

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.1724 of 2001

J U D G M E N T:

This is an appeal filed against the judgment and decree dated 07.03.2001 in O.S.No.277 of 1999 on the file of the III Additional District Judge, Guntur.

The defendants in the suit are the appellants before this Court. As this is a first appeal, the parties are referred to as they are in the lower Court itself.

The suit is initially filed by one Smt.K.Hymavathi against her husband and eldest son. The claim in the suit is for the mother's share/partition in the property belonging to the deceased-Prem Kumar, who is the second son of the plaintiff and the defendant. During the course of the suit, the first defendant died, therefore, the four daughters were added as defendants 3 to 6. They, however, remained *ex-parte*.

The brief facts of the case are that the first defendant is the husband of the plaintiff. The second defendant is the eldest son of the plaintiff and of the first defendant. The first defendant and the plaintiff were blessed with four daughters and two sons and all of them got married, except Prem Kumar. The said K.Prem Kumar and the defendants constitute a Hindu undivided Mithakshara joint family. The plaint schedule property is an ancestral property of the family and they enjoyed the same till 05.03.1983, when Prem Kumar, the second son of the plaintiff died intestate;

issueless being unmarried and leaving behind him the plaintiff herein as his legal heir under Hindu law of succession. The deceased Prem Kumar has got an undivided 1/3rd share in the joint family properties and that after his death, the same has devolved on the plaintiff. After the death of Prem Kumar, the first defendant is managing the joint family properties. The defendants 1 and 2 colluded and started wasting the joint family properties. The plaintiff demanded for partition of the property and to allot a share to her. The defendants are not co-operating for the same and so the plaintiff got issued a lawyer's notice dated 06.07.1987 demanding the defendants for partition of the property. The defendants received the notice and kept quiet. Hence, the suit is filed.

The second defendant filed a written statement denying the plaint allegations. It is further stated that his brother Prem Kumar fell sick three months prior to his death. He made some arrangements in respect of undivided joint family properties. On the advice of his parents and elders, when he is in a sound mind, he bequeathed his undivided share in joint family property to the second defendant and his father-first defendant under a Will dated 25.02.1983. Therefore, defendants 1 and 2 are entitled to the undivided share of Prem Kumar and they divided the same. At the instance of the second daughter of the plaintiff and first defendant, the suit is filed with false and untenable allegations and hence,

the suit is liable to be dismissed. Pending the suit, the first defendant died and his legal representatives were added as defendants 3 to 6.

On the basis of the pleadings, the following issues were framed:

1. whether the Will dated 25.02.1983 is true, valid and binding on the plaintiff?
2. whether the partition pleaded by the defendants is true, valid and binding on the plaintiff?
3. whether item No.4 of the plaint schedule property is not joint family property?
4. whether the plaintiff is entitled for partition of the plaint schedule properties?

Coming to the evidence, PW.1 was examined and Exs.A.1 to A.6 were marked. On behalf of the defendants, no witness was examined, but Exs.B.1 to B.3 were marked during the cross-examination of DW.1. The lower Court, after considering the evidence on record, came to a conclusion that the plaintiff is entitled to a preliminary decree. This judgment and order is now assailed in this appeal.

The matter was argued at length by both the counsels for the appellant and defendants.

The genealogy, the existence of the property, the nature of the property being ancestral etc., are not denied by either of the parties. However, the written statement filed by the contesting second defendant is to the effect that the deceased Prem Kumar executed a Will bequeathing his share in joint family property to the contesting defendant and his father.

The Will is supposedly dated 25.02.1983. Later, after the death of Prem Kumar, this defendant states that the property so bequeathed and all other properties were divided between the contesting defendant and the father (first defendant). Since Prem Kumar executed a Will, the contents of the Will were adopted for this division also. The plaintiff is aware of the same, and according to para 2 of the written statement, the plaintiff was a party to discussions and was privy to the advice of elders, who suggested the division of the property. Consequent on this division, the plaintiff got into possession of items 3 and 7 of the plaint schedule property etc. He also states that there was a partition list that was drawn up and the plaintiff is aware of the same. (para 3 of the written statement) dated 27.02.1986.

As mentioned earlier in the judgment, the defendant did not enter the witness box to depose. The defendant did not file the Will that is mentioned in the written statement or the partition list that is supposedly executed pursuant to the Will. Even in the cross-examination of PW.1, nothing was suggested about this Will, the partition list or of the presence of PW.1 at the time of the so called "partition". The lower Court relying on this lack of evidence, decreed the suit in favour of the plaintiff and passed a preliminary decree for partition into three shares.

It is the submission of the learned counsel for the appellant basing upon the judgment reported in ***Pandurang Jivaji Apte v. Ramachandra Gangadhar Ashtekar***¹ that an adverse inference cannot be drawn against his clients for their failure to introduce evidence merely because they did not enter into the witness box. In that case, three learned Judges of Supreme Court felt that an adverse inference cannot be drawn because there was other evidence available on record on the point in issue. Therefore, the Hon'ble Supreme Court held that there was no need to draw an adverse inference. Subsequently, in ***Vidhyadhar v. Manikrao & Another***², and ***Man Kaur (dead) by LRS. v. Hartar Singh Sangha***³, the Hon'ble Supreme Court held that if a defendant does not appear and enter the witness box, the presumption would arise that the case he has set up is not proved. In the circumstances of this case, this Court is of the opinion that ***Pandurang Jivaji Apte's*** case (1 supra) is not applicable for the reason that the available evidence does not show that a Will in fact executed by the deceased and that consequent to the Will and the death of Prem Kumar, the partition was effected. In the absence of any evidence whatsoever, this Court agrees with the finding of the lower Court that an adverse inference had to be drawn for the non-examination of the defendants.

¹ AIR 1981 SCC 2235

² AIR 1999 SC 1441

³ 2010 (10) SCC 512

The learned counsel also relied upon ***Controller of Estate Duty, Madras v. Alladi Kuppuswamy***⁴ and ***Sunil Kumar and another v. Ram Prakash and others***⁵ that it is only a son, who is a coparcener and that the mother is not a coparcener. He argues that the property will have to go back into the coparcenary and that the mother is not entitled to a share. The answer to this is found in the case of ***Danamma @ Suman Surpur v. Amar and others*** (Civil Appeal Nos. 188-189/2018) dated 01.02.2018 of the Hon'ble Supreme Court of India which considered Section 6 of the Hindu Succession Act and the notional partition provided for in explanation 1 to that Section. This issue is no longer in doubt. Therefore, these two cases are not really applicable.

The last judgment relied by the learned counsel for the appellant is that ***A.Raghavamma and another v. A.Chenchamma and another***⁶. In this case, the Hon'ble Supreme Court held that the severance and status of joint family can be inferred from a declaration of an intention to separate which is made known specifically to the others. The Hon'ble Supreme Court held that once manifestations or the interest to separate is made clear to all the members, the same is sufficient to draw inference of the partition. The learned counsel argued that in this case, there is sufficient evidence to show that there was a partition. However, this

⁴ (1977) 3 SCC 385

⁵ (1988) 2 SCC 77

⁶ AIR 1964 SC 136

Court is unable to agree with the submissions of the learned counsel for the appellant. Prem Kumar's Will is not on record. The partition list is not on record. Merely because some items of the property are in the possession of the defendant, it cannot lead to a conclusion that even Prem Kumar's share of the property was included in the so called division of the property subsequent to his death. The bequeathal of the share should have been proved by filing the Will or other documents. The presence of the plaintiff in the discussions and her acceptance of the partition should have been proved. Neither of the same was done. Therefore, this Court cannot come to the conclusion that the share of Prem Kumar was in fact divided. In fact, this judgment relied on by the learned counsel itself says that merely because one coparcener is separated from the others, there is no presumption that there has been a separation with regard to all. The burden of proof as per the Hon'ble Supreme Court is on the person who asserts the partition. Therefore, this Court is of the opinion that the case law cited do not really help the appellant in the facts and circumstances of this case.

In response to this argument, the learned counsel for the respondent argued that the impugned order is correct but consequent on the change of law and the amendment of the Hindu Succession Act, by Act 39 of 2005, the shares of the parties will have to be drawn up and that the daughters also have a share. According to the learned counsel for the

respondent, the Hindu Succession Act and more particularly Section 6 of the Hindu Succession Act, has been amended and because there is no partition in the family, even the daughters will have a share in the property.

It is a fact that the Hindu Succession Act has been amended and the amendment of the Hindu Succession Act by the Central Act is not in dispute. The legal position and the interpretation of the Hon'ble Supreme Court is also not in dispute. The respondent has placed reliance on ***Ganduri Koteshwaramma and Another v. Chakiriyani and Another***⁷ and ***Prakash and others v. Phulavati and others***⁸. Based on these two judgments, it is the contention of the learned counsel for the respondent that the daughter has a same share as a son after the death of a Hindu. According to the learned counsel, the daughter and son are entitled to an equal share since by the date of the amendment i.e. 09.09.2005, the property is not partitioned. Therefore, according to the learned counsel for the respondent as the father-(first defendant) has died, the shares in the property have to be redrawn and the shares of the daughters have also got to be drawn up along with the share of the mother in the entire property.

This Court finds force in the submission made and holds that in view of the subsequent pronouncements of the Hon'ble Supreme Court of India after the Amendment Act 39

⁷ (2011) 9 SCC 788

⁸ (2016) 2 SCC 36

of 2005 and more so the latest orders dated 01.02.2018 in Civil Appeal Nos.188-189/2018 in ***Danamma @ Suman Surpur v. Amar and others***, the daughters are also entitled to a share.

There are no merits in the appeal and the same is dismissed but in view of the change in the law, the daughters are also entitled to a share. Based on this observation, the decree shall have to be drawn up accordingly. No order as to costs.

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

Date: 27.02.2018
KLP

D.V.S.S. SOMAYAJULU, J

