

(2009) 09 AP CK 0049

In the Andhra Pradesh High Court

Case No : A.S. No. 171 of 2007 and Cross-Objections

Ganachari Veeraiah alias Veeresham alias Shankaraiah and
Another

APPELLANT

Vs

Ganachari Shiva Ranjani

RESPONDENT

Date of Decision : 07-09-2009

Acts Referred:

Hindu Succession Act, 1956 — Section 23, 26, 29A, 6, 6(1)

Citation : (2010) 1 ALT 799

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : P.V. Narayana Rao, in A.S, for the Appellant; P.V. Narayana Rao in Cross Objections and P. Sridhar Reddy, for the Respondent

Judgement

L. Narasimha Reddy, J.—The 2nd appellant is the son, and the sole respondent is the daughter of the 1st appellant. The respondent filed O.S. No. 41 of 2005 in the Court of senior Civil Judge, Siricilla, against the appellants for partition and separate possession of 1/3rd share in plaint "A" and "B" schedule properties, and for a declaration, that the gift/settlement deeds dated 14-09-2005, executed by the 1st appellant are not binding upon her.

2. The suit schedule properties comprised of plaint "A" and "B" schedules. Plaint "A" schedule has three items viz., Item No. 1, RCC house with ground, first and second floors; Item No. 2, RCC house with ground and first floor, and Item No. 3, RCC house with ground and first floor. Plaint "B" schedule comprised of two items, viz., agricultural land of Ac.1.13 1/2 guntas at Vemulawada, and open plot of land of 400 sq. yards, at Kallakal Village, Toopran Mandal, Medak District.

3. The respondent pleaded that plaint "A" and "B" schedule items are joint family properties under the management of the 1st appellant. She has briefly stated the manner in which the items were acquired. She stated that she married, in the year 1999, a Muslim person, who was converted into Hindu religion, and that the marriage was not to the liking of her parents and brother.

According to her, she is in joint possession of the suit schedule properties, and that the 1st appellant did not accede to her request for partition of the properties.

4. The 1st appellant filed the written-statement, and the same was adopted by the 2nd appellant. They pleaded that the suit is not maintainable on the ground that the respondent has converted into Islam religion, and changed her name as "Mahamooda Bee". The averment that the husband of the respondent was converted into Hindu religion was denied. The 1st appellant pleaded that two old houses were allotted to his share in O.S. No. 166 of 1974, filed by his paternal uncle, and after demolition of the houses, the constructions were made upon the site, with his income. Items 1 and 2 of suit "A" schedule properties are said to be his properties, and that item 3 thereof has been purchased by him, from one, Y. Nagabhushanam, under a registered document. The two items of "B" schedule are also said to have been purchased by him. With these pleadings, the appellants opposed the plea of the respondent, for partition of the properties.

5. Through its judgment dated 15-02-2007, the trial Court passed a preliminary decree, as regards items 1 and 2 of plaint "A" schedule. The suit was dismissed as regards item 3 of "A" schedule, and the entire "B" schedule property. The appellants feel aggrieved by the preliminary decree passed by the trial Court.

6. The respondent, on the other hand, filed cross-objections, feeling aggrieved by the dismissal of the suit, as regards other items.

7. Sri P.V. Narayana Rao, learned Counsel for the appellants, submits that though the respondent based her claim on the provisions of the Hindu Succession Act, 1956 (for short "the Act"), as amended through Act 39 of 2005, she can seek partition, when the succession opens, on the death of the concerned male Hindu, and not earlier thereto. He contends that the respondent does not have any right to claim the property, as long as the 1st appellant is alive. Learned Counsel submits that the trial Court erred in decreeing the suit, as regards items 1 and 2 of the plaint "A" schedule properties, when they are available for partition. He contends that what was allotted to the 1st appellant under the decree in O.S. No. 166 of 1974 was only the land, with dilapidated house, and the constructions were made with the income and earnings of the 1st appellant. According to the learned Counsel, the respondent, at the most, would be entitled to 1/3rd of the value of the land, and not the structures. He places reliance upon certain decided cases.

8. Sri P. Sridhar Reddy, learned Counsel for the respondent, on the other hand, submits that his client did not change her religion and that not only she continued to be a Hindu, but also her husband, who was a Muslim, became a Hindu at the time of marriage. He contends that, even where a Hindu changes religion, it does not result in disqualification to inherit or succeed, and u/s 26 of the Act it is only his progeny, that is barred from succession, subject to certain limitations. Learned Counsel submits that the trial Court has recorded clear findings on the basis of oral and documentary evidence, to the effect that items 1

and 2 of "A" schedule are joint family properties, and the finding does not warrant interference. He contends that the respondent proved that other items were also acquired through the income derived from the nucleus of the family, and the preliminary decree ought to have been passed in respect of those items also.

9. On the basis of the pleadings before it, the trial Court framed the following issues:

(a) Whether the plaintiff became Muslim by marrying a Muslim; thereby not entitled to file the suit? And cannot be considered as a Hindu Coparcener?

(b) Whether the husband of plaintiff is a Hindu, having converted to Hindu Religion? And married the plaintiff as per Hindu Rites in Aarya Samaj, Hyderabad, dt. 29-07-1999?

(c) Whether the plaintiff is not entitled to seek partition in respect of Item No. 1 of A-schedule in view of Section 23 of Hindu Succession Act?

(d) Whether the suit schedule properties are joint family properties and liable for partition?

10. The respondent deposed as P.W.1. She examined P.W.2 to speak about her marriage, according to the practices and rituals of Aarya Samaj. Exs.A-1 to A-19 were filed by her. The 1st appellant deposed as D.W.1, and no other witnesses were examined, on his behalf. He filed Exs.B-1 to B-153. Most of the documents are house tax receipts, permissions for construction, etc.

11. The appellants did not pursue the controversy covered by issues (a) and (b). Issue (c) becomes redundant, in view of repeal of Section 23 of the Act, through Act 39 of 2005. Arguments are addressed mostly on the distinction between succession, on the one hand, and coparcenary rights, on the other hand; and about the nature of various items of suit schedule property, in the context of their availability, or otherwise, for partition.

12. In view of these submissions, two aspects become important viz.,

(1) The distinction between the coparcenary rights, on the one hand, and succession, on the other hand, and

(2) The nature of the suit schedule properties, in the context of their availability for partition.

13. The sole respondent is the daughter of the 1st appellant and sister of the 2nd appellant. The relationship between the appellants, on the one hand, and respondent, on the other hand, appears to have suffered a set back, ever since the latter married a person, by name, Md. Kareem, who is said to have since been converted into Hinduism, and named as Shiva Kumar. Six years after the marriage, she filed the suit for partition. By the time the suit was filed. Section 29-A of the Act, in its application to the State of Andhra Pradesh; was in force.

That provision conferred the status of coparcener, upon a daughter, in Hindu joint family, governed by Mitakshara Law. That, however, was limited to the one, of allotment of a share, in the event of a partition in a joint family, subject to certain limitations. The respondent appears to have based her claim on that provision. Shortly after the suit was filed, Parliament amended Section 6 of the Act. The amended provision reads as under:

Section 6. Devolution of interest in coparcenary property:

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall.

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of Sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child

of the predeceased son or a predeceased daughter, as the case may be.

Another provision, which has relevance, is Section 8. It reads,

Section 8. General rules of succession in the case of males:

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:

- (a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
- (b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

14. Learned Counsel for the appellants submits that notwithstanding the conferment of coparcenary rights upon a daughter, she has to wait, till the succession opens, to claim her share. He places reliance upon Sub-section (3) of Section 6, as well as Section 8 of the Act.

15. It is noteworthy that Sections 6(3) and 8 give an indication that the succession would open on the death of a person, whose property is to devolve. Coparcenary is a typical concept, specific to persons, professing Hindu religion. It clothes an individual, with right to property, with the incidence of mere worth. Though succession is also a concept through which, an individual gets right, vis-a-vis the property, on account of his kinship to the owner, there exists a clear distinction between these two concepts. The first is that, the right of coparcener is against a property, which is held by joint family, and not an individual. Succession, on the other hand, is, in respect of the property held by one individual. The second is that a coparcener can enforce his right at any point of time, by seeking partition, whereas succession would take place only after the death of the owner of the property.

16. Though the title of the Hindu succession Act suggests that it deals with matters of succession, it has several ingredients, relating to coparcenary also. It may be that, one and the same individual may be entitled for the rights as a coparcener, on the one hand, and right to succeed, on the other hand. While the succession would open, only on the death of the predecessor, the right to seek partition can be exercised even while the other coparceners, including the manager of the family is alive. Some times, it may so happen, that against the same set of persons, an individual may have rights, partly of coparcenary in nature, and partly of succession. One thing can certainly be said that, one and the same item of property cannot be subject-matter of partition, on the one hand, and succession, on the other hand. More often than not, these two aspects are treated as interchangeable/or different facets of the same right. This naturally would give rise to certain complications.

17. Sections 6(3) and 8 of the Act deal with succession to the property, by a Hindu, who is governed by the Mitakshara Law. The succession provided for, under those provisions, has nothing to do with the right to seek partition.

18. The recent amendment to Section 6 of the Act has virtually obliterated the distinction between male and female members of a joint Hindu family, as regards conferment of coparcenary rights. The result is that wherever it is compatible for a Hindu male, to exercise rights of coparcener, including the one, of seeking partition, it is equally competent for a Hindu female of the same degree, to exercise such rights. In view of this development, the right of the respondent, to seek partition of the joint family properties; cannot be denied. If at all she has to wait for the opening of succession, it is only in respect of the properties, that are exclusively owned by the appellants, and which are not part of joint family properties. Her right to seek partition of joint family properties is absolute, and not subjected to any riders.

19. A strong effort was made by the appellants to convince the trial Court, that the respondent lost her right to claim the properties, on account of her conversion into a different religion. Firstly, the plea of conversion was not proved, and the trial Court has recorded a finding, that not only the respondent remained in the Hindu religion, but also her husband was converted into Hinduism. Assuming that there was a change of religion, on the part of the respondent, there would not be any adverse effect upon her right, as a coparcener. Section 26 of the Act imposes disqualification, in the event of conversion, in a limited way, that too, upon the offspring of the convert, and not upon himself. The provision reads as under:

Section 26: Convert's descendants disqualified:- Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

20. Another objection raised on behalf of the appellants was, that the respondent cannot seek partition of a dwelling house. Reliance is placed upon Section 23 of the Act. However, that provision stood repealed, through Act 39 of 2005.

21. The result of this discussion is that, the right to seek partition of the joint family properties conferred upon the respondent u/s 6(1) of the Act, and it is independent of, and different from, the right to succeed under Sections 6(3) and 8 of the Act. While the partition of the joint family properties can be sought at any point of time, the succession would open, only on the death of the owner of the property.

22. Once the right of the respondent to seek portion as a coparcener is recognized, the focus shifts to the identification of the properties, that are available for partition. It must be said to the credit of the trial Court, that it has

undertaken extensive, and relevant discussion, in relation to each and every item of property, before arriving at conclusions. While the appellants feel aggrieved by the finding of the trial Court, as regards items 1 and 2 of "A" schedule, the respondent urges that the trial Court was not justified in excluding the other items, from the scope of partition.

23. Items 1 and 2 of "A" schedule comprised of two buildings, constructed over two separate pieces of land. The record discloses that the plots, upon which, items 1 and 2 of "A" schedule houses were constructed; were allotted to the share of the 1st appellant in a compromise decree, passed in O.S. No. 166 of 1974 filed as Ex.A-8. That suit was filed by the paternal uncle of the 1st appellant. It is not in dispute that two old houses were existing thereon. The father of the 1st appellant was alive, almost up to the filing of O.S. No. 166 of 1974. 1st appellant was the junior-most member of the family. By the time the decree was passed in that suit, he was employed. There is nothing on record to show, that the said items were yielding any income. In her deposition as P.W.1, the respondent admitted that the father of the 1st appellant was living on begging or through alms. Few years after the decree was passed, the buildings were constructed. The trial Court went mostly by presumptions in concluding, that the buildings may have been constructed with the income derived from the old houses. At one place of the judgment, the trial Court observed,

...As already stated by me no evidence was placed by the D.W.1 to the effect that, the shops he got under the partition were unfit for habitation from 1976 to the date of demolition or new construction. Therefore, there is every likelihood for the D.W.1 to receive rents from those shops at least till the date of their demolition. In view of the location of the items 1 and 2 even prior to the reconstructions and the nature of the property, one can presume that the D.W.1 had been in receipt of rents...

24. It needs to be noted that the permission for construction of the buildings on the two sites was obtained soon after the decree in O.S. No. 166 of 1974, somewhere in the year 1977-78, and it was extended by, up to 1979. In one form or the other, the work continued for quite a long time. Once it is evident that the old buildings were demolished soon after the decree in Ex.A-8, hardly there existed any income from those properties. The ratio laid down by the Supreme Court in AIR 2003 3800 (SC) gets attracted in this regard.

25. The respondent did not place any material before the trial Court, to prove that there existed any nucleus of the joint family, which was capable of yielding income, sufficient to construct the buildings, over the sites, allotted to the share of the 1st appellant, under Ex.A-8. It has already been mentioned that the 1st appellant was employed, and except the salary, he has no other income.

26. It is not uncommon that developments are made by coparceners, with their own funds, over the sites, or land, that belong to joint family. Subjecting the land together with the building, constructed by one of the coparceners, would

naturally lead to injustice. The Madras High Court, in A.L.P.R. Periakaruppan Chetti Vs. R.M.P.R. Arunachalam Chetti and Another, held that, in such cases, what becomes partible is the value of the land, and not the superstructure. Therefore, the finding of the trial Court, as regards items 1 and 2 of "A" schedule, needs to be modified, to the effect that the respondent shall be entitled to 1/3rd share in the value of the sites on which, items 1 and 2 of "A" schedule were constructed.

27. Now remains the Cross-objections:

They relate to the finding of the trial Court on item 3 of "A" schedule, and two items of "B" schedule properties. The source through which, the properties were acquired, was pleaded and proved before the trial Court. Admittedly, those three items were purchased through sale deeds, in the name of the 1st appellant. In the discussion, in relation to items 1 and 2 of "A" schedule properties, it has been observed that the 1st appellant did not succeed to any income yielding property. Therefore, the acquisitions made in his name cannot be said to be through the income derived from the nucleus of the joint family. In that view of the matter, the finding of the trial Court, as regards item 3 of "A" schedule, and two items in "B" schedule, does not warrant interference.

28. For the foregoing reasons, the appeal is partly allowed, modifying the preliminary decree, passed by the trial Court, to the effect that the respondent shall be entitled to 1/3rd share, of the value of the sites, upon which, items 1 and 2 of "A" schedule buildings were constructed.

29. The Cross-objections are rejected.

30. There shall be no order as to costs.