

THE HON' BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON' BLE SRI JUSTICE T. AMARNATH GOUD

+ C.C.C.A. No.247 OF 2016

%Date:14.02.2018

Between:

K. V. Ratnamala W/ o.K.V. Rambabu,
Aged about 66 years, Occ: House wife,
R/ o.1-8-702/ 31, Vidyanagar, Hyderabad.

...Appellant

Vs.

\$ Ch. Svaramasastry S/ o.Late Achyuta Ramaiah,
Aged about 57 years, Occ: Service, R/ o.1-8-702/ 31,
Vidyanagar, Hyderabad and others.

... Respondents

! Counsel for Appellant : Sri P. Venkata Swamy

^ Counsel for Respondent No.1 : Sri J. Prabhakar

< Gist :

> Head Note :

? Cases Referred :



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AND

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JUDGMENT: (per V. Ramasubramanian, J)

Aggrieved by a second preliminary decree passed on an application for final decree, the 3rd defendant in a suit for partition has come up with the above regular appeal.

2. Heard Mr. P. Venkata Swamy, learned counsel appearing for the appellant and Mr. J. Prabhakar, learned counsel for the 1st respondent/ plaintiff.

3. The 2nd and 3rd respondents are already dead. An endorsement has been made by the appellant that the 4th respondent is not a necessary party to this appeal.

4. The 1st respondent in this appeal filed a suit in O.S No.1107 of 2008 for partition, impleading (1) his mother as the 1st defendant, (2) his sister as the 2nd defendant (3) the appellant herein as the 3rd defendant and (4) another sister as the 4th respondent. The prayer in the suit was for partition and separate possession of the plaintiff's 1/5th share in the one and only suit schedule property.

5. It appears that the suit was instituted in the year 2008. During the pendency of the suit, the 1st defendant (arrayed as the 2nd respondent in this appeal) died. Therefore, the claim in the partition suit got enlarged from 1/5th share to 1/4th share. It is admitted by the learned counsel on both sides that a preliminary decree was passed on 25.10.2010 declaring the entitlement of the 1st respondent's/ plaintiff's 1/4th share in the suit schedule property and none of the parties has challenged the said preliminary decree. A period of nearly 7 ½ years has passed from the date of the said preliminary decree and thus it has

attained finality. Thereafter, the 2nd respondent herein, who was the 2nd defendant in the suit also died on 12.11.2013. Therefore, the 1st respondent/plaintiff ought to have taken out an application for modification of the preliminary decree, if it was his contention that the 2nd respondent died intestate without leaving any class-I heir. But instead, the 1st respondent/plaintiff filed I.A. No.711 of 2015, under Order – XX Rule 18 CPC seeking a final decree for the division of the property into three equal shares and for the allotment of one such share to himself.

6. The Court below, though did not articulate the issue in the manner that we have indicated above, proceeded to pass a modified preliminary decree declaring the surviving parties, namely, the appellant, the 1st respondent and the 4th respondent have entitled to 1/3rd share each in the suit schedule property.

7. Aggrieved by the said modified preliminary decree, (though it was not called so by the trial Court), the 3rd defendant has come up with the above appeal on the short ground that her case that the 2nd respondent left behind a Will bequeathing the 2nd respondent's share to her, was not even considered by the Court below, before granting a modified preliminary decree for 1/3rd share.

8. The points arising for determination in the above appeal are:

- (1) Whether the Court below could have passed a modified preliminary decree on an application under Order XX Rule 18 CPC?
- (2) Whether the procedure adopted by the Court below in overruling the claim of the appellant with regard to the last Will and testament allegedly executed by the 2nd respondent was in order?

8. POINT No.1: The first point arising for determination is as to whether the Court below could have passed a modified preliminary decree on an application for a final decree?

9. The answer to this question is not very difficult to be found. Irrespective of the label given to an application, the Court is obliged to see the contents. What the 1st respondent/plaintiff prayed in his application i.e. I.A. No.711 of 2015 was for the appointment of an Advocate Commissioner to effect partition of his 1/3rd share and to pass a final decree in terms of the preliminary decree dated 25.10.2010. But, in the affidavit, the 1st respondent/plaintiff had explained that the share originally allotted to him got enlarged upon the death of the 2nd defendant post the preliminary decree.

10. It was open to the Court below to do two things in such circumstances. The first is to return the application calling upon the 1st respondent as to how a final decree could be passed for a larger share. If this procedure had been adopted by the Court below, the 1st respondent could have rectified the mistake and represented the application for a modification of the preliminary decree.

11. The second option available to the Court below was to treat this application as an application for modification of the preliminary decree, after ignoring the prayer made. This course of action is what the Court below appears to have done, though it did not articulate in the manner as aforesaid.

12. In any case, we are dealing with a regular appeal under Section 96 CPC. Therefore, there can be no impediment for us to hold that the application I.A. No.711 of 2015 filed by the 1st respondent/plaintiff should be treated only as an application for modification of the preliminary decree, in the light of the death of one sharer subsequent to

the preliminary decree. Hence, the first point for determination is answered against the appellant.

13. POINT No.2: The second point arising for consideration is as to whether the procedure followed by the Court below in disposing of the plea with regard to the Will set up by the appellant, was in accordance with law.

14. It was contended by Mr. J. Prabhakar, learned counsel for the 1st respondent that after setting up a Will, the appellant never cared to get into the witness box to prove the Will in accordance with Section 68 of the Evidence Act.

15. It is his contention that even otherwise, the bequest under the Will is not valid, since it seeks to bequeath identified portions of an undivided property.

16. The first contention of Mr. J. Prabhakar, learned counsel for the 1st respondent might have been accepted by us, if the trial Court had not even looked into the Will. But, the trial Court considered the Will and held that no property could have been disposed of by Will, that was covered by a preliminary decree. The trial Court omitted to note that the Will could not be looked into, in the absence of the same being marked as an exhibit. We do not know how a document which was not exhibited could have been looked into by the Court below and a finding recorded on the same. Therefore, the fact that the appellant did or did not go to the witness box, hardly matters when the document relied upon by her was rejected by the Court below without taking it on record as an exhibit.

17. On the second question, it is not possible for us to look into the Will, unless the Will had come on record either before the trial Court as an exhibit or before this Court under Order 41 Rule 27 CPC.

18. Therefore, we are of the considered view that the second point arising for determination should be answered in favour of the appellant and the appeal should be allowed and the matter remanded.

19. Accordingly, the appeal is allowed, the judgment and decree of the Court below are set aside and I.A. No.711 of 2015 is remanded back to the trial Court for a fresh disposal. It will be open to the parties to lead evidence on the limited question of the truth and validity of the Will set up by the appellant, as the first preliminary decree has already attained finality. I.A. No.711 of 2015 will be treated as an application for modification of the first preliminary decree. After giving an opportunity to the appellant to prove the Will in accordance with law and after giving opportunity to the 1st respondent, if necessary, to lead rebuttal evidence, the Court below shall dispose of the I.A. in accordance with law within a period of three (3) months.

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

V. RAMASUBRAMANIAN, J

T. AMARNATH GOUD, J

February 14, 2018
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