
(1995) 01 AP CK 0022
In the Andhra Pradesh High Court
Case No : A.S. No. 1572 of 1982

Musini Leela Prasad

APPELLANT

Vs

Musini Bhavani and Others

RESPONDENT

Date of Decision : 20-01-1995

Acts Referred:

Hindu Succession Act, 1956 — Section 6, 8

Citation : (1995) 1 ALT 814 : (1995) 1 APLJ 263 : (1995) 2 CivCC 94

Hon'ble Judges : S.V. Maruthi, J

Bench : Single Bench

Advocate : R.V. Subba Rao, for the Appellant; V.L.N.G.K. Murthy, for the Respondent

Final Decision : Allowed

Judgement

S.V. Maruthi, J.—The first defendant is the appellant. The plaintiff is the wife of the first defendant. She filed a suit in forma pnapueris for partition of the plaintiff "A" Schedule properties by metes and bounds and as per good and bad qualities into three equal shares and for possession of one such share to the plaintiff after ejecting the defendants therefrom and for costs of the suit. The averments of the plaintiff, in brief, are as follows:-

2. It plaintiff is the legally wedded wife of the first defendant. The second defendant is the undivided brother of defendant No. 1, while defendant No. 3 is the mother of defendants 1 and 2. Sri Musini Narasimhamurthy, is the father of defendants 1 and 2 and the husband of the third defendant. The immovable properties described in the plaintiff "A" schedule are the ancestral joint family properties of the said joint family. The said Narasimhamurthy, died intestate and undivided from his sons in or about 1960. He left behind him his two sons i.e., defendant No. 1 and defendant No. 2 and his widow defendant No. 3 as his sole heirs under law. Therefore his undivided 1/3rd share in plaintiff "A" schedule defendant No. 1 and defendant No. 2 purchased the properties described in the plaintiff "B" schedule with the income derived out of the ancestral properties, in

the name of the mother i.e., the defendant No. 3 benami and for the benefit of defendant No. 1 and defendant No. 2. The first defendant is thus having an undivided 1/3rd share in the plaint "A" schedule properties on his own right and has another undivided 1/3rd share out of his father's 1/3rd share in the same i.e., $\frac{1}{3} + \frac{1}{9} = \frac{4}{9}$ share in the plaint "A" schedule properties and an undivided half share in plaint "B" schedule properties. While so, a son was born to defendant No. 1. through plaintiff on 6-2-1971 and immediately there after he died. Consequently, the said child's half share acquired by birth in defendant No. 1's $\frac{4}{9}$ th share in plaint "A" schedule properties and half share in plaint "B" schedule properties i.e., $\frac{4}{18}$ th, $\frac{2}{9}$ th share in plaint "A" schedule properties and $\frac{1}{4}$ th share in plaint "B" schedule properties devolved on his mother, the plaintiff. Subsequently, another son was born to the first defendant through the plaintiff on 19-9-1974 and he also immediately died. Consequently his undivided half share out of the remaining $\frac{2}{9}$ th share in plaint "A" schedule and $\frac{1}{4}$ th share in plaint "B" schedule properties devolved on the plaintiff. The first defendant is an employee in the Postal department working as a Postman drawing about Rs. 450/- per mensem. He developed illicit intimacy with a Muslim woman by name Gulzar and started ill-treating the plaintiff as she protested against his ways of life. Ultimately during April, 1976 the plaintiff was driven out by the first defendant and the plaintiff had no option but to return to her parents house at Pedalanka, Hamlet of Kesarakurru, where her father was working as a Mile Coolie in Public Works Department. All samans of the plaintiff and her movables described in the plaint "C" schedule are with defendant No. 1 and the plaintiff was not allowed even to take them with her. Hence the plaintiff claimed partition of plaint "A" and "B" schedule properties and possession of her share in the said properties and also claimed return of her movable properties described in plaint "C" schedule or costs of the same to be paid to her. She also claimed payment of Rs. 200/- per mensem towards her separate residence and maintenance. Hence the suit for partition and separate possession of her share and also for maintenance at the rate of Rs. 200/- per month.

3. Defendant No. 1 filed a written statement which was adopted by the second defendant. Defendant No. 1 admitted the relationship between the plaintiff and himself and also the plaint "A" Schedule properties are ancestral joint family properties. He denied the averments that the defendants 1 and 2 purchased the "B" schedule properties with their funds in the name of the third defendant benami and for the benefit of the defendants 1 and 2; that the joint family of the defendants owned and possessed the plaint "B" schedule properties; that the third defendant is only a benamidar for defendants 1 and 2 in respect of "B" schedule properties; that the defendants 1 and 2 are the real owners of the "B" schedule properties; that the defendant No. 3 has no manner of right in "B" schedule property. It is further stated that the plaint "B" schedule properties were purchased by defendant No. 3 with her stridhana funds and she alone has been paying taxes due to the Government; that no son was born to the first defendant either on 6-2-1971 or on 19-9-1974 and that he was working as

E.D.D.A. in Postal Department and drawing a sum of Rs. 92/- per month. He also denied that he was addicted to all vices like wine, woman and gambling; that he developed illicit intimacy with Gulzar at Mandapet and that he began to treat the plaintiff cruelly that he was demanding the plaintiff to give her written consent for the marriage of the Muslim lady. He further stated that the plaintiff is a quarrelsome lady and in the habit of going away to her parents house frequently; that the plaintiff voluntarily left for her parents house with, her samans in a box as usual and that she did not come back in spite of several demands by first defendant that the plaintiff was not entitled to claim maintenance or separate residence; that the plaintiff "C" schedule movables do not exist; that there are no grounds for the plaintiff to stay away from her husband and that the plaintiff was not entitled to claim any charge on the plaintiff "A" and "B" schedule properties.

4. Defendant No. 3 filed a written statement contending that "B" schedule properties are stridhana properties; that she purchased the same with her stridhana funds; that she has been in possession of "B" schedule properties since the date of sale and she has been paying taxes thereon due to the Government and that she is the absolute owner of "B" schedule properties and defendants 1 and 2 have no interest or title or possession in respect of that properties.

5. On the basis of the above pleadings, the learned Subordinate Judge framed the following issues:-

1. Whether the plaintiff "B" schedule properties were purchased with joint family funds benami in the name of D-3 and whether they are the joint family properties of D-1 and D-2?
2. Whether a son was born to D-1 on 6-2-1971 and whether the son died immediately and whether the plaintiff became entitled to the share of the alleged deceased minor?
3. Whether a son was born D-1 on 19-9-1974 and whether such son died immediately afterbirth and whether the plaintiff became entitled to the share of the alleged deceased minor son?
4. Whether the plaintiff is entitled to seek for partition of "A" and "B" schedule properties and if so, to what share she is entitled?
5. Whether the abandonment, legal cruelty and ill-treatment and keeping of a Muslim woman by D-1 are true?
6. Whether the plaintiff is entitled to claim maintenance and if so, at what rate?
7. Whether the "C" schedule property is true and existing and whether the plaintiff is entitled to recover possession of the same?
8. Whether the plaintiff is entitled to charge over the plaintiff "A" and "B" schedule properties?
9. To what relief?

6. On behalf of plaintiff six witnesses were examined. She herself was examined as P.W.1. Sri Koppiseti Nagabhushanam resident of Kothapeta, relative of plaintiff, was examined as P.W.2 Sri Rayudu Laxmanaswami, resident of Khandriga, Hamlet of Paliveda, was examined as P.W.3. Sri Koppiseti Manikyam, grand-mother of P.W.1 was examined as P.W.4 and Musini Manikyam, a resident of Kothapeta, was examined as P.W.5. Lady doctor was examined as P.W.6. Ex.A-1 was marked on behalf of the plaintiff. On behalf of the defendants, the first defendant examined himself as D.W.1 and defendant No. 3 was examined as D.W.2 Exhibits B-1 to B-5 were marked on behalf of the defendants.

7. On consideration of the oral and documentary evidence on record the learned Subordinate Judge held that the plaint "B" schedule properties are the separate properties of defendant No. 3 and they are not available for partition and that as on was born to the plaintiff on 6-2-1971 and he immediately died and another son was born to the plaintiff on 19-9-1974 and he also immediately died and the plaintiff is entitled for partition of "A" schedule properties. He also found that the plaintiff is entitled for maintenance on account of ill-treatment and keeping a woman. Holding as above, the learned Subordinate Judge decreed the suit. He passed a preliminary decree for partition of plaint "A" schedule properties by metes and bounds as per good and bad qualities in three equal shares and for possession of one such share being given to her after ejecting the defendants therefrom and for mesne profits on her share from the date of plaint till the delivery of possession. He awarded the maintenance of Rs. 50/- per month from the date of plaint with a charge over 1/9th share of defendant No. 1 in plaint "A" schedule property only. He directed the first defendant to pay the Court fee and each party to bear his or her own costs. Against which the present appeal was filed.

8. Before referring to the arguments advanced by the learned Counsel for the appellant, it is necessary to refer to the findings arrived at by the learned Subordinate Judge. He found that the "C" schedule property is not in existence. In support of the finding that P.W.1 gave birth to two sons for defendant No. 1, he relied on the evidence of P.W.4 who is the grand-mother of the plaintiff as well as the 1st defendant. The plaintiff is no other than the brother's daughter of defendant No. 3. In other words, she is the daughter of the maternal uncle of defendant No. 1. He observed that, the fact that the birth and death of two sons was not reported to panchayats or health authorities and the failure to examine Yarukulla Mahalaxmi is of much relevance as P.W.4, the grand-mother who was an old lady and categorically stated that P.W.1 gave birth two sons and there is no reason why an old lady should speak lies at that age.

9. The learned Judge disbelieved the evidence of P.W.6, who was the lady Doctor on the ground that the evidence is far fetched and against the well-settle principles of Medical Jurisprudence. He also disbelieved the case of the defendants that the plaintiff aborted in fourth month. In other words, relying on the evidence of P.W.4, who is the grand-mother of plaintiff and defendant No. 1,

the learned Subordinate Judge held that the births and deaths of the sons to the defendant No. 1 are correct.

10. The learned Counsel appearing for the appellant took me through the entire evidence. P.W.1 categorically stated in her evidence that her first delivery took place in the ancestral house of her father at Kothapeta at 1-30 a.m. in the night of Saturday and died next morning and that she does not know either the birth and death of the son was reported to the hospital or not. She also stated that her second son was born in the house of defendants 1 to 3 and defendant No. 3 attended to her delivery and subsequently a child was born in the afternoon at about 2-00 p.m. on Thursday and died the next day at 9-00 or 10-00 a.m. She does not know whether anybody reported about the birth and death of her second son. P.W.2 uncle of P.W.1 also spoke about the birth and death of two sons of P.W.1, the plaintiff. P.W.3 also spoke about the births of the children. P.W.4 who is the paternal grand-mother of P.W.1 and maternal grand-mother of defendant No. 1 stated that several neighbours including the tenants of the locality came and saw the both children prior to or subsequent to their death. However, she could not say when the first and second sons were born and the year, month and the ailment with which they died. She also stated that no doctor attended the children and that she does not know whether any letters were written reporting the births and deaths of the children; that P.W.1's first son was born in her house and the second son was born in defendant No. 3's house; that for the first son's birth and death parents of P.W.1 did not come; that no still births or abortions took place for P.W.1. From the evidence referred to above, especially the evidence of P.W.4, who is the grand-mother of the plaintiff and also the defendant No. 1, it is established that P.W.1 gave birth to two sons. There is no reason to disbelieve her evidence and I agree with the finding of the learned Judge that two sons were born to P.W.1 and they died immediately after their births on two occasions. P.W.4 being the grand-mother of the plaintiff and the defendant No. 1 there is no reasons why she should speak lies supporting the plaintiff's case.

11. The learned Subordinate Judge disbelieved the case of the defendants who spoke that the plaintiff aborted in the fourth month on the ground that there was no plea in the written statement and it is only during the course of trial that they have spoken about aborting in the 4th month. As regards the maintenance, relying on the evidence of P. Ws.1 to 4 the learned Judge held that defendant No. 1 resided with Gulzar and that he has abandoned the plaintiff. I see no infirmity in the finding arrived at by the learned Subordinate Judge.

12. The learned Counsel appearing for the appellant submitted that the property being joint family, on the death of the father of defendant Nos. 1 and 2 the share of the father devolves on defendant No.3, defendant Nos. 1 and 2 into three equal shares. Therefore, in addition to 1/3rd share the first defendant is entitled to 1/9 th share which devolved on him is to be excluded for the purpose of partition in view of the judgment of the Supreme Court in Commissioner of

Wealth Tax, Kanpur and Others Vs. Chander Sen and Others, wherein it was held:-

"Under the Hindu Law the son would inherit the property of his father as karta of his own family. But the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. The first rule is that the property of a male Hindu dying intestate shall devolve according to the provisions of Chapter II and Class I of the Schedule provides that if there is a male heir of Class I then upon the heirs mentioned in Class 1 of the Schedule. In interpreting provisions of Act it is necessary to bear in mind the Preamble to the Hindu Succession Act. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus. In view of the Preamble to the Act i.e., that to modify where necessary and to codify the law, it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as karta of his own undivided family. If a contrary view is taken it would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded u/s 8 to inherit, the latter would be applying the old Hindu Law get a right by birth of the said property contrary to the scheme outlined in Section 8. Further more the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu Law. It would be difficult to hold today that the property which devolved on a Hindu u/s 8 of the Hindu Succession Act would be HUF in his hand vis-a-vis his own son; that: would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule u/s 8 of the Act included widow, mother, daughter of predeceased son etc. The express words of Section 8 of the Hindu Succession Act cannot be ignored and must prevail. The Preamble to the Act is, inter alia, to "amend" the law. With that background the express language which excludes son's son but included son of predeceased son cannot be ignored."

13. From the above passage it is clear that the ancestral property inherited by the son on the death of his father shall be treated as his separate property and a son born to him is not entitled to a share by birth. At this stage I may point out that before the amendment of the Hindu Succession Act, 1956, the share in the ancestral property inherited by the son on the death of his father is treated as ancestral property in the hands of his son and therefore, the son got a share by birth. However, according to the judgment of the Supreme Court, referred to above, by virtue of the amendment introduced in 1956 Act and also by virtue of the fact that the intention of 1956 Act is to modify the then existing Hindu Law, it was held that a share in the joint family properties inherited by the son on the death of his father should be treated as separate property. The learned Judges pointed out that it would be difficult to hold today that the property which

devolved on a Hindu u/s 8 of the Hindu Succession Act would be HUF in his hand vis-a-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. Therefore the share which defendant No. 1 got on the death of his father i.e., 1/9th share is not available for partition as the son who was born does not get the share by birth. Therefore if 1/9th share is excluded the remaining property which is available for partition is 1/3rd share of defendant No. 1. Out of this property the plaintiff would be entitled to 3/4th which is 1/6th plus 1/12th which she inherited as the heir of her two sons born in 1971 and 1974. To this extent the decree is modified.

14. I may also point out an anomaly that if the share in the joint family property got by the appellant on the death of his father is treated as joint family and therefore, his predeceased son would have been entitled for a share by birth, then his share would be reduced. Further on the facts of the instant case the appellant has ancestral property and the wife gave birth to two sons who died while the father was alive are entitled to a share in the ancestral property and as per the provisions of the Act the mother becomes the heir to the interests of the son i.e., to the half share of the ancestral property for the son having left his surviving mother a female relative specified in Class I. The rule of survivorship will not operate and the mother takes interest of a child being Class I heir. So on the death of the first son in the ancestral property of the first defendant, the respondents and the appellant would share half and half. When the second son was born he also takes a right by birth in the remaining share of the father in the ancestral properties. Since he also died the mother similarly takes the entire interest of the child and the share of the husband and wife become 1/4th and 1/4th respectively. In other words respondent No. 1 would take 7/8th or 15/16th share in the husband's ancestral property on the death of the third and fourth male child respectively. The only way of avoiding the anomaly pointed out earlier is to amend the Hindu Succession Act by including the father in Class-I heirs so that under similar circumstances the father would also get a share from the son who dies during his life time. It is hightime that Class I under Hindu Succession Act, 1956 is amended suitably by including the "father" also as one of the heirs under Class I (refer to the article written by Sri C.S. Venkatasubramanian, in AIR 1956 SC 103 Section 6 of the Hindu Succession Act, 1956 a plea for (amendment)).

15. As regards the maintenance, in view of the findings in the earlier paragraphs, the learned Subordinate Judge is justified in fixing the maintenance at the rate of Rs. 50/- per month. I see no reason to interfere with the said finding. There shall be a charge on 7/36th share of defendant No. 1 in plaint "A" schedule property. In other respects the Judgment stands confirmed.

16. In the result, the appeal is allowed in part. Each party to bear his or her own costs.