

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

* * * *

SA No.1406 of 2017

Between:

PONANGI VEERA VENKATA SATYANARAYANA & ANOTHER
...Appellants

&

PONANGI SURYA SUBRAHMANYAM & OTHERS
...Respondents

DATE OF JUDGMENT PRONOUNCED: 16-04-2018

SUBMITTED FOR APPROVAL:

1. Whether Reporters of local newspapers
may be allowed to see the Judgment? Yes/No
2. Whether the copies of judgment may be
marked to Law Reporters/Journals Yes/No
3. Whether Your Lordships wish to
see the fair copy of the Judgment? Yes/No

A. RAJASHEKER REDDY, J

***THE HON'BLE SRI JUSTICE A. RAJASHEKER REDDY**

+ S.A.No.1406 of 2017

% 16-04-2018

Ponangi Veera Venkata Satyanarayana and another
...Appellants

VERSUS

\$ Ponangi Surya Subrahmanyam and others
...Respondents

< **GIST:**

> **HEAD NOTE:**

! **Counsel for Appellants: Sri Y.Srinivasa Murthy**

^ **Counsel for Respondents: Sri Davuluri Narasimha Rao**

? **Cases referred**

1. 2015(6) ALT 34 SC
2. 2017(3) ALD 188 SC
3. AIR 1966 SC 735
4. 2018 SCC On-line 63



HON'BLE SRI JUSTICE A.RAJASHEKER REDDY**SA No.1406 of 2017****JUDGMENT:**

The appellants are defendants 2 and 3 in the suit OS No. 134 of 2009. Plaintiffs and defendant no.1 in the suit are respondents 1 to 7 herein. The plaintiffs filed the suit OS No.134 of 2009 seeking partition of the suit schedule properties into nine equal shares and for allotment of one such share to each of them and defendants and for separate possession with future mesne profits. The plaintiffs and defendants (seven daughters and two sons) are children of Venkata Ramana Murthy and Suryakantham. The plaintiffs (six daughters, among seven daughters) filed the above suit against the defendants-two brothers and another sister.

Parents of the parties are no more in this world. While their father died on 28-01-2000, their mother died on 28-1-2009 and they died intestate. In the original suit, the plaintiffs contended that their father got items 1 and 2 of the suit schedule properties in oral partition, in between himself and his brothers in the year 1947 and item 3 of the suit schedule property was purchased by him as Kartha of the joint family

in the year 1961 with the savings derived from ancestral properties *i.e.* items 1 and 2 and, therefore, all the three items of the suit schedule properties are ancestral properties. The marriages of the plaintiffs, except the marriage of the eldest sister, whose marriage was performed on 24-10-1979, the rest of the plaintiffs' marriages were performed after the amendment and introduction of Section 29A of Hindu Succession Act, (AP State Amendment, Act 13 of 1986), which came into force with effect from 05-09-1985. After the said amendment, all the daughters conferred with equal rights in coparcenary property, and therefore the plaintiffs (daughters) whose marriage was performed after 05-09-1985 are entitled to equal share in ancestral property along with sons in the family. That in view of amendment to Section 6 of Hindu Succession Act, 2005, (Central Amendment) though the marriage of the 1st plaintiff-eldest sister was performed prior to the AP State Amendment, Act 13 of 1986, she also becomes coparcener and entitled to equal share in the properties. With the death of the parents, their share also devolved on the parties to the suit. Properties under item nos.1 and 2 of the suit schedule

properties being ancestral properties and property under item no.3 purchased by their father, with the income derived from the properties under items 1 and 2, all properties under item nos.1 to 3 become joint family properties and the parties being coparceners, claimed that they are entitled for equal share in all the three items of the suit schedule properties as coparceners.

2. The defendants opposed the suit claim of the plaintiffs.

The defendants (sons) set up their claim based on a Will, Ex.B1. It is their case that their father, in a sound state of mind and disposing condition, executed Will dated 15-05-1999 bequeathing all the three items of the suit schedule properties to them in the presence of attestors DWs.2 and 3 by creating life interest in the properties in favour of his wife (Suryakantham) with vested remainder to them. They cannot be divested of the suit schedule properties by reason of amendment to Section 6 of the Hindu Succession Act. The plaintiffs are not the coparceners and the suit schedule properties are not coparcenary properties. The plaintiffs fully aware of the execution of the Will dated 15-05-1999 by

their father Venkata Ramana Murthy and therefore the suit is liable to be dismissed.

3. The Court at first instance, basing the respective pleadings of the parties, framed the following issues for trial:-

1. Whether the plaint schedule property are ancestral and joint family properties as claimed by the plaintiffs ?
2. Whether the Will dated 15-05-1999 is true and valid ?
3. Whether the Court fee paid is correct ?
4. Whether the plaintiffs are entitled to relief of partition of plaint schedule properties as prayed for ?
5. Whether the plaintiffs are entitled to future profits as prayed for ?
6. To what relief ?

4. To prove case of the plaintiffs, the plaintiffs examined 4th and 2nd plaintiffs as PWs.1 and 2 and another witness as PW3 and marked Exs.A1 to A19. On behalf of defendants, 2nd defendant was examined himself as DW1 and marked the Will, dated 15-05-1999 as Ex.B-1 and examined the attestors of the said Will as DWs.2 and 3, besides examining another witness as DW4. The trial Court on issue no.1 recorded a finding that (*sic* item no.1 is the ancestral property) properties under 1 and 2 were ancestral properties and property under item no.3 was purchased with the income from the joint

family nucleus thus all properties under items 1 to 3 are ancestral properties and as to their entitlement, which issue is framed under issue no.4, observed that except 1st plaintiff whose marriage was performed in the year 1975, the other parties are equally entitled for share being coparceners in view of Section 29A of Hindu Succession Act, (AP State Amendment, Act 13 of 1986) and on issue no.5 observed that the parties are also entitled for mesne profits. On issue no.2, the Will dated 15-05-1999 was disbelieved in the light of contradictions in the evidence of DWs2 and 3. On issue no.3, the plaintiffs were directed to pay the deficit Court fee.

5. On appeal, the lower appellate Court framed the following points:-

1. Whether suit schedule properties are coparcenary properties of father of plaintiffs and defendants ?
2. Whether the trial Court wrongly framed the 2nd issue that “whether Will dated 15-05-1999 is true and valid ?” and thereby wrongly fixed the burden on defendants to prove the said Will ? If not
3. Whether defendants proved the valid execution of Will dated 15-05-1999 by the father of defendants and plaintiffs ?
4. Whether suit of plaintiffs’ is barred by limitation ?
5. Whether the suit of plaintiffs is liable for dismissal by reason of non-payment of Court fee under Section 34(1) of APCF and SV Act at the time of filing of suit ?

6. Whether items 2 and 3 of plaint schedule properties are not liable for partition in view of Section 23 of Hindu Succession Act, 1956 ?

7. Whether suit of plaintiffs' is bad for non-joinder of the properties of mother of plaintiffs and defendants to this suit ? if not

8. Whether the plaintiffs are entitled for partition of suit schedule properties as prayed for ?

9. Whether plaintiffs are entitled for future mesne profits ?

10. Whether there are grounds to interfere with findings of trial Court ?

6. On point no.1 the lower appellate Court reached a conclusion that the suit properties are separate properties of the father of the parties and not ancestral properties, which is also the plea of appellants herein. As regards point no.2, after referring to Section 67 and 68 of the Evidence Act, it was observed that defendants must prove the execution of the Ex.B1 Will deed said to have been executed by their father, and burden of proof lies on them. On point no.3, Ex.B1 Will was disbelieved by pointing to the material contradictions in the versions of the witnesses as to the execution of Ex.B1 by the father of the parties. On point no.4 issue regarding of limitation, it was rightly held that the suit was filed within limitation and regarding Court fee, it was held that even if there is any deficiency in payment of court fee, the Court is empowered to collect the deficit Court fee and the suit need

not be dismissed on that ground. On point no.6, it was held that Section 23 of the Hindu Succession Act, 1956 was omitted, as the same was deleted by Hindu Succession Amendment Act, 2005 w.e.f. 09-09-2005 as such the female sharers in a joint family are also entitled to file suit for partition of dwelling house even though male persons did not choose to separate their shares. On point no.7, whether the suit is bad for non-inclusion of properties of the mother of the parties, it was held that since the plaintiffs did not deny equal rights and share in the properties held in the name of their mother, there was no dispute at all about the division of properties of mother of the plaintiffs and defendants. Even otherwise, division of properties of mother of the parties is a different cause of action and division of properties of father of the parties is a different cause of action, there was no necessity to join the properties of the mother of parties in this suit. On point no.8, the lower appellate Court disagreed with the conclusion of the trial Court that the suit properties are coparcenary properties and observed that properties under item nos.1 and 2 are separate properties of father of the parties, and property under item no.3 was purchased from out

of the income derived from property under item nos.1 and 2, the plaintiffs and defendants are entitled to equal shares in the suit properties being Class-I heirs under Section 8 of the Hindu Succession Act. On points no.9 to 10, except the finding of the trial Court that the suit schedule properties are coparcenary properties, it was observed that the plaintiffs are entitled for future mesne profits, and accordingly confirmed the judgment of the trial Court and dismissed the appeal.

7. Learned counsel for the appellants-defendants contended that after promulgation of the Central Act (Act 39 of 2005), which came into effect on 09-09-2005, the State Act (Act 13 of 1986) stood repealed by operation of law, and Act 39 of 2005, is also not applicable to the properties of persons who died before 09-09-2005, and as admittedly the father of the parties died on 28-01-2000, the question of applicability of Act 39 of 2005 does not arise. It is also contended that the burden of proof, when forgery is alleged, is upon the plaintiffs, but the Courts below erroneously placed such a burden on the defendants. On the other hand, learned counsel for respondents made submissions in support of the impugned judgment. Learned counsel stated that the concurrent findings

arrived at by the Courts are based on evidence and law and therefore, needs no interference and the second appeal is liable to be dismissed.

8. The Will dated 15-05-1999 marked as Ex.B1 set up by defendants 2 and 3, was their main thrust to dislodge the plaintiffs of their claim, both the Courts disbelieved the Will in the light of contradictions in the evidence of the attestors and also as to the drafting of the very Will dated 15-05-1999 itself by Venkata Ramana Murthy. Having disbelieved the Will, Ex.B1, the trial Court considered the entitlement of the claim of the plaintiffs. The trial Court in view of the decision of the Supreme Court in **PRAKASH vs. PHULAVATHI**¹ held that the right of a daughter as coparcener under Hindu Succession (Amendment Act, Act 39 of 2005) applies only when both coparcener and his son/daughter were alive as on the date of commencement of the said Act *i.e.* from and with effect from 09-09-2005, irrespective of date of birth of daughter and coparcener who died thereafter. The trial Court proceeded on the footing that existing law has to be applied when the succession opens *i.e.*, as on the death of a coparcener.

¹ (2015 (6) ALT 34 SC)

Inasmuch as, in this case the father of the parties, Venkata Ramana Murthy died on 20-01-2000 i.e. before the commencement of Hindu succession (Amendment) Act, (Act 39 of 2005), the marriage of the eldest daughter (1st plaintiff) performed prior to introduction of Section 29A of the Hindu Succession Act, by AP State amendment, (Act 13 of 1986), she cannot be treated as coparcener along with the other plaintiffs and defendants. Accordingly, the trial Court passed a preliminary decree treating the suit schedule properties as coparcenary properties and the parties, except 1st plaintiff, as coparceners. In appeal being AS No.63 of 2016, the lower appellate Court though considered the matter on different footing, but confirmed the judgment and decree of the trial Court except the finding of the trial Court that the suit schedule properties are coparcenary properties. However, the lower appellate Court considered the ratio laid by the Supreme Court in ***RAMESH VERMA (DEAD) THRU LRs vs. LAJESH SAXENA (DEAD) THRU LRs***², and observed that the share taken by son after the death of his father become the separate property of the son and in this case, Venkata Ramana Murthy,

² (2017 (3) ALD 188 (SC))

father of the parties, got his share of property (items 1 and 2) in a partition from among his brothers, it is not coparcenary property, but it is a separate property of Venkata Ramana Murthy, and if that becomes his separate property, the property under item no.3 purchased from the income derived from items 1 and 2, which he got in partition, also becomes separate property of Venkata Ramana Murthy and rightly observed that they cannot be coparcenary properties to be governed by amended provision of Section 6 of the Hindu Succession Act. When once they are held to be separate properties of father of the parties, the plaintiffs and defendants are entitled to take equal shares in the suit schedule properties as Class-I heirs as their father Venkata Ramana Murthy who died intestate, in equal shares under Section 8 of the Hindu Succession Act. The lower appellate Court also disbelieved the Will, Ex.B1 set up by the defendants 2 and 3 on almost for the same reasons as assigned by the trial Court and the evidence brought on record does not suggest to take a contrary view than the view taken by the Courts below as to the validity of the Will dated 15-05-1999.

9. It is well settled that the High Court in second appeal under Section 100 of the Code of Civil Procedure, cannot interfere with concurrent findings of facts arrived at by the Courts below by re-appreciating the entire evidence. In second appeal, High Court will not also set aside the concurrent findings of fact by giving its own findings merely on the ground that a contrary view is possible, unless the findings arrived at by the Courts below are perverse and where the Courts below have relied on irrelevant evidence by ignoring the relevant evidence and the findings are not based on evidence. (See ***Deva (Dead) by LRs vs. Sajjan Kumar (Dead) by LRs***, (2003 (7) SCC 481), ***Sayed Akhtar vs. Abdul Ahad***, (2003 (7) SCC 52) & ***Saraswathi vs. S.Ganapathy*** (2001 (4) SCC 694).

10. Though the plaintiffs laid their claim under Section 6, mere wrong quoting of provision of law by the parties, will not take away their substantial rights, which they are otherwise entitled. The claim of the parties even if considered under Section 8 of the Hindu Succession Act, they are entitled for equal shares irrespective of their date of marriages. Even according to appellants counsel both Act 13 of 1986 and Act

39 of 2005 are not applicable to the facts of the case as the suit schedule property is self acquired property of the father of the parties and lower appellate Court also recorded a finding that suit property is self acquired property. The Will, Ex.B-1 is disbelieved by both the Courts below. As such, Section 8 of Hindu Succession Act applies in respect of property of male dying intestate and the lower appellate Court rightly construed the same by relying on decision of the Supreme Court in **BHAGWATI PRASAD vs. SHRI CHANDRAMAUL³**, wherein it is held thus:-

“.....If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be

³ AIR 1966 SC 735

a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and had had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another”.

11. In **DANAMMA @ SUMAN SURPUR vs. AMAR⁴**, wherein the Supreme Court considered the scope of amended provision of Section 6 of the Hindu Succession Act, vide (Act 39 of 2005) including the authoritative pronouncement case law in **PRAKASH's** case, (1 supra), but the said judgments are not relevant for the purpose of deciding this case as lower appellate Court granted relief to parties under Section 8 of Hindu Succession Act holding that suit property as self acquired property and the plea of appellants is also that suit schedule property is self-acquired property. The contention of appellants is that the father of parties died before Central Act 39/2005 came into force, as such the same is not applicable to present case and also need not be gone into as relief is granted under Section 8 of the Act.

12. The other contentions of the appellants' counsel that the burden of disproving the Will dated 15-5-1999 was on the plaintiffs, was correctly answered by both the Court below.

⁴ (2018 SCC OnLine 63)

The burden lies on the defendants in view Section 67 of the Evidence Act and there is a special procedure prescribed for proof of execution of a Will under Section 68 of the Evidence Act, and in such view of the matter, the burden is on the defendants to prove the execution of Will. The applicability of the Act 39 of 2005 is also not required to be gone into, as no relief is granted on that basis. The reasoning adopted by the lower appellate Court is based on acceptable evidence and cogent reasons are assigned for coming to such conclusion.

13. In the circumstances, no question of law, muchless substantial question of law is involved in this second appeal and it is accordingly dismissed, at the admission stage itself. Miscellaneous petitions, if any, pending shall stand closed.

No order as to costs.

Dated:16-04-2018.
NRG

A.RAJASHEKER REDDY, J

