

(2007) 09 AP CK 0032

In the Andhra Pradesh High Court

Case No : Second Appeal No. 649 of 1997

B.K. Babu Rao @ died per L.Rs. and Others

APPELLANT

Vs

Smt. A. Jaya Lakshmi

RESPONDENT

Date of Decision : 26-09-2007

Acts Referred:

Citation : AIR 2008 AP 78 : (2008) 2 ALD 411 : (2008) 3 ALT 570

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : V. Hari Haran, for the Appellant; W.B. Usha Kiran, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—This Second Appeal presents an avenue for discussion, on certain important aspects, on Hindu law.

2. Stated in brief, the facts that gave rise to this Second Appeal are as under:

Appellants 1 to 4 are the sons and respondent is the daughter of late B.S. Kondal Rayudu and late Janakamma. House bearing No. 6-2-150 situated at New Bhoiguda, Secunderabad, was purchased, in the year 1934, by the family. The respondent was married in the year 1942. However, she continued to live in part of the suit schedule house, since long time.

3. The respondent and her mother, Janakamma, filed O.S. No. 1012 of 1973 in the Court of X Assistant Judge, City Civil Court, Hyderabad, against the appellants, for the relief of permanent injunction to restrain the appellants, from interfering with the possession of part of the suit schedule house and for mandatory injunction, directing them to vacate that portion of the house, which is in their possession. It was pleaded that Kondal Rayudu executed a Will, dated 02.09.1949, bequeathing the entire suit house in favour of Janakamma, and that she, in turn, had gifted the property to the respondent, vide document, dated 14.09.1971. The suit was contested by the appellants, on several grounds.

Through its judgment, dated 03.02.1979, the trial Court dismissed the suit, holding that the property was the joint acquisition of Kondal Rayudu and his sons - the appellants and that he did not have the right, or entitlement to execute a Will, in respect of the suit property. Consequently, the claim under the gift deed, dated 14.09.1971, was also rejected. The judgment therein was affirmed in A.S. No. 332 of 1979 by the Court of Additional Chief Judge, City Civil Court, Hyderabad, and in S.A. No. 88 of 1982 by this Court, through its judgment, dated 23.02.1987.

4. The appellants filed O.S. No. 3523 of 1988 in the Court of XI Assistant Judge, City Civil Court, Secunderabad, for eviction of the respondent. It was alleged that the suit schedule property was acquired through their contribution and that the respondent has no right to live therein, particularly in the context of the judgment in O.S. No. 1012 of 1973.

5. The respondent opposed the suit by filing a written statement. She stated that the judgment in O.S. No. 1012 of 1973 has to be read in a limited context and that her right to live in the suit house cannot be defeated. She has also raised a plea that another individual, by name, Vittal Rao, ought to have been made as party to the suit. Through its judgment, dated 31.12.1992, the trial Court decreed the suit, as prayed for. Aggrieved thereby, the respondent filed A.S. No. 1 of 1993 in the Court of I Additional Senior Civil Judge, City Civil Court, Secunderabad. The appeal was allowed on 07.04.1997 and the decree passed by the trial Court was set aside. Hence, this Second Appeal.

6. Sri V. Hari Haran, learned Counsel for the appellants, submits that the lower appellate Court had completely deviated from the record and reversed the judgment of the trial Court by accepting the plea raised by the respondent, which did not form part of the written statement. He contends that the judgment in O.S. No. 1012 of 1973, which was marked as Ex. A.1, has become final and there was no basis for the lower appellate Court in taking a view different from that.

7. Learned Counsel further points out that, even assuming that Janakamma was entitled to be allotted a share, in the event of partition, her share merged into the coparcenary, on account of the fact that she did not seek partition during her lifetime. It is also urged that the respondent did not have any right under the Hindu Succession Act, in view of the fact that she was married way back in the year 1942.

8. Ms. W.B. Usha Kiran, learned Counsel for the respondent, on the other hand, submits that the lower appellate Court had taken into account, the provisions of the Hindu Women's Rights to Property Act, 1937 (for short "the 1937 Act") as well as the Hindu Succession Act, and being pure questions of law, they were not required to be supported by any pleadings, much less amendment thereto. She contends that the provisions of law relied upon by the appellants would have fallen for consideration and examination, if only a suit for partition was filed and

that no exception can be taken to the judgment and decree under appeal. The relationship of the parties is not in dispute. Late Kondal Rayudu and Janakamma had four sons, viz., appellants 1 to 3 and the deceased appellant No. 4; and a daughter, the respondent herein. Kondal Rayudu died on 05.06.1953. The present suit was preceded by a litigation, between the parties, in the form of O.S. No. 1012 of 1973. In the present suit, the trial Court framed the following issues:

1. Whether the Will executed by late B.S. Kondal Naidu, dated 02.09.1949, bequeathing the suit property in favour of the 1st plaintiff is true valid and whether he was competent to bequeath the property?
2. Whether the suit house is a joint family acquisition in which B.S. Kondal Naidu was having only 1/5th share?
3. Whether the gift deed, dated 14.09.1971, by the 1st plaintiff in favour of the 2nd plaintiff is true, valid and operative against the defendants?
4. Whether the defendants are in occupation of the portions as licences only?
5. Whether the suit is grossly under valued? If so, whether the Court fee paid is not sufficient?
6. Whether this Court has no pecuniary jurisdiction to try the suit?
7. Whether the suit is barred by limitation?
8. Whether the defendant No. 1 to 4 are in adverse possession?
9. Whether the plaintiffs are entitled to mandatory and permanent injunctions?
10. To what relief?

9. On behalf of the appellants, PWs.1 and 2 were examined and Exs. A.1 to A.6 were marked. The respondent deposed as DW.1 and another witness was examined as DW. 2. No documentary evidence was adduced by them. The trial Court decreed the suit, as prayed for, through its judgment, dated 31.12.1992. The lower appellate Court reversed the decree of the trial Court, through its judgment, dated 07.04.1997.

10. Some controversy persisted as to the nature of only item of suit schedule property. While the appellants pleaded that it was a joint acquisition with the contribution of themselves and their father, the respondent pleaded that it was the exclusive property of their father Kondal Rayudu. If the contention of the respondent that the suit schedule property is the exclusive acquisition of late Kondal Rayudu is accepted, it cannot be treated as a coparcenary of Kondal Rayudu and his sons. This question however is no longer at large.

11. As observed earlier, the respondent and the mother of the parties, by name, Janakamma, filed O.S. No. 1012 of 1973, against the appellants herein. It was pleaded that the suit schedule property was the self-acquisition of Kondal Rayudu

and that he, in turn, bequeathed the same on Janakamma, through a Will, dated 02.09.1949. It was further pleaded that Janakamma, in turn, had gifted the property to the respondent under a gift deed, dated 14.09.1971. On this basis, they sought for eviction of the appellants herein from a major portion of the suit house. The appellants, in turn, took the plea that the suit property was acquired with their contribution and that it cannot be treated as self- acquired property of their father. The trial Court dismissed the suit through its judgment, dated 03.02.1979, and certified copy thereof was marked as Ex.A.1, in the present suit. Issue No. 2 in that suit was "whether the suit house is a joint family acquisition in which B.S.Kondal Naidu was having only 1/5th share?"

12. In para 12 of the judgment (E.A.1), it was held as under:

The categorical admission of PW. 1 (Janakamma) made during her cross-examination would on to show that her sons namely the defendants have contributed money to the joint family and so also for the construction of the house. It is further evident from her admissions that the construction of the suit house was carried out with the help of her sons even after the death of her husband. The evidence of D.W. 1. that himself and other defendants being contributed both for purchasing the suit site and also for the construction of the superstructure therein, is in consilience with the admissions made by PW. 1. Thus, it is obvious from the evidence on record that the suit house was acquired jointly by the defendants and late Kondala Naidu. Further it is made out from the evidence that the defendants have lived jointly with the 1st plaintiff till recently, constituting a joint family. The evidence as discussed above would get to disclose that the defendants being the members of the joint family helped late Kondalaidu in the acquisition the suit site and also in raising the suit house within that site. Thus, it was made out that the suit house was constructed by late Kondalaidu with the joint family funds taking from common hotch pot. If that is made out from the family acquisition and in which late Kondalaidu was having only 1/5th share. The issue is therefore held accordingly.

13. This judgment was affirmed in A.S. No. 332 of 1979 by the Court of Additional Chief Judge, City Civil Court, Secunderabad, and by this Court in S.A. No. 88 of 1982, vide judgment, dated 23.02.1987. Therefore, it was not open to the respondent to plead anything to the contrary.

14. Obviously, it is the judgment in O.S. No. 1012 of 1973 that prompted the appellants herein to file the present suit for eviction of the respondent. In her written statement, the respondent tried to play down the effect of the dismissal of O.S. No. 1012 of 1973. It needs to be noted that she did not take any new, or fresh plea, as regards her entitlement for a share in the property, other than the one taken by her in O.S. No. 1012 of 1973. She raised an objection as to the array of parties. To be more specific, she did not take a plea that she is entitled to be allotted an independent share, or that the property is liable to be partitioned. The suit was decreed and the respondents filed A.S. No. 1 of 1993.

15. Before the lower appellate Court, the appellants herein raised a specific objection that the respondent did not claim any share for herself, in the suit property. The lower appellate Court took a strange view of the matter and proceeded as though the absence of plea was of no consequence. In its anxiety to ignore the lapse on the part of the respondent, the lower appellate Court committed patent mistakes, which are contrary to the record. The conclusive portion of the judgment reads as under:

The main point that arises for consideration is not that the defendant whether has got right in the suit schedule property by virtue of being the daughter of late Kondalraidu and late Janakamma but whether the plaintiffs are entitled to evict the defendant from the premises on the ground that the suit schedule premises is joint family property consisting of late Kondalraidu and the plaintiffs. It has been categorically proved by the appellant/defendant from the cross-examination of PW. 1 that the suit house was self acquired property of late Kondalraidu. The plea of the plaintiffs that they contributed for construction of the house and they became joint owners and that they permitted the appellant/defendant to remain in the suit is totally false and therefore, the suit is liable to be dismissed. I am of the firm opinion that the proper course is to file a partition suit. In that view the appeal is maintainable and for the reasons discussed above I feel the judgment and decree of the lower court are liable to be set aside.

16. The lower appellate Court did not even care to verify the findings in Ex. A.1 i.e., judgment in O.S. No. 1012 of 1973, which was affirmed by this Court in S.A. No. 88 of 1982, and its observation that the suit house was the self-acquired property of Kondal Rayudu is contrary to the record. To sustain an otherwise untenable conclusion, it proceeded to commit further mistakes in making observations, which are opposed to the record and law. This ground is sufficient to set aside the judgment and decree of the lower appellate Court. However, on account of the long standing disputes between the parties, and having regard to the perseverance with which the litigation is fought, the other subsidiary contentions, which may arise for consideration, need to be dealt with, lest the litigation further proliferates.

17. Assuming that the respondent can raise a plea, asserting her own share in the suit schedule property, by filing an application to amend the written statement, it needs to be seen, as to where she stands in that context.

18. The fact that the suit schedule property was not the exclusive one of late Kondal Rayudu and on the other hand, it is the joint acquisition of himself and his sons, the appellants herein, has been conclusively held by the trial Court in O.S. No. 1012 of 1973 and that finding was affirmed by this Court in S.A. No. 88 of 1982. Therefore, even if the respondent is permitted to amend her pleadings, she cannot take any stand contrary to the said findings. The only course left over, is to see as to whether she can demand the partition of the said property.

19. The starting point for examining this would be to treat the property as the

joint acquisition of Kondal Rayudu and the appellants and the respondent. In that configuration, Janakamma does not figure as an independent coparcener. In Ex.A.1, it was already held that Kondal Rayudu is entitled for 1/5th share. In an imaginary partition, that 1/5th share, being 50 square yards, out of 250 square yards, is to be allocated for Kondal Rayudu and one share each, to the appellants 1 to 4. In the share of Kondal Rayudu, the appellants and their mother Janakamma would be entitled to 1/5th share each, which accounts for 10 square yards, each. Janakamma, in turn, would have been entitled to seek partition of her share during her lifetime. The record discloses that she did not insist on partition. Therefore, the consequences of her share not having been partitioned during her lifetime need to be examined.

20. In *Controller of Estate Duty, Madras Vs. Alladi Kuppuswamy*, , the Supreme Court had an occasion to deal with similar question. In the said judgment, the nature of conferment of coparcenary rights upon a woman under the 1937 Act, was aptly described by the Supreme Court as under:

By the Act (Act of 1937) certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener: though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshra school of taking that interest by the rule of survivorship remains suspended so long as that estate enures. x x x She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property.

21. Therefore, the legal consequence is that, since Janakamma did not seek partition of her share, in the property held by her husband, during her lifetime, her putative share would merge into the coparcenary and it would not be available to be dealt with separately. Being a married woman, the respondent did not have any independent share in the coparcenary. She could have claimed a share in the property of her mother, provided the latter got any independent share, on partition, during her lifetime. Since that did not take place, the respondent stands no where vis-vis the suit schedule property. Viewed from any angle, the judgment of the lower appellate Court cannot be sustained.

22. The Second Appeal is accordingly allowed and the judgment and decree passed by the lower appellate Court is set aside. The result would be that the

judgment and decree of the trial Court would hold good. There shall be no order as to costs.