

THE HONOURABLE SRI JUSTICE SAMUDRALA GOVINDARAJULU

SECOND APPEAL NO.631 OF 1999

JUDGMENT:

The 5th defendant is the appellant herein. The plaintiff/first respondent filed the suit in the trial Court for partition of the plaint schedule properties into five equal shares and for allotment of one such share to him. The defendants 1 and 2 are brothers, the 3rd defendant is sister and the 4th defendant is father of the plaintiff. The defendants 1 to 4 remained *ex parte* in the suit. The 5th defendant is alienee of items 7 and 8 of the plaint 'A' schedule from the 4th defendant under Ex.B-1 registered sale deed. Item No.7 is Ac.02-02 gts. in S.No.392 and item No.8 is Ac.05-16 gts. in S.No.394 of Allapuram village of Toopran Mandal, Medak district. It is the 5th defendant's contention that items 7 and 8 are self-acquired properties of the 4th defendant and that therefore the plaintiff has no share therein and that those properties are not liable for division in the suit. After trial, the trial Court decreed the suit granting preliminary decree for division of the entire plaint schedule properties into five equal shares and for allotment of one such share to the plaintiff. On appeal by the 5th defendant, the lower appellate Court modified the preliminary decree passed by the trial Court and held that the 5th

defendant is entitled for 1/5th share of the 4th defendant in items 7 and 8. As against the said judgment and decree of the lower appellate Court, the 5th defendant approached this Court with this second appeal.

At the time of admission of this second appeal, the then learned Judge of this Court held that ground No-14 of memorandum of grounds of second appeal contained the substantial questions of law. They are as follows:

- (a) Whether the Courts below were justified in law, having regard to Ex.B-1, that the property, wherein in the recital it is clearly shown that the property is self-acquired and not ancestral, in decreeing the suit for partition when there is nothing to show that the properties are ancestral, especially items 7 and 8 of plaint 'A' schedule property.
- (b) Whether the Courts below were justified in law in holding that items 7 and 8 of the plaint 'A' schedule partitioned which, in fact is the self-acquired property of Defendant No.57
- (c) Whether the Courts below were justified in putting the onus on the appellant herein to show that the properties are self-acquired, especially in the teeth of Ex.B1, which is an admitted document ?
- (d) Whether the Courts below are justified in

rejecting the claim of the appellant insofar as items 7 and 8 of plaint 'A' schedule properties is concerned, contrary to the provisions of Sections 6 and 8 of the Hindu Succession Act ?

It is contended by the appellant's counsel that Ex.B-1 registered sale deed executed by the 4th defendant in favour of the 5th defendant itself recites that the property being sold thereunder was self acquired property and that therefore, evidence *aliundi* may not be required to show that items 7 and 8 are self-acquired properties of the 4th defendant. On the other hand, it is contention of the plaintiff that the said items are ancestral properties of the 4th defendant in which all the plaintiff and the defendants 1 to 4 have got one share each.

In my opinion, the burden of proof takes a back seat when the entire evidence is let in by all the parties and when the entire evidence is before this Court. No doubt, Ex.B-1 sale deed in favour of the 5th defendant recites that the property being sold by the 4th defendant thereunder was his self-acquired property. But mere mentioning of the property as self-acquired property by the 4th defendant in Ex.B-1, is not decisive. When that recital is questioned in Court, it has to be proved like any other fact.

The appellant's counsel pointed out that under various sale deeds like Exs.B-11 to B-16 several individual family members have alienated several properties and that it indicates that the properties are not joint family properties and are self-acquired properties of each of the said individuals. Exs.B-11 to B-16 may not have any bearing in the present suit/appeal as it all depends upon as to how the properties covered by Exs.B-11 to B-16 were acquired by the respective vendors and in what circumstances Exs.B-11 to B-16 came to be executed by the respective vendors. In the absence of any material on the above facts and circumstances, one cannot come to any conclusion from Exs.B-11 to B-16 that items 7 and 8 herein were self-acquired properties of the 4th defendant.

Exs.A-4 and A-6 corresponding to Exs.B-22 and B-23 are kasra pahanies of the year 1954-55 relating to the disputed items 7 and 8. They show that the properties stood in the name of the 4th defendant. But, Mandal Revenue Officer, who is examined as D.W.6 noticed and stated that there are certain manipulations /interpolations concerning those items in the said record. Therefore, the lower appellate Court rightly did not place any reliance on the said documents.

Unfortunately for the 5th defendant, the 4th defendant in spite of remaining *ex parte* in the suit, preferred to examine himself as D.W.2 during trial. It is evidence of D.W.2 that items 7 and 8 of the plaint schedule are part of his ancestral properties which he got towards his share in partition with his brother. There is no cross-examination at all of D.W.2 on the nature of property spoken to by him. In the absence of any registered sale deed or any title deed for items 7 and 8 standing in the name of the 4th defendant and in the light of evidence of P.W.1 and D.W.2, it cannot be said that the Courts below went wrong in finding that items 7 and 8 are joint family properties in which the plaintiff has got share. The plaintiff from the above material on record discharged his burden to prove that items 7 and 8 of the plaint schedule are also joint family properties of himself and the defendants 1 to 4.

The 5th defendant is no other than son of the 4th defendant's wife's sister. He is cousin of the plaintiff. He is not a 3rd party as such to the family. No doubt, neither the plaintiff nor any of the family members filed any proceedings questioning Ex.B-1 sale deed executed by the 4th defendant in favour of the 5th defendant on the ground that it is vitiated by

any fraud or other reason. Therefore, evidence of D.W.2 to the effect that the 5th defendant was obtaining several signatures from him on several papers when there were disputes between the 4th defendant and his son, on request of the plaintiff for partition, cannot have any bearing in this second appeal. At any rate, D.W.2 did not say that Ex.B-1 is one such document obtained by the 5th defendant in any other way than in legal fashion. Therefore, the 4th defendant is bound by Ex.B-1 sale deed. As found by the lower appellate Court, certainly Ex.B-1 operates in so far as the 4th defendant's undivided 1/5th share in the properties covered by that sale deed. At the same time, since the 4th defendant is also entitled to 1/5th share along with the plaintiff and the defendants 1 to 3 in all the plaint schedule properties, equity demands that at the time of passing of final decree, possibility of allotment of entire item Nos.7 and 8 to the share of the 4th defendant will have to be considered and if possible, items 7 and 8 or any part thereof shall be exclusively allotted to the share of the 4th defendant so that the said properties will be ultimately taken by the 5th defendant by virtue of sale in his favour under Ex.B-1 sale deed. The substantial questions of law framed at the time of admission are answered accordingly.

Subject to the equities directed by this Court in the preceding paragraph, the second appeal is dismissed. No costs.

SAMUDRALA GOVINDARAJULU, J

10th April, 2013.
Dv/Rns