

(2004) 01 AP CK 0022
In the Andhra Pradesh High Court
Case No : Second Appeal No. 265 of 1993

N. Anantha Kumar

APPELLANT

Vs

P. Anjaneyulu and Others

RESPONDENT

Date of Decision : 20-01-2004

Acts Referred:

Hindu Succession Act, 1956 — Section 30
Succession Act, 1925 — Section 57, 59, 63

Citation : (2004) 3 ALD 24 : (2004) 4 ALT 98 : (2004) 3 CivCC 169

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : C.R. Pratap Reddy, for the Appellant; E.S. Ramachandra Murthy, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—Heard Sri C.R. Pratap Reddy, Counsel representing the appellant and Sri Srinivas, Counsel representing Sri E.S. Ramachandra Murthy, Counsel representing the respondents.

2. The only substantial question of law which would arise for consideration in the present Second Appeal is as hereunder:

Whether the appellate Court is justified in reversing the well considered Judgment of the trial Court having held that the Will was executed by late Seetamma, but on the ground that there is no proof of partition between Seetamma and her sister Andalamma and that an undivided share cannot be bequeathed by a Will especially in the light of the provisions of Section 30 of the Hindu Succession Act, 1956, r/w. Sections 59 and 63 of the Indian Succession Act, 1925.

3. The learned Counsel for the appellant/plaintiff had taken this Court thoroughly through the findings recorded by the Court of first instance and also the findings recorded by the appellate Court and had explained that when both the branches

are representing only late Seetamma and having held that Seetamma died testate, there is no question of the 1st respondent becoming a co-sharer or co-owner in the facts and circumstances of the case. The learned Counsel also would maintain that the genuineness of the Will is not in serious controversy and definitely it cannot be also especially in the light of the concurrent findings recorded by both the Courts below relating to the genuineness of the Will as such. The learned Counsel also pointed out that in the light of Section 30 of the Hindu Succession Act, 1956 definitely Seetamma was competent to execute the Will in question and hence negating the relief on such a ground and reversing the well considered Judgment of the Court of first instance is totally unsustainable.

4. Per contra, Sri Srinivas, the learned Counsel representing the respondents would maintain that the appellant and the 1st respondent represent the two branches of Seetamma as reflected from the pedigree and in the light of the clear findings which had been recorded by the appellate Court the remedy prayed for by the appellant/plaintiff is a misconceived remedy and hence the appellate Court is well justified in reversing the Judgment and decree made by the Court of first instance.

5. Heard both the Counsel and also perused the oral and documentary evidence available on record and the findings recorded by the original Court and the appellate Court as well.

6. Ananth Kumar, the appellant herein as plaintiff instituted the suit O.S.No.191/80 on the file of District Munsif, Medak for the relief of permanent injunction in respect of the plaint schedule properties pleading in the plaint as hereunder:

7. The plaintiff is the owner, possessor and title holder of the agricultural land to an extent of Ac.0-09 gts. in S.No.89 situate at Maddulvai village and half portion of the house bearing No.2-1-91/2/A situated at Fatehnagar Chowrasta, Medak town. Originally the land in S.No.89 was inam land standing in the name of one Andalamma and her sister Seethamma as the joint owners of the above land. Seethamma died three years back and during her life time she executed a Will deed in favour of the plaintiff. It was pleaded that the tinal patta certificate was also issued in favour of the plaintiff declaring him as pattedar to an extent of half share in S.No.89 Admn. 0-14 gts. and S.No.90 admn. 0-04 gts and mutation was also effected in the revenue records in the Jamabandi for the year 1978-79. The ryothwari pass book was issued in favour of the plaintiff by the Revenue authorities. It was further pleaded that S.No.89 and S.No.90 are situated in one block. It was also pleaded that there was partition in respect of both the survey numbers into two equal shares in which the plaintiff got 0-09 gts. in S.No.89 and from the date of partition, the plaintiff had been enjoying the exclusive possession of the suit land. It was further pleaded that the suit house was originally in the name of Ayyawari Venkamma and that house was in possession of Seethamma till her death. The plaintiff being the sole heir of late Seethamma

who during her life time executed a will deed in favour of the plaintiff made an application before the Municipal Commissioner for transferring the ownership of the suit house. The Municipal Commissioner after following the procedure transferred the ownership in favour of the plaintiff vide his proceedings No.A3/211/78 dated 7-6-1978. The plaintiff was enjoying the possession of the old suit house and was paying the Municipal tax in the Municipality Medak. The said house being the old construction collapsed and the old basements are existing. It was also further pleaded that the defendants are strangers having no manner of right, title or interest over the suit property trying to trespass over the suit properties and to oust the plaintiff from the possession of the suit property and that the defendants came to the suit land on 9-7-1980 with some unsocial elements and tried to damage the seedlings of the paddy of Machulu variety which were raised by the plaintiff. The plaintiff managed to send them with great difficulty and retained his possession. The defendants while leaving the suit land threatened to dispossess the plaintiff from the schedule property forcibly. It was pleaded that the plaintiff being the absolute owner and exclusive possessor of the suit property, the defendants may be restrained perpetually from interfering in the peaceful possession of the plaintiff in respect of the suit property.

8. The suit was opposed by the defendants by filing a written statement pleading as hereunder :

It was pleaded that it is true that Andalamma and Setamma are the sisters but the execution of the alleged Will is false. Seetamma had two daughters through whom the plaintiff and the 1st defendant are their sons. It was further pleaded that there was agreement in the year 1978 in the presence of elders that the properties belonging to the share of Seetamma should be jointly and equally inherited and enjoyed by the plaintiff and the 1st defendant and that if there is any document executed by Seetamma, automatically the same becomes null and void. It was also pleaded that there was no partition and separate possession by metes and bounds in between the plaintiff and the 1st defendant nor any share was allotted to any one. The plaintiff schedule property and the Hanuman temple property of Medak had been in joint possession and enjoyment of the plaintiff and the 1st defendant. The plaintiff who is the son of elder daughter of Seetamma, by misrepresenting the facts to the Municipal and Revenue authorities, got faisla patta and mutation. Defendants 2 and 3 cultivated the suit land and put the seedlings of paddy of muchulu variety in the suit property. The defendants contend that the plaintiff had alienated the agricultural land belonging to the plaintiff and the 1st defendant. When the 1st defendant claimed his half share in the sale proceeds, the plaintiff filed this false suit to harass the 1st defendant. The plaintiff had no cause of action and the suit is liable to be dismissed with costs.

9. On the strength of the respective pleadings of the parties, the following Issues were settled :

1. Whether the plaintiff is entitled to the decree as prayed for ?

2. Whether the will deed executed by Seetamma is null and void ?

3. Whether the plaint schedule property and the Hanuman temple property of Medak have been in joint possession and enjoyment of plaintiff and defendants ?

4. To what relief ?

10. The appellant/plaintiff had examined himself as PW-1 and also examined PW-2 to PW-4 and also marked Exs.A-1 to A-10. Likewise, the 1st respondent/1st defendant examined himself as DW-1 and had examined yet another witness DW-2 and Exs.B-1 to B-1(d) were marked. The Court of first instance, on appreciation of the oral and documentary evidence available on record, came to the conclusion that the appellant/plaintiff is entitled to the relief of permanent injunction as prayed for and ultimately had decreed the suit with costs. Aggrieved by the same, the 1st defendant in the suit P.Anjaneyulu preferred A.S.No.22/88 on the file of Subordinate Judge, Medak and the appellate Court had just framed the Point for consideration "Whether the appellant is entitled for the relief as prayed for, but however the Issues framed by the trial Court had been referred to and findings had been recorded at para-7 on Issues 2 and 3 and at para-8 on Issue No.1" and ultimately came to the conclusion that the plaintiff is not entitled to the relief of permanent injunction and consequently allowed the Appeal. Aggrieved by the same, the present Second Appeal is preferred.

11. The factual matrix essential for disposing of the Second Appeal already had been narrated supra. The appellate Court while answering Issue No.1 at para-8 had stated as hereunder:

"The only legal position in favour of the defendant is that there is no partition in between Seetamma and Andalamma and no partition in between plaintiff and Andalamma. There is no document filed by the plaintiff/respondent No.1 in this case to prove that there was already partition in between themselves and hence characteristic nature of the suit property and family is undivided. Though the plaintiff in this suit is in possession and enjoyment of the suit schedule properties it is subject to partition since in joint Hindu family properties can be in the name of any member or co-parcener. The possession by the plaintiff (respondent No.1) over the suit schedule land and house only amounts to benami on behalf of the undivided joint family property.

This suit filed by the plaintiff/respondent No.1 is only for issuing of perpetual injunction in respect of the suit schedule properties. This suit is for bare injunction. There is no dispute in this case with regard to the relationship of the parties and the parties admitted the family pedigree as true. The partition alleged by the plaintiff is not proved by any document. Appellant is related as cousin brother to the plaintiff/respondent No.1. The said relation is admitted. One cannot seek injunction against his own brother or cousin brother when they are co-heirs or co-possessors. AIR 1954 S.C. 34. The possession of one co-heir considered in law as possession of all co-heirs. In this case plaintiff is in possession of the suit schedule properties without proof of partition either in

between himself and Andalamma and in between Seetamma and Andalamma. There is no document to show that there was partition. There cannot be an injunction against co-heir. Considering this aspect a suit for bare injunction by the plaintiff against the defendant is not maintainable. Hence I answer this issue No.1 in favour of the appellant against respondent No.1/plaintiff."

12. It is pertinent to note that both the contesting parties to the present lis, the cousin brothers, represent the branches of the two daughters of deceased Seetamma. The said Seetamma died testate and not intestate. Ex.A-9 is the Will and Ex.A-9(a) is the signature on Ex.A-9. Ex.A-1 is the final patta certificate and Ex.A-2 is the ryotwari pass book. Ex.A-3 is the pahani patrika for the year 1979-80. Exs.A-4 and A-5 are revenue receipts. Ex.A-6 is the order of Commissioner. Ex.A-7 is the municipal receipt. Ex.A-8 is the map and Ex.A-10 is the plaint rough plan. Ex.B-1 is the alleged agreement executed by the plaintiff. Ex.B-1(a) is the alleged signature of Andalamma, Ex.B-1(b) is the alleged signature of Ananth Kumar, Ex.B-1(c) is the alleged signature of Shyamlal who was examined as DW-2 and Ex.B-1(d) is the alleged signature of late Seetamma. The specific case of the appellant/plaintiff is that S.Nos.89 and 90 are located in one plot and the appellant/plaintiff partitioned both the survey numbers with Andalamma in two equal shares in which the plaintiff got 0-09 gts. in S.No.89 and ever since the date of partition, the plaintiff had been enjoying the said property and even in revenue records the names of the plaintiff and Andalamma alone had been mentioned in the cultivation column and it is his specific case that after the death of Seetamma, Andalamma and the plaintiff partitioned both the S.Nos.89 and 90 into two equal shares and in pursuance thereof a final patta certificate was issued declaring him as pattadar to an extent of half share in S.Nos.89 and 90 by the Assistant Collector, Medak and mutation also was effected in revenue records in Jama Bandi and ryotwari pass book was issued. Findings in detail had been recorded by the Court of first instance appreciating both the oral and documentary evidence. The evidence of DW-1 and DW-2 also had been discussed in detail and the agreement Ex.B-1 and the other evidence available on record also had been discussed at length. Several circumstances had been narrated why the stand taken by the 1st defendant in this regard cannot be believed. The appellate Court mainly had proceeded on the ground that there is no documentary evidence to prove the partition between the plaintiff and Andalamma and as such it is very clear that there is no partition between Seetamma and Andalamma and in the absence of partition deed or partition list or memo of partition it is to be presumed that the properties are the joint family properties when the family pedigree is admitted by the plaintiff.

13. It is no doubt true that Venkamma is the original holder of inam patta and she had two daughters Seetamma and Andalamma and Seetamma in turn had Anthamma, Venkayya and Manemma. Venkayya died in the year 1966. 1st defendant is the son of Anthamma and the plaintiff is the son of Manemma and thus the plaintiff and the 1st defendant are related as cousin brothers as per the family pedigree. Though the Will executed by Sitamma was denied in the

written statement, there was no serious contest relating to the same and concurrent findings had been recorded by both the Courts below relating to the proof of the Will. The appellate Court had recorded a finding that Ex.A-9 is in relation to an undivided share of the ancestral property in which the 1st defendant also is having a right and since there is no acceptable evidence relating to partition, the plaintiff is not entitled to the relief of permanent injunction. In my considered opinion, this approach adopted by the appellate Court is definitely erroneous and perverse too for the reason that the plaintiff and the 1st defendant are representing the respective daughter-branches and at any stretch of imagination in relation to such property, the principle relating to coparcenary cannot be extended. Section 30 of the Hindu Succession Act, 1956 dealing with Testamentary succession reads as hereunder :

"Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

Explanation: The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a Tarwad, Tavazhi, Illom, Kutumba or Kavaru in the property of the Tarwad, Tavazhi, Illom, Kutumba or Kavuru shall, notwithstanding anything contained in this Court or in any other law for the time being in force, be deemed to be the property capable of being disposed of by him or by her within the meaning of this Section."

14. It is no doubt true that Wills or Codicils initially were unknown to ancient Hindu law and the first Legislation dealing with execution and the interpretation thereof was the Indian Succession Act 1865 which was not applicable to Hindus and in 1870 Hindu Wills Act, Act 2 of 1870, was enacted which had extended the provisions of the Indian Succession Act 1865 to certain of the Hindu Wills and Codicils. Subsequent thereto, Act 6 of 1881 i.e., Probate and Administration Act allowed granting of Probate and Letters of Administration to the estate of a deceased person to whom the provisions Indian Succession Act, 1865 were not applicable and hence the Act applied to the Wills made by Hindus and the Indian Succession Act 1925 was enacted subsequent thereto repealing the Acts of 1865 and 1870, but incorporating the provisions thereof in Sections 57(a) and (b) and in 1926 the Act was amended and the provisions of Section 63 of the Indian Succession Act 1925 were extended to the Hindu Wills and Codicils made on or after 1-1-1927 and in 1929 there was yet another amendment amending the Indian Succession Act 1925 and the provisions specified in Schedule III to the Act were made applicable to Hindu Wills and Codicils made on or after 1st January 1927. Thus, the provisions of the Indian Succession Act 1925 specified in Schedule III which are applicable to Wills and Codicils of Hindus are Sections 59, 61 to 64, 68, 70, 71, 73 to 90, 95, 96, 98, 101 to 117, 119 to 190. A careful analysis of Section 30 of the Hindu Succession Act, 1956 read with the provisions of the Indian Succession Act, 1925 which are applicable in the case of Wills made

by Hindus makes it clear that there is no bar imposed on a female Hindu to make a Will in relation to the joint property. Even otherwise, in the present case, specific stand was taken that there was partition and the evidence of PW-1 is clear and categorical in this regard. Ample documentary evidence in respect thereof also had been produced. It is pertinent to note that the dispute is not from the branch of Andalamma. When the genuineness or the validity of the Will executed by Seetamma is not in serious dispute and concurrent findings had been recorded in this regard by both the Courts below, definitely the appellate Court is not justified in negating the relief of permanent injunction on the ground that the plaintiff and the 1st defendant would be co-sharers or co-owners since there is no acceptable evidence relating to partition. This definitely is an erroneous approach and the findings recorded by the appellate Court in this regard are perverse findings.

15. Hence, in the light of the foregoing discussion, the appellant/plaintiff is bound to succeed and accordingly the Judgment and decree of the appellate Court are hereby set aside and the Second Appeal is allowed restoring the Judgment and decree made by the Court of first instance. In view of the close relationship between the parties, this Court makes no order as to costs.