

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

S.A.No.853 of 2016

JUDGMENT:

In the course of admission of the Second Appeal, the following substantial questions of law are formulated:

(i) Whether the marriage of sole plaintiff, who is no other than the sister of defendants 2 & 3 and daughter of defendant No.1 and late Bullabbai (with alias name Sathiraju), not performed prior to 05.09.1985 in deciding whether the plaintiff is a coparcener under the Hindu Succession (Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986) to the Hindu Succession Act, 1956 (Act 30 of 1956)? If so, along with the defendants 2 and 1, the plaintiff is also a coparcener under the Hindu Succession (Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986) irrespective of the death of their father in 1979.

(ii) Whether the Will-Ex.B2 dated 17.01.1979 said to have been executed by the father of plaintiff and defendants 2 & 3-cum-husband of defendant No.1, by name Bullabbai, is duly proved as true, valid and in a sound and disposing state of mind executed by the said testator and as a last Will and testament in making any bequeath solely in favour of the son for the plaint schedule residential house property and acted upon and proved as outcome of free will and volition of the said testator as claimed in the defence of defendant No.3 to non-suit the plaintiff for the relief of partition.

(iii) If at all the Will is proved once, it is the coparcenary property, in view of Section 30 of the Hindu Succession Act, whether the execution of Will for the entire house property as per the claim of defendant No.3 by his father to obstruct the natural flow of non-testamentary succession is sustainable? and if not, can it be confined to the undivided interest of said Bullabbai and if so, to what share if at all the plaintiff is entitled in answering any of the above points for consideration?

(iv) Whether any right vested if at all the plaintiff was not married by the date of 05.09.1985 under the Hindu Succession

(Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986), which received the assent of the President of India and prevails over the other provisions of the Hindu Succession Act, 1956 (Act 30 of 1956), would divest by virtue of the subsequent central amendment by the Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005) amending mainly Section 6 of the Hindu Succession Act, leave about other provisions. In either case whether the plaintiff is entitled to any of the benefits of the central amended Act 39 of 2005, more particularly from the death of their father in 1979, and by virtue of the existing Section 6 prior to the central amended Act 39 of 2005 for there was already a notional partition under the legal fiction as if there was a partition, though that does not tantamount to actual partition by exact metes and bounds under Section 29A(iv) of the Hindu Succession (Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986).

2. After hearing the counsel for both sides, this Second Appeal is taken up for disposal in answering the aforesaid substantial questions of law.

3. The appellants 1 & 2 are no other than defendants 3 & 4 in O.S.No.748 of 2010 on the file of the learned I Additional Senior Civil Judge, Kakinada, which is a suit for partition, filed by respondent No.1 herein as sole plaintiff against respondent No.2 herein and defendants 1,3 and 4 for the reason defendant No.1 Ranganayakamma died pending the first appeal in A.S.No.17 of 2015 and the factum of other parties, who are her legal representatives on record is recorded thereby. The suit is for partition of the plaint schedule house property into four equal shares seeking to allot one such share to the plaintiff. It is claimed that it is the ancestral and

coparcenary property that was originally acquired by the plaintiff's paternal grandfather Venkata Swamy, who died intestate, and there was no alienation of the property by her late father Bullabbai in his lifetime and the family was enjoying after death of Venkata Swamy and his wife Manikyam till Bullabbai's death in 1979 and after the death of Bullabbai they all enjoying the family property and the plaintiff was demanding the defendants 1 to 3 for partition; as there was no cooperation, she was constrained to issue notice dated 02.11.2010 and constrained to file the suit, that was also evidence of the plaintiff before the trial Court with reference to Ex.A1- office copy of notice, acknowledged by Ex.A2. Leave about the Exs.A3 to A8, which are not of much relevancy for the purpose of Second Appeal with reference to the oral evidence of herself and PW2-T.S.Murty. The contest of defendant No.1, their mother, who not came to the witness box, is in support of the case of the plaintiff and defendants 2 and 3 are entitled equally to the property in question by partition. The written statement of defendant No.2, another unmarried sister, is similar to that of the written statement of defendant No.1 in claiming she is also entitled to 1/4th share in the plaint schedule house property. The defendant No.3, brother of plaintiff & defendant No.2 and son of defendant No.1, is while denying the plaint averments in setting up a

Will, said to have been executed by Bullabbai dated 17.01.1979, unregistered and thereby, he is entitled to the entire property. It is also averred that said Bullabbai (with alias name Sathiraju) was described in the Will and not only that as described in the earlier mortgage deeds during 1925-1927 as one of the array of the defendants in O.S.No.34 of 1940. It is also contested by defendant No.3 that he performed the marriage of plaintiff after death of their father by spending amount. It is further contended that defendant No.2 is suffering from mental sickness and treating by a Doctor under his supervision and expenses. Defendant No.4, who is no other than the wife of defendant No.3, claims the property under the registered Gift Deed dated 31.08.2004-Ex.B6 and she was delivered possession by defendant No.3. The additional written statement of defendant No.3 is also in this line after the impleadment of defendant No.4 in the pending suit, consequent to the written statement of defendant No.3, in this regard. That made the trial Court to formulate the issues as to whether the plaint schedule property is the joint family property of plaintiff and defendants, and the Will set up by defendant No.3 dated 17.01.1979 is true, and the suit is bad for non-joinder of parties, and whether the plaint schedule property is liable for partition, and whether the Gift Deed by the defendants 3 & 4

is binding on the plaintiff also and her right to challenge is barred by limitation and consequent to it there is any extinguishment of right of the plaintiff to claim partition by adverse possession.

4. The trial Court ultimately held in its finding that the plaint schedule property is the joint family property and the Will is not proved and the Gift is not binding on the plaint schedule property, however, stated liable for partition into four equal shares and the plaintiff is entitled to one such share and equally by other defendants each $1/4^{\text{th}}$ among defendants 1 to 3 for no relief entitled by defendant No.4. It is the said decree and judgment dated 26.12.2014 impugned in A.S.No.17 of 2015 by the defendants 3 and 4 supra. Before coming to that, it is necessary to mention that the trial Court did not deal with how defendant No.1 is also entitled to $1/4^{\text{th}}$ share, if it is a coparcenary property and the plaintiff entitled to the coparcenary interest of $1/4^{\text{th}}$ along with her other sister and brother and late father's share for what the late father's share again was devolving by succession in view of Section 6 r/w 8 of the Hindu Succession Act for that $1/4^{\text{th}}$ share, each $1/4^{\text{th}}$ by the plaintiff and defendants 1 to 3 respectively, for the reason the very Hindu Succession (Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986) covered by Sections 29A to 29C concerned; it is not by amending Section 6 of the

Hindu Succession Act, like by Central amended Act 39 of 2005, but by starting Section 29A with a non-obstante clause of notwithstanding anything contained in Section 6 of the Hindu Succession Act to say Section 29A of the Hindu Succession (Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986) prevails having received the assent of the President against any inconsistent provisions of the Hindu Succession Central Act, 30 of 1956.

5. The lower appellate Court did not even refer much less consider what are the grounds of appeal, though from the very wording of Order XL1 Rule 31 C.P.C. it is pursuant to the findings of the trial Court's judgment impugned in the appeal covered by the grounds, the points for determination shall be formulated and the same shall be answered with reasons. What is the point No.1 among the second point as to what relief formulated by the lower appellate Court as if is simply that of the trial Court's decree and judgment warrants any interference in the appeal, which is not the spirit of the mandatory requirement in use of the word 'shall' under the Order XL1 Rule 31 C.P.C. for the lower appellate Court to so casually deal with the appeal, that too being the final fact finding Court by re-appreciation of entire facts, more particularly from the availability of Order XL1 Rule 33 C.P.C., leave about to read with Order XL1 Rule 24 C.P.C. of the

entire matter at large, irrespective of the First Appeal maintained is only for one portion or any portion of the trial Court's decree, leave apart to impugn any adverse finding without even filing cross-objection. When it is not the negation of the relief, the respondents can attack in the appeal. Leave about any interlocutory application pending suit even filed ended in dismissal or negated the interlocutory relief, that also can be made a ground in the First Appeal as contemplated by Section 105 C.P.C. that also requires to be considered not only in formulation of the points for determination, but also a decision is required to be given with reasons in relation thereto.

6. A perusal of the lower appellate Court's judgment even running to paragraph Nos.35 by getting in juxtaposition to some of the paragraphs of the trial Court's judgment, it is almost a reproduction of some paragraphs and reproduction of the portion of some paragraphs of the trial Court's judgment with exact words by combining separate paragraphs in the appeal. Though for confirmation of the trial Court's judgment by the appellate Court, a detailed discussion is not required, but for to say at least those covered by the grounds urged in the First Appeal, that are required to be considered in formulating the points for determination with reasons that in fact is as a duty imposed, once not undertaken by the lower

appellate Court. The lower appellate Court's judgment is, on that ground, liable to be set aside to remand to answer not only for that, but also for the substantial questions of law formulated above involved for determination as to what is the date of marriage of the plaintiff. Leave about defendant No.2's marriage will not performed and once such is the case, if the plaintiff's marriage is performed subsequent to 05.09.1985 under the Hindu Succession (Andhra Pradesh) Amendment Act, 1986 (Act 13 of 1986) came into force with effect from 05.09.1985, where defendant No.3 could not prove Ex.B.2-Will as contemplated by law, for the coparcenary property from taken death of Bullabbai intestate for otherwise what he succeeded from his late father Venkata Swamy he can make a bequeath in his lifetime and if died intestate then only in the hands of the plaintiff, defendants 2 and 3 being of third generation becomes coparceners and once such is the case, to what share the plaintiff is entitled to.

7. Having regard to the above and the date of marriage of plaintiff is also silent from the material on record, it also requires in determination of the substantial questions of law supra involved permit of the parties to adduce further evidence.

8. Accordingly, and in the result, this Second Appeal is allowed by setting aside the first appellate Court's judgment

in A.S.No.17 of 2015 and remanding the matter to the first appellate Court with a direction to restore A.S.No.17 of 2015 and permit the parties to adduce additional oral and documentary evidence in relation to the date of marriage of the plaintiff, to record evidence by itself as contemplated by Section 107 C.P.C., and give fresh disposal, on own merits by formulating the points for consideration more particularly relevant of those covered by the substantial questions of law supra, preferably within a period of six (6) months from the date of receipt of a copy of this order. No order as to costs.

9. Consequently, miscellaneous petitions pending, if any, shall stand closed.

22.03.2018
MVA/ VVR

Dr. B. SIVA SANKARA RAO, J

