

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

A.S.No.469 of 1997,
Cross Appeal (SR) No.14514 of 2015
and IA No.1 of 2016 (ASMP No.408 of 2016)

JUDGMENT:

This appeal is filed by the defendants against the judgment and decree dated 27.12.1996 in O.S.No.88 of 1992 on the file of the Subordinate Judge, Adoni.

2. For the sake of convenience, as this is a first appeal, the parties are referred to as in the suit only i.e., 'plaintiffs' and 'defendants'.

3. The suit OS No.88 of 1992 was filed by two plaintiffs against their father-1st defendant, his second wife-the 2nd defendant and defendants 3 and 4, who are the children born out of the second marriage between the defendants 1 and 2 and brother of the 1st defendant. The suit was filed for partition and separate possession of the plaintiffs' 2/3rd share in the plaint schedule property.

4. The case of the plaintiffs is that they are the children of the 1st defendant and his first wife. During the life time of their mother itself and without dissolving the marriage between 1st defendant and their mother, the 1st defendant entered into the relationship/marriage with 2nd defendant and out of the said relationship/second marriage, defendants 3 and 4 are born. As far as 5th

defendant is concerned, he got a sale deed from 2nd defendant, which is a collusive sale deed and not binding on the plaintiffs. As it is a joint family property, which cannot be alienated, they filed the suit for partition, mesne profits etc.

5. A written statement was filed on behalf of defendants 1 to 4 wherein the relationship between the parties including the second marriage between defendants 1 and 2 is admitted. The 1st defendant denied the existing family and joint family funds and also denied the plaint averments. He also stated that the suit is bad for non-joinder of necessary parties. The sale in favour of the 5th defendant was also pleaded to be a correct sale etc. The 5th defendant also filed a written statement denying the joint family etc. and also pleaded that the sale in his favour is a valid and correct sale.

6. On the basis of these pleadings in OS No.88 of 1992, the following four issues are framed:

- i) Whether the suit is bad for non-joinder of necessary and proper parties?
- ii) Whether the plaintiffs are entitled for partition of plaint schedule properties and for separate possession of their 2/3rd share in the plaint schedule properties as prayed for? and
- iii) Whether the plaintiffs are entitled for mesne profits as prayed for?
- iv) To what relief?

7. This matter was heard along with two other suits viz., OS No.13 of 1986 and OS No.108 of 1988, but the evidence was recorded in OS No.88 of 1992. For the plaintiffs, PWs.1 to 11 were examined and Exs.A.1 to A.4 were marked. For the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.8 were marked. In the X series, Exs.X.1 to X.7 were marked.

8. The lower Court after considering the facts, evidence etc., came to a conclusion in O.S.No.88 of 1992 that the plaintiffs are entitled to a preliminary decree for partition of all the items, except item No.4 and for separate possession. It is this judgment that is now impugned in the appeal. In the cross-appeal, the findings against the defendants in the suit were objected to.

9. This Court has heard Sri K.V. Raghuveer and S. Lakshmi Narayana Reddy, learned counsel for the appellants/defendants and Sri M.R.S. Srinivas, learned counsel for the respondents/plaintiffs.

10. The essential question that arises for consideration in this case is about the rights of defendants 3 and 4, who are the children/offspring of the second marriage. According to the plaintiffs, since defendants 3 and 4 are the offspring of an illegal relationship/marriage, they are not entitled to any share

in the joint family property. On the other hand, the learned counsel for defendants 3 and 4 states that in view of the amendment to Sec 16 of the Hindu Marriage Act in 1976, defendants 3 and 4 (illegitimate children) are entitled to their share on par with the legitimate children. Even the written note dated 14.06.2018 submitted by the learned counsel for the appellants essentially concentrated on the amendment to Section 16.

11. The learned counsel for the appellants filed a booklet containing the case law. The following eight judgments are contained therein. The crux of the judgments of various High Courts is not being considered, in view of the fact that the Hon'ble Supreme Court is actually seized of the matter as will be discussed later in this order. This Court is not relying on the other case law or referring to the same in view of this.

- i) ***Jagarlamudi Sujata v. Jagarlamudi Jadadish Krishna Prasad*¹**;
- ii) ***Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma v. K. Devi*²**;
- iii) ***Revanasiddappa v. Mallikarjun*³**;
- iv) ***Mahila Mathuro Bai v. Ramwati*⁴**;
- v) ***Karuvankandy Narayani (deceased by L.Rs.) v. Nelliadan Aravindakshan*⁵**;
- vi) ***Kanagavalli v. Saroja*⁶**;

¹ AIR 1992 AP 291

² AIR 1996 SC 1963 (1)

³ (2011) 11 SCC 1

⁴ AIR 1990 MP 276

⁵ AIR 2006 Kerala 26

- vii) ***Smt. Savitri Devi v. Smt. Manorama Bai***⁷; and
- viii) ***Chikkamma v. N. Suresh***⁸.

12. Section 16 of the Hindu Marriage Act, 1955 is reproduced hereunder:

“16. Legitimacy of children of void and voidable marriages. —

- (1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)*, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.
- (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
- (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”

13. Section 16 of the Hindu Marriage Act as it is originally enacted contained sub-section (3) which stated that nothing contained in this section shall confer upon any child of a marriage which is declared as null and void

⁶ AIR 2002 Madras 73

⁷ AIR 1998 MP 114

⁸ 2001 AIHC 394

or annulled by a decree, any rights in the property of any person other than the parents. The right of such a child was only limited to claiming a right in the property of their parents. Thus, the 'illegitimate' children were given a right to claim a share in the properties of their parents. The vires of this section was upheld by the Hon'ble Supreme Court in **K. Devi's** case (2 supra). For the decision in this matter, the second judgment relied upon by the learned counsel for the appellants is important namely **Revanasiddappa's** case (3 supra) wherein a Division Bench of the Hon'ble Supreme Court (written by his Lordship A.K. Ganguly) took a view that the children of void or voidable marriages are entitled to a share in the property of their parents; whether it is self-acquired property or ancestral property falling to the parents share after the partition. The Hon'ble Supreme Court also held that the partition can be sought only after the parents' death.

14. In reply to this, the learned counsel for the respondents also cited the following judgments of the Hon'ble Supreme Court:

- i) **Gur Naraian Das v. Gur Tahal Das**⁹;
- ii) **Jinia Keotin v. Kumar Sitaram Manjhi**¹⁰;

⁹ AIR 1952 SC 225

¹⁰ (2003) 1 SCC 730

iii) ***Neelamma v. Sarojamma***¹¹; and

iv) ***Bharatha Matha v. R. Vijaya Renganathan***¹²

In these cases, the Hon'ble Supreme Court held that the child born out of void or voidable marriage are not entitled to a claim in any joint family property but are only entitled to a share in the self-acquired property of his parents. These Judgments before or after the amendment are of equal and co-ordinate benches. This Court, however, notices that the Hon'ble Supreme Court in ***Revanasiddappa***'s case (3 supra), which is a bench of two judges considered the judgments that were cited by the learned counsel for the respondents viz., ***Jinia Keotin, Neelamma*** and ***Bharatha Matha*** (10 to 12 supra). The decision of ***Gur Naraian Das*** (9 supra) has also been considered in this judgment. After considering all of the above in para-38 of ***Revanasiddappa***, the Hon'ble Supreme Court held that such children are entitled to his share in the property of their parents even if the same is derived from the ancestral property. It was held that in view of the amendment of Section 16 of the Hindu Marriage Act by Act 68 of 1976, the children born out of such marriage are entitled to a share in the property of their parents on par with the legitimate children.

¹¹ (2006) 9 SCC 612

¹² AIR 2010 SC 2685

The word 'property' was not limited to the self-acquired property and the Supreme Court held that on partition of ancestral property, the property falling to the share of parents is also considered as self-acquired property. It was also held that as the Hindu Marriage Act is a socially beneficial legislation, the words should not be interpreted as if they are cast in stone. In para-39, their Lordships held that they are constrained to differ from the interpretation of Section 16 (3) of Hindu Marriage Act rendered in **Jinia Keotin, Neelamma** and **Bharatha Mathab** (10 to 12 supra). Therefore, their Lordships felt that this matter is to be considered by a Larger Bench and for that purpose, the records of the case were to be placed before the Hon'ble the Chief Justice of India for constitution of a Larger Bench on this judgment. Both the learned counsel agreed that a decision from the Larger Bench is still not yet pronounced.

15. Therefore, as things stand, the three earlier coordinate benches of the Hon'ble Supreme Court held that an illegitimate child born out of such marriage is not entitled to a share in the ancestral property. In view of the settled law as it exists as on today which is not unsettled till date, this Court in the present set of circumstances is will follow the earlier judgments and

hold that the children born out of such marriage are not entitled to claim a share in the coparcenery/ancestral property. They are entitled to claim a share only in the separate property of the parents.

16. The learned counsel for the appellants again also argued that even if **Revanasiddappa** (3 supra) is followed, the limitation imposed by the Hon'ble Supreme Court on interpreting Section 16 as amended is to the effect that the children cannot ask for partition till after the death of their parents. In the case on hand, the learned counsel submits that 1st respondent has died and that therefore, the only hurdle that is there in the Section has also been eliminated. This is a subsequent event that the learned counsel desires should be noticed by this Court. At flush blush, while this argument appears to be sound, the fact remains that their question is to be answered by the Larger Bench of the Hon'ble Supreme Court as per the decision in **Revanasiddappa**. Therefore, this Court is not in a position to pronounce anything on that subject at this stage.

17. This court does not find any reason to interfere with the impugned judgment. Therefore, the appeal is dismissed. The judgment and decree dated 27.12.1996

in O.S.No.88 of 1992 on the file of the Subordinate Judge, Adoni, are confirmed.

**Cross Appeal (SR) No.14514 of 2015
and IA No.1 of 2016:**

18. The cross-appeal is filed in this case by the respondents in the appeal against a part of the judgment and decree, which is answered against them particularly with regard to item No.4. Along with the cross-appeal, I.A.No.1 of 2015 (ASMP No.408 of 2016) was also filed to condone the delay of 6733 days in filing the cross-appeal.

19. The learned counsel for the petitioners/cross-objectors argued that his clients were only informed about the need of filing the cross-appeal in 2015 and that the same is therefore filed pursuant to the discussion with the learned counsel in December 2015. He also points out that after the certified copies were obtained to show that the property is joint family property etc., the cross-appeal was filed along with the delay of 6,733 days. The learned counsel cited the following judgments and argued that the limitation should be condoned with a pragmatic view.

- i) ***K. Subbarayudu v. Special Deputy Collector (Land Acquisition)***¹³;

¹³ (2017) 12 SCC 840

- ii) ***B.S. Sheshagiri Setty v. State of Karnataka***¹⁴; and
- iii) ***Ram Nath Sao alias Ram Nath Sahu v. Gobardhan Sao***¹⁵

20. The contention of the learned counsel is that the term “sufficient cause” under Section 5 should receive a very liberal interpretation so as to advance substantial justice. The counsel also argued that the valuable rights of his clients are involved and as a final decision was not really given in this matter, a proper and liberal interpretation should be given.

21. The learned counsel for the respondents in this application (appellants in the appeal), however, argued that the case of ***K. Subbarayudu*** (13 supra) relates to Land Acquisition Act with regard to four farmers. ***B.S. Sheshagiri Setty*** (14 supra) was also a case of small farmers and ***Ram Nath Sao*** (15 supra) was a case of appellants dying during the pendency of the case and the legal representatives not being brought on record. Therefore, he argued that the same cannot be equated to the facts on hand as the persons involved in this case were experienced businessmen. The learned counsel also points out that the Hon’ble Supreme Court

¹⁴ (2016) 2 SCC 123

¹⁵ AIR 2002 SC 1201

held that there is no straitjacket formula accepting or rejecting the application and that the Hon'ble Supreme Court also sounds a note of caution against the condonation of delay in a routine manner. The learned counsel points out that by not taking any steps within time a valuable right which has accrued to his party will have taken away on allowing this application.

22. On a perusal of the case cited, this Court is of the opinion that the affidavit does not really warrant condoning the delay of 6733 days. A reading of the affidavit shows that the parties were conscious that their issues can be raised in the appeal also. They also talk of their deceased-father informing them that the properties are the joint family properties. Admittedly, the 1st defendant in the suit died in 2010 as per the statement made. Therefore, from prior to a point of time in 2010 they are aware that these properties are joint family properties. They also alleged fraud against the deceased-father, which again appears to be an afterthought at this stage. The judgment of the Hon'ble Supreme Court in ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy***¹⁶ wherein the court sounded a note of caution in paragraphs-15 and 16 is

¹⁶ (2013) 12 SCC 649

also apposite. Therefore, this Court is of the opinion that the delay of 6733 days cannot be condoned.

23. I.A.No.1 of 2016 (ASMP No.408 of 2016) is therefore rejected and consequently the delay in filing the cross-appeal is not condoned.

24. The last issue for survives for consideration is AS MP No.46 of 2014 in the appeal itself. This application was filed in December 2014 for amendment of the plaint in the lower Court and to incorporate certain amendments in para-7 (a) and to add C schedule properties to the plaint schedule. This application was allowed by a learned single judge of this Court on 14.07.2015.

25. However, the learned counsel for the appellants/respondents in this application points out that after the plaint is directed to be amended, the same should be physically amended and that the provisions of Order 6 Rule 18 CPC are mandatory. He drew the attention of this Court to the judgment reported in ***Union of India v. Pramod Gupta (D) by L.Rs.***¹⁷, wherein the Hon'ble Supreme Court in paragraphs 138 to 140 clearly held that if the order of amendment does not specify the

¹⁷ (2005) 12 SCC 1

time within which the amendment is to be carried out, then within 14 days from the date of passing of the order, amendment should be carried out. The learned counsel points out that the order was passed on 14.07.2015 and that the amendment should be carried out within two weeks from there i.e., by 29th July, 2015. He points out that such an amendment was not carried out in the original plaint at all.

26. This Court notices that the plaintiffs, who are respondents in the appeal, have merely filed a copy of an amended plaint in the lower Court on 22.08.2015. The statement of the court shows that on 22.08.2015 an amended plaint was filed and the same is available in the lower Court record. The actual amendment to the plaint is not done in this case. The judgment of the Hon'ble Supreme Court is very clear. The Supreme Court clearly held that the proviso to Order 6 Rule 18 CPC is a "mandatory" proviso. In the absence of any proof to show that the time was extended by this Court pursuant to the order dated 14.07.2015, this Court is of the opinion that the order passed in AS MP No.46 of 2014 has worked itself out. As necessary amendments were not physically carried out nor was time extended, the filing of the plaint in the lower Court on 22.08.2015 will not help the

petitioner. Hence, the plaintiffs in the suit and the respondents in the appeal cannot be allowed to state anything about items which are proposed to be added in the plaint. This issue is accordingly answered.

27. For all the above reasons, AS No.469 of 1997 is dismissed. IA No.1 of 2016 (ASMP No.408 of 2016) is dismissed. Consequently, Cross-appeal (SR) No.14514 of 2015 is also rejected. In the circumstances of the case, there shall be no order as to costs.

28. Miscellaneous petitions, if any, pending in this appeal, shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 31.07.2018
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