienation intra vivos. While the gift being a disposition in presenting, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary disposition under the Act would be dealt with in accordance with the Indian Succession Act. Section 55 and Schedule 3 of the said Act prescribe procedure effecting succession amongst Hindus by testamentary succession by will or codicil. Section 30 employs non-obstinate clause and excludes from the operation of pre-existing or any other law applicable to coparcenery property governed by Mitakshara law and introduced fiction in its explanation and empowers the Hindu male or female to dispose of his or her interest by a will or any other testamentary disposition known to law-which would be effective after the demise. It would, therefore, be difficult to envisage that disposition by gift partakes the character of testamentary succession under Section 30 of the Act.

34. Though the Supreme Court, in *Pavitri Devi,* expounded the meaning of the expression ‘testamentary disposition’ and gave it a meaning, we do not think that we can take the decision in *Pavitri Devi* as an authoritative pronouncement on the issue now before us, for two reasons. They are:

(a) As we have pointed out in the preceding paragraph, the Supreme Court was concerned in *Pavitri Devi* with a gift deed and not a Will. A gift is actually a transfer of property, while a Will is not.

Therefore, the interpretation given by the Supreme Court in *Pavitri Devi* to the expression “testamentary disposition” is actually out of context and did not arise out of the *lis* before the Supreme Court. Hence, the decision in *Pavitri Devi* cannot be taken to be the last word on the interpretation of the expression found in the proviso to Section 6(1).

(b) By its very nature, a testamentary disposition is one which does not take effect and which does not become final, unless and until the testator dies. *It is not only the bequest under a Will, which is subject to various uncertainties, dependent upon the life and wish of the testator, but even the right of the testator to bequeath a particular property may undergo a change before he dies.* Take for instance a case where the testator begets a child after the execution of Will. If his undivided share in the joint family property had been the subject matter of the Will, his own share may undergo a change with the birth of a son after the execution of the Will. In peculiar cases it may even happen with the birth of a sibling to the testator. Therefore, *a testamentary disposition can never be an actual disposition in the true sense of the term, since its coming into effect as well as the extent to which it takes effect, are always subject to the uncertainties of time and mind, apart from birth and death*. As pointed out by the Supreme court in *Mathai Samuel Vs. Eapen Eapen {(2012) 13 SCC 80}, a Will is merely a legal declaration of the testator’s intention and its essential characteristic is its ambulatoriness and revocability*.

35. Unfortunately, the word 'disposition' itself emerged from the English language and law and hence the manner in which law dictionaries have expounded the term, is in tune more with linguistics than with law. This is perhaps why the Supreme court pointed out in *Goli Eswariah vs. Commissioner of Gift Tax {AIR 1970 SC 1722} that the word 'disposition' is not a term of law, having a precise meaning and that its meaning has to be gathered from the context in which it is used.*

36. Black's Law Dictionary defines "disposition" to mean "the fact of transferring something to another's care or possession especially by deed or will; the relinquishing of property". The same dictionary defines "testamentary disposition" to mean "a disposition to take effect upon the death of the person making it, who retains substantially entire control of the property until death". P. Ramanatha Aiyar's the Law Lexicon (3rd Edition 2012) deals with the definition of the word "disposition" in a variety of circumstances. One of the several connotations given in the Law Lexicon is as follow:

> "The word disposition in relation to property means disposition made by deed or will and also disposition made by or under a decree or under order of a Court as the qualifying phrase used in Section 21(2), viz., including any transfer in execution of a decree or order of a Court, Tribunal or authority (Sanjay v. State of Maharashtra – AIR 1986 SC 414).

37. The right of a Hindu to dispose of his property by will or other testamentary disposition is recognised by Section 30 of the Hindu Succession Act. It is that in Section 30, the expression "testamentary disposition" is used. A careful look at the manner in which Section 30 is worded would show two things, viz., - a) that a testamentary disposition could be either by way of will or otherwise; and b) that what is sought to

be done through will or other testamentary disposition is considered by Section 30 to be a "disposal".

38. Interestingly the Oxford English Dictionary defines the word, whenever used as a noun in the branch of law, to mean "the distribution or transfer of property or money to someone especially by bequest". The origin and etymology of the word 'disposition', as indicated in Merriam Webster Dictionary shows that the word evolved in the 14th century from the Latin word '*Dispositio'* and from the word '*disponere'*. Though no disposition or disposal or distribution of property takes place at the time of execution of the Will, the word disposition has come to be associated even with testamentary instruments.

39. But the Proviso to section 6(1) does not merely use the expression 'testamentary disposition'. It starts with the word 'disposition', then proceeds to include 'testamentary disposition' within its ambit and then qualifies it with the words "which had taken place". Therefore, we think that *the proviso to Section 6(1) has to be split into 3 parts—*

(i) the first part containing the words "disposition or alienation"

(ii) the second part containing the words "including any partition or testamentary disposition" and

(iii) the third part containing the words "which had taken place before 20-12-2004".

40. Therefore, if a case is to be brought within the purview of the proviso to section 6(1), especially in relation to a Will, 2 things are to be proved namely *(i) that there was a valid Will and (ii) that the disposition under the Will had taken place before the date specified*. *The disposition under a Will would take place only*

when the testator dies and not otherwise. This is not only due to the very nature of testamentary disposition but also due to the fact that *during the period between the date of execution of the Will and the date of death of the testator, many things may happen, even beyond the control of the testator, that would make the bequest invalid, wholly or partially*. Therefore, *the expression 'testamentary disposition' appearing in the proviso to section 6(1) should be understood to mean only a Will which had taken come into effect before 20-12 2004. The words "which had taken place" should be understood to mean "which had taken effect".*

41. There is one clue available in Section 6 itself, for anyone to come to the same conclusion as we have. It is in sub-section (5) and the Explanation following the same. Sub-section (5) of section 6 and the Explanation following the same, read as follow:

> "(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.
>
> Explanation: For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court."

42. While *the proviso under sub-section (1) of section 6 excludes from the operation of sub-section (1), any alienation or disposition, including any partition or testamentary disposition that has taken place before the appointed day, sub-section (5) excludes from the operation of section 6 in entirety, a partition made by a registered deed or a partition effected by a decree of court.* It is important to note that the proviso to sub-section (1) is confined in its applicability to sub-section (1). In contrast, the prescription

contained in sub-section (5) and the Explanation there under, are applicable to the entirety of section 6.

43. The prescription contained in sub-section (5) and the Explanation following the same, give a clear indication to the fact that the law makers did not want parties to plead oral partition effected before the appointed day, for the purpose of defeating the right created by the Amendment Act. An oral partition or a Memorandum recording past partition, had always been accepted by courts, subject to proof. But the Explanation to section 6, makes it clear that unless a partition had been effected by a registered deed or by a decree of court, the benefit of sub-section (5) may not be available.

44. It is needless to point out that in a partition, mutual transfers take place in presenti. Even then, the benefit of sub-section (5) will not be available unless the partition had been effected by a registered deed or a decree of court. Therefore, *the intention of the law makers is very clear to the effect that no one should be allowed to create documents, after the advent of the Amendment Act of 2005, to defeat the rights conferred by the amendment*. In order to prevent the creation of ante dated documents, the Amendment ensures that even reliance upon such documents is impermissible. In such circumstances, if the expression "testamentary disposition" is taken to mean the mere execution of a Will, the rights conferred by section 6 can be easily defeated by parties by setting up a Will, which is not required to be compulsorily registered.

45. Therefore, we are of the considered view that in cases where the testator was alive as on 20-12-2004, the Will, even if any executed by him genuinely before the said date, would not make it a case of

"*testamentary disposition which had taken place*", so as to make the case fall under the proviso and to take it out of the application of section 6(1). *In other words, a case will fall under the proviso to section 6(1), only if 2 things had taken place before 20-12 2004 namely (i) execution of a Will and (ii) the death of the testator.* The execution of the Will before 20-12 2004 alone is not sufficient to take a case out of the operation of section 6(1), as no disposition under the Will would have taken place, if the testator was alive. As pointed by the Supreme court in *S.Rathinam vs. Mariappan {AIR 2007 SC 2134}, a Will of a man is the aggregate of his testamentary intentions manifested in writing and is not a transfer.*

46. Today there can be no dispute any longer about the proposition that to fall under the category of "a disposition that had taken place", a partition should have become final and conclusive and that even a preliminary decree for partition would not suffice. This is in view of at least 3 decisions of the Supreme court namely (1) S. Sai Reddy v. S. Narayana Reddy (1991) 3 SCC 647 (2) Prema vs. Nanje Gowda (2011) 6 SCC 462 and (3) Ganduri Koteshwaramma vs. Chakiri Yanadi (2011) 9 SCC 788. *If a preliminary decree for partition itself cannot bring a case within the ambit of the proviso to section 6(1) or within the ambit of section 6(5), on account of the same not becoming final and conclusive, we do not know how the mere execution of a Will, without the death of the testator before the appointed day, can make the case come within the purview either of the proviso to section 6(1) or of section 6(5).* Hence, we answer point no. 2 in favour of the appellant/plaintiff, since the father of the parties hereto died

(unfortunately for the respondent and fortunately for the appellant) after 20-12-2004.

<u>POINT No.3</u>

46. The third point arising for determination in this appeal is as to whether the declarations filed by the respondent and the father before the Land Reforms Tribunal, as evidenced by Ex.B.7 are sufficient to hold that there was a valid partition before the commencement of the Hindu Succession (Amendment) Act, 2005.

47. As we have pointed out earlier, the respondent/defendant raised this particular plea only by way of amendment to the written statement. The original written statement, that appears to have been filed in December, 2011, did not contain such a plea. But after the evidence on the side of the plaintiffs was closed and the defendant was in the witness box as DW.1, the defendant filed an application in I.A.No.52 of 2014 for amendment of written statement. It was allowed by an order dated 17.04.2014. By this amendment, para-8(a) was inserted in the written statement, wherein the respondent/defendant pleaded that he and his father submitted separate declarations of lands owned by them, under the Land Reforms Act and that the Tribunal passed orders based upon the declarations. He also claimed in the amended written statement that from the date of the order, the partition was given effect.

48. As already pointed out, by the time the amendment to the written statement was allowed in April 2014, the evidence on the side of the plaintiff was already over. Even the respondent/defendant had already filed his affidavit in lieu of chief-examination, much before the written statement was amended. Along with the affidavit in lieu of chief-examination, the respondent/defendant filed only six documents. These

documents were marked as Exs.B.1 to B.6 on 28.02.2014. Thereafter, the cross-examination was deferred.

49. In the interregnum, the application for amendment of the written statement was filed and allowed. Therefore the defendant once again went to the witness box as DW.1, after a gap of more than 18 months, only on 05.10.2015. On 05.10.2015, the respondent/defendant marked the copies of the orders passed by the Land Reforms Tribunal in C.C.Nos.3593 & 3594/KNL, dated 23.01.1976 as Ex.B.7. Thereafter, the cross-examination of DW.1 by the counsel for the plaintiff was taken up on 07.10.2015.

50. The portion of the cross-examination that revolved around Ex.B.7 is extracted as follows:

> "It is true there are two declarants as per Ex.B.7 proceedings. It is true I was absent at the time of those proceedings. C.C.3574 in Ex.B.7 pertains to my land. My father's declaration Number is 3 and mine is 4 as per Ex.B.7. It is true as per Ex.B.7 (Page No.3) declarant No.2 has one major son, and that son is entitled for one half share in the property."

51. A careful look at paragraph-9 of the rejoinder filed by the appellant/plaintiff in response to the specific pleading with regard to the Land Reforms Proceedings, together with the cross-examination by the appellant's counsel, as extracted above, would show that the appellant did not dispute the truth, but disputed only the validity of Ex.B.7.

52. Ex.B.7 is of the year 1976. Under the declarations found in EX.B.7, the ancestral properties were divided into two halves; one half being taken by the respondent and the other half taken by the father. Ex.B.7 is the order of the Land Reforms Tribunal under Section 9 of the A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973. It is seen

from the said order that the declarant in C.C.No.3593/KNL was M. Satyanarayana Reddy, the father of the parties. The declarant in C.C.No.3594/KNL was the defendant. The relevant portion of the order of the Tribunal dated 23.01.1976 filed as Ex.B.7 reads as follows:

> Accordingly the relevant proportions of the extent of each class held by the declarant to the extent of standard holding of the appropriate class has been worked out in the manner prescribed and the aggregate of all such proportions comes to 2.0004. The declarant has one major son. He has also filed his declaration in C.C.No.3594/KNL. He is entitled to have his ½ share in the property. Their share works out as follows:
>
> Share of the Declarant in C.C.3593/KNL. 1.0002
>
> Share of the Declarant in C.C.3594/KNL 1.0002
>
> The family unit of the declarant in C.C.3593/KNL consists of two members i.e., the declarant and his wife and the family unit of the declarant in C.C.3594/KNL consists of five members, i.e., declarant, his wife, two minor sons and one minor daughter. So both the family units of the above two declarants are entitled to hold one standard holding.
>
> The Tribunal hereby determines u/s 9 of the A.P.L.R. (Ceiling on Agricultural Holdings) Act, 1973 that the declarant in C.C.3593/KNL holds an extent of land equivalent to 0.0002 standard holding, and the declarant in C.C,.3594/KNL holds an extent of land equivalent to 0.0002 standard holding in excess of the ceiling area, which they are liable to surrender u/s 10(1) of the A.P.L.R. (Ceiling on Agricultural Holding) Act, 1973.

53. The main focus of attack to Ex.B.7 by the learned counsel for the appellant/plaintiff was on the basis of the explanation to Section 6 of the Hindu Succession (Amendment) Act, 2005. The explanation reads as follows:

> "Explanation – For the purposes of this section "partition" means any partition made by execution of a deed of partition duly, registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court"

54. Therefore the contention of the learned counsel for the appellant is that Ex.B.7 can never tantamount to a partition that stands excluded by sub-section (5) of Section 6, in view of the Explanation thereunder.

55. Placing reliance upon the decision of the Supreme Court in Ganduri Koteshwaramma v. Chakiri Yanadi[4] it is also contended by the learned counsel for the appellant/plaintiff that the right of a daughter in a coparcenery property was not lost even by the passing of a preliminary decree. Since a preliminary decree determines only the rights and interests of the parties and the suit for partition is not disposed of by the passing of the preliminary decree, it was held by the Supreme Court in the said decision that the amendment to the Hindu Succession Act became a supervening circumstance, which necessitated the modification of the preliminary decree for partition.

56. Therefore, it is contended by the learned counsel for the appellant/plaintiff that in as much as Ex.B.7 does not satisfy the requirement of the Explanation under sub-section (5) of Section 6, the same cannot be taken to be evidentiary of partition. In simple terms the contention of the learned counsel for the appellant is that unless a partition pleaded in a suit after the 2005 amendment, satisfied either of the two criteria, viz., (a) execution and registration of a deed of partition; or (b) a partition effected by a decree of Court, before 20-12-2004, the same cannot be recognized.

57. We have carefully considered the above submissions.

[4] AIR 2012 SC 169

58. It is true that the Explanation under sub-section (5) of section 6 recognises only (i) a registered deed of partition and (ii) a decree of partition. No other mode of partition is made entitled to the benefit of sub-section (5). This stands in contrast to other Statutory enactments and the law that normally governs a partition. There is no prohibition in law, in normal circumstances, for a party to plead in any proceedings, an oral partition, as evidenced among other things, by a Memorandum recording past partition. But the Explanation to section 6 makes a deviation.

59. It is relevant to point out here, that the deviation made in the Explanation under section 6(5) is bound to create some confusion, as we shall explain here. Under Article 40 of Schedule-1A to the Indian Stamp Act, 1899 (as applicable to the State of A.P. by virtue of State Amendments), an "instrument of partition", as defined in Section 2(15) of the Indian Stamp Act, 1899, requires to be stamped with the same stamp duty as a Bottomry Bond for the amount or the market value of the separated share. But what is important to note is, what is chargeable to stamp duty under Article 40 of Schedule-1A is only an "instrument of partition" and not partition by itself. The words "instrument" as well as "instrument of partition" are separately defined under Section 2(14) and 2(15) respectively.

60. Section 2(14) of the Indian Stamp Act, 1899 reads as follows:

> "Instrument": - "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded."

But the expression "instrument of partition", as originally defined in section 2(15) of the Indian Stamp Act, 1899 did not include a Memorandum recording past partition. This is despite the fact that a memorandum would also come within the definition of the word "instrument".

61. Realizing that this created a loophole in the law relating to Stamp Duty, the State of Andhra Pradesh made an amendment to the Indian Stamp Act, 1899 by A.P. (Amendment) Act 17 of 1986, w.e.f., 16.08.1986. By this amendment, the words "and a memorandum regarding past partition" was inserted in the definition of the expression "instrument of partition" under Section 2(15) of the Indian Stamp Act, 1899.

62. The definition of the expression "instrument of partition" as it now stands under section 2(15) of the Stamp Act, in its application to the State of A.P., reads as follows:-

> "Instrument of Partition": "Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severally, and includes also a final order for effecting a partition passed by any revenue authority or any civil Court and an award by an arbitrator directing a partition (and a memorandum regarding past partition;)"

63. It can be seen from the definition of the expression "instrument of partition" in Section 2 (15), that even a final order effecting a partition passed by a Revenue Authority is taken to be an instrument of partition. An important aspect to be noted from the definition of the expression "instrument of partition" under Section 2(15) is that it takes within its purview (1) any document in writing; (2) any final order passed by a Revenue Authority; (3) any final order passed by a Civil Court; (4) an award passed by an Arbitrator directing partition; and (5) a memorandum regarding past partition.

64. Therefore, if the members of a Hindu Undivided Family, instead of fighting a battle for partition in a Court of law, had chosen to go before a panel of Arbitrators and secure an award directing partition, before the commencement of the Hindu Succession (Amendment) Act, 2005, the same would have been definitely covered by Section 6(5). Unfortunately the Explanation under Section 6(5) covers only two methods by which a partition could be effected, viz., (1) execution and registration of a deed of partition; and (2) a partition effected by a decree of a Court.

65. If we go strictly by the latter of the law as contained in the Explanation to Section 6(5), even a final order passed by a Revenue Authority effecting partition and an award passed by an Arbitrator effecting partition, before 20.12.2004 would stand excluded from Section 6(5). This would only be absurd as well as disastrous.

66. There are certain areas in the State of Andhra Pradesh called “agency areas” where civil Courts have no jurisdiction over property matters. Even title disputes are settled in Revenue Courts. Therefore, if the Explanation to Section 6 is applied literally, whatever had transpired before the Revenue Courts leading to actual division of properties, even if taken place before 20.12.2004, would not be excluded from the operation of Section 6 of the Amendment Act. Therefore, the manner in which the Explanation to Section 6 has been drafted, appears to be slip shod, since by its literal meaning, any partition effected through Revenue Courts in the agency areas of the State of Andhra Pradesh and any partition effected through an Award passed by Arbitrators, (though before 20-12-2004) would not come within the purview of Section 6(5).

67. Having settled the legal position thus, if we come back to the facts of the case, there are two things that would impel us to answer the

third point arising for consideration in this appeal in favour of the appellant/plaintiff. They are –

(1) Ex.B.7 does not disclose the actual division of properties by metes and bounds. For the purpose of determining the holding of the father, his son and the grand sons, and for finding out the land in excess of the ceiling limit, the Land Reforms Tribunal took note of the declarations filed by the father and the respondent herein. The Tribunal merely recognized the half share of the father and the half share of the respondent and his minor sons. There is no indication in Ex.B.7 of a partition in the strict sense of the term, viz., a division by metes and bounds;

(2) As we have stated earlier, Ex.B.7 is dated 23.01.1976. It is only since no actual division by metes and bounds had taken place as on the date of Ex.B.7 that under Ex.B.1-Will dated 20.04.1990, the father conveyed his half undivided share in the properties. If a partition had actually taken place and the properties had been divided by metes and bounds, way-back in 1975 or 76, there was no question of the father bequeathing his half undivided share under the Will executed in 1990. The very fact that what was bequeathed under Ex.B.1 was the half undivided share of the father establishes that no partition took place either before or under Ex.B.7. Hence the third issue arising for determination is answered in favour of the appellant/plaintiff.

<u>Point No.4</u>:

68. The fourth point arising for determination is as to whether the properties described as Item Nos.9 and 17 of the schedule to the plaint are liable to be partitioned. This question has arisen in view of the claim

made by the respondent/defendant that these two items were gifted to him by his Aunt under a gift deed dated 03.08.1984 marked as Ex.B.2.

69. The pleading with regard to this gift was made by the respondent/defendant specifically in para-5 of the written statement, filed even in the first instance. In response to this averment, the appellant/plaintiff merely stated that the gift is false and untrue and that the property of the maternal Aunt also became the ancestral property.

70. Interestingly, the appellant/plaintiff herself examined the maternal Aunt P. Seethamma as PW.2. In the affidavit filed in lieu of chief examination, she made no whisper about Ex.B.2-gift deed. PW.2 focused in her chief examination, only upon the entitlement of the plaintiff to half share in the suit properties. Though the defendant had pleaded the execution of the gift deed even in the written statement first filed, the plaintiff did not choose to make PW-2 deny, even formally, the execution of the same.

71. Therefore, in cross-examination, she was confronted with the gift deed and she admitted that she executed the gift deed. There was no re-examination by the appellant/plaintiff. Therefore, the evidence of PW.2 itself is sufficient to hold that Ex.B.2 was true and valid, since PW.2 was examined by the plaintiff himself and she admitted the execution of Ex.B.2, without questioning either its truth and validity or her own right to execute Ex.B.2. Hence the fourth issue arising for consideration is answered in favour of the respondent/defendant and against the appellant.

<u>Point No.5</u>:

72. The fifth point arising for consideration is as to whether the properties described in Items 8, 11, 12 and 21 of the plaint schedule are liable to be partitioned.

73. Items 11 and 12 of the plaint schedule are claimed by the respondent/defendant to have been sold partially. Item Nos.8 and 21 are stated to have been acquired by the Government way back in 1999 for providing house sites to the Scheduled Castes. The averments, in relation to the sale as well as the acquisition, are specifically made in para-5 of the written statement filed by the respondent/defendant.

74. In response to the averments contained in para-5 of the written statement, the plaintiff claimed in para-5 of her reply that she did not receive compensation for the lands acquired by the Government in S.Nos.315 and 775, which were described at Sl.Nos.8 and 21 of the plaint schedule. Insofar as the lands in S.Nos.765/1B and 763/1A at Guduru Village are concerned (described as Item Nos.11 and 12 of the plaint schedule), it is stated in para-5 of the reply statement filed by the appellant/plaintiff that the sale was illegal as she had a share.

75. Out of the four items of properties now in dispute, two items are to be excluded straight away, for the simple reason that the acquisition of land in S.Nos.315 and 775, has admittedly taken place in 1999. The Amendment Act, 2005 has no application to the acquisition made in 1999, as it would fall under the category of “alienation” within the meaning of the Proviso under section 6(1). Therefore, the appellant/plaintiff would have no right over the compensation paid in respect of the properties described in Item Nos.8 and 21 of the plaint schedule.

76. Insofar as the other two items are concerned, the sale of a part of the lands described in Item Nos.11 and 12 of the plaint schedule is virtually admitted by the appellant/plaintiff. But the date of the sale is not known. However, the plaintiff herself has admitted during cross-examination that the sale of a part of items 11 and 12 of the plaint schedule took place long back. Therefore, we have no alternative but to presume that the sale took place before 20.12.2004. Hence what is available in S.Nos.765/1B (Item 11 of plaint schedule) is only 13 ½ cents. What is available in s.No.763/1A (Item 12 of the plaint schedule) is only Ac.0.03 cents.

77. Therefore, our finding on Point No.5 would be that the properties described in Items 8 and 21 of the plaint schedule are not available for partition. Insofar as Item Nos.11 and 12 are concerned, what is available for partition is only 13 ½ cents in S.No.765/1B and Ac.0.03 cents in S.No.763/1A.

POINT No.6

78. In fine, in view of our findings on Point Nos.1 to 5 arising for consideration in this appeal, the appellant is entitled to succeed and to have a preliminary decree for partition, in respect of her half share in all the suit schedule properties except Item Nos.8, 9, 17 and 21. Insofar as Item Nos.11 and 12 of the plaint schedule are concerned, the appellant will be entitled to a similar preliminary decree only to the extent of the lands now available.

79. Accordingly, the Appeal is allowed in part and the judgment and decree of the trial Court are set aside. There will be a preliminary decree declaring that the appellant/plaintiff is entitled to half share in all the items of plaint schedule properties except those described in Item

Nos.8, 9, 17 and 21. Insofar as Item Nos.11 and 12 of the plaint schedule are concerned, the appellant will be entitled to a similar preliminary decree insofar as 13 ½ cents in Sy.No.765/1B and Ac.0.03 in S.No.763/1A. There will be no order as to costs.

80. As a sequel, miscellaneous petitions pending in this appeal, if any, shall stand closed.

V. RAMASUBRAMANIAN, J

ANIS, J

Date: 27-04-2017

Js

L.R. copy to be marked

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SMT JUSTICE ANIS

A.S.No.349 of 2016
(Per VRS,J)

27th April, 2017

Js.