

(1993) 02 AP CK 0002

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No's. 133/91 and 39/92

Ponnolu Chandra Sekhar Reddy

APPELLANT

Vs

Vaka Rachaiah (died) by L.R. and Others

RESPONDENT

Date of Decision : 16-02-1993

Acts Referred:

Hindu Succession Act, 1956 — Section 6

Citation : (1993) 1 ALT 378

Hon'ble Judges : P. Ramakrishnam Raju, J;M.N. Rao, J

Bench : Division Bench

Advocate : C.V. Nagarjuna Reddy and M. Venkateswara Rao, for the Appellant; P. Sree Rama Moorthy, for R.2 and K. Jagan Mohan Reddy, for R.4 to R.6, for the Respondent

Judgement

P. Ramakrishnam Raju, J.—These two Letters Patent Appeals arise out of the decree and judgment made in A.S. No. 1085 of 1983, partly reversing the decree and judgment in O.S.No. 86 of 1981 on the file of the Subordinate Judge's Court, Cuddapah.

2. The appellant in L.P.A.No. 133 of 1991 is the plaintiff, while the legal representative of the first defendant is the appellant in L.P. A.No. 39 of 1992. The parties in these appeals will be referred to as the plaintiff and defendants for the sake of convenience.

3. The appellant in L.P.A. No. 133 of 1991 filed O.S.No. 86 of 1981 on the file of the Subordinate Judge's Court, Cuddapah for partition of the plaint schedule properties into two equal shares and for separate possession of one such share together with mesne profits. The defendant Nos.1 & 2 therein, are the alienee and his father respectively. The case of the plaintiff is that the plaint schedule properties are the properties of his joint family of which himself, his father - D-2 and his grandfather - P. Gangireddy are co-parceners. During the life time of his grandfather, his uncle, one Gangireddy, got divided from the joint family and went away. His paternal grandfather, Gangireddy died about eight years back and

on his death, his properties devolved upon the members of the joint family viz., plaintiff's father, the second defendant and the plaintiff by survivorship. As the second son of late Gangireddy having separated from the joint family, had no interest in the property left by late Gangireddy. However, even during the life time of his grandfather, his father, the second defendant had alienated the plaintiff schedule properties in favour of the first defendant while he was a minor. There was no legal necessity to alienate the properties.

The alienations were made for illegal and immoral purposes and as such, they are not binding on him. The second defendant remained ex parte and the first defendant contested the suit. It is his plea that he had purchased the plaintiff schedule properties under two registered sale deeds for valuable consideration from the second defendant who was in management of the joint family, for agricultural purposes and also for the marriage of his daughter and as such, the alienations are binding on the plaintiff.

4. The trial Court framed the necessary issues and after considering the oral and documentary evidence, found that the alienations under Exs.B-10 and B-11 are not binding on the plaintiff, as there is no legal necessity nor were they entered into for discharge of antecedent debts. Even the consideration under those documents was found to be inadequate. Accordingly, the trial Court decreed the suit for partition into two shares and for allotment of one such share to the plaintiff. Questioning the said decree, the first defendant filed A.S.No. 1085 of 1983.

5. While the appeal was pending, the second defendant died and his legal representatives are brought on record. The learned Single Judge also agreed with the findings of the trial Court that the properties are the joint family properties; that there was no legal necessity for alienating the properties under Exs.B-10 and B-11 and that therefore, they are not binding on the plaintiff. However, the learned single Judge granted a decree for 1/4th share in respect of items 1 to 4 of the suit schedule properties, on the ground that when the alienation (Ex.B-10) was made on 15-9-1964, the plaintiff's grandfather - Gangireddy was alive; since the said Gangireddy died in the year 1966, the items covered by Ex.B-10 will have to be divided into two shares, one share is to be allotted to the plaintiff's father and in that one share, the plaintiff will be entitled to a half share. Therefore, the plaintiff will be entitled to 1/4th share in items 1 to 4 of the suit schedule properties. In respect of item No. 5, the learned single Judge granted a decree for Rs. 500/- representing half share of the plaintiff in the said item. Aggrieved by this decree, the plaintiff preferred L.P.A.No. 133 of 1991. The first defendant also preferred L.P.A.No. 39 of 1992.

6. Sri C.V. Nagarjuna Reddy, learned Counsel for the appellant in L.P.A.No. 133 of 1991, submitted that having found that all the plaintiff schedule properties are the joint family properties and that the alienations made by the second defendant are not binding on the plaintiff for want of legal necessity, the learned single judge ought to have seen that the plaintiff although entitled to a 1/4th share on

the date of alienations under Ex.B-10 and as Gangireddy, the grandfather of the plaintiff died in the year 1966, his interest in the coparcenary property devolved by survivorship upon the surviving members of the co- parcenary viz., the plaintiff and his father and accordingly, the plaintiff's 1/4th share has enlarged into a half share and therefore, the plaintiff is entitled to a decree for half share instead of 1/4th share. The learned Counsel also contended that the learned single Judge having accepted that the plaintiff is entitled to a half share in item No. 5 of the plaint schedule covered by Ex.B-11, ought to have granted a decree for half share instead of a decree for Rs. 500/-.

7. Countering these arguments, Sri P. Sreerama Moorthy, learned Counsel for the appellants in L.P.A.No. 39 of 1992, contended that the sales under Exs. B-10 and B-11 are for valuable consideration and they are effected for legal necessity and for discharge of antecedent debts. Therefore, the said sales are binding on the palintiff. He has also made a feeble attempt to show that the plaint schedule properties are the self-acquired properties of late Gangireddy and as such, the plaintiff has no right to claim any share therein nor demand for partition of the said properties.

8. In view of the above submissions, it is to be seen whether the alienations made under Exs.B-10 and B-11 are binding on the plaintiff and if not, what is the share to which the plaintiff is entitled to?

9. In this context, it is necessary to state some of the admitted facts. Late Gangireddy, the grandfather of the plaintiff and his two sons viz., second defendant and his brother, Gangireddy constituted a joint family. While so, Gangireddy, son of Gangireddy, the paternal uncle of the plaintiff got divided from the joint family and walked away with some properties; with the result, Gangireddy, grand father of the plaintiff and the second defendant along with the plaintiff continued as members of joint Hindu family. Although Gangireddy was alive, the second defendant (father of the plaintiff) was managing the properties. While so, he sold away items 1 to 4 of the plaint schedule under a registered sale deed Ex.B-10 dt.15-9-1964 to the 1st defendant for a sum of Rs. 3,000/-. The sale deed recites that the sale was for the necessity of the family and for improvements of agricultural lands. By then, the grandfather of the plaintiff was alive and he died in the year 1966. The second defendant again sold item No. 5 of the plaint schedule under a registered sale deed Ex.B-11 in favour of the first defendant on 10-7-1972 for a consideration of Rs. 2,000/-. Of course, this document does not mention the purpose for which this sale was effected. The minor plaintiff filed the suit for a half share in the plaint schedule properties on the ground that the sales are not binding on him. It may be seen that admittedly, the plaintiff was a minor at that time and he was not even made eo nomine party to the sale deeds. If the plaintiff has a share in the said properties, it cannot be disputed that the sales will not be binding on him except for certain purposes. Therefore, the first question that falls for consideration is, what is the share of the plaintiff in the joint family properties. As already stated, a faint attempt is

made by the learned Counsel for the first defendant in these appeals, that the plaint schedule properties are the self-acquired properties of late Gangireddy and therefore, the plaintiff does not have a right. This contention has no substance.

10. Firstly, the plaintiff has specifically stated in the plaint that the plaint schedule properties are the joint family properties of Gangireddy, his paternal grandfather and the second defendant. The plaint schedule properties are referred to as joint family properties at several places in the plaint. But, the first defendant did not choose to deny the same in his written statement. What all he stated in the written statement in reply to these allegations, is that Survey No. 77/1 (item No. 5) does not belong to the joint family, but it is the exclusive property of the second defendant. As there was no denial that items 1 to 4 of the plaint schedule, covered by Ex.B-10 sale deed, are the joint family properties, we cannot countenance the argument of the learned Counsel in this regard. Even otherwise, what all the learned Counsel has relied on in support of his contention is the admission of some of the plaintiff's witnesses to the effect that the plaint schedule properties were acquired by Gangireddy, the grandfather of the plaintiff. The fact that these properties were acquired by Gangireddy was not denied even by the plaintiff. From this admission, the learned Counsel for the first defendant wants us to infer that these properties are the self-acquired properties of Gangireddy. We are afraid, we cannot read so much into the statement of these P.Ws. In fact, there is no admission that these properties are the self-acquired properties of late Gangireddy or that they are treated as such, and not as joint family properties.

11. In this connection, the learned Counsel has also relied on a decision reported in *Kavita v. State of Maharashtra* AIR 1981 SC 2084 to show that admission, unless explained, furnishes the best evidence. There cannot be any dispute on this proposition of law.

12. The learned counsel next relied on another decision reported in *Avadh Kishore Das Vs. Ram Gopal and Others*, . This decision is also relied on for the same purpose. Therefore, we agree with the findings of the trial Court as well as the learned single Judge that all the properties are the joint family properties.

13. If these are joint family properties, the irresistible conclusion is that the plaintiff's father would be entitled to an undivided half share and as of right by birth, the plaintiff would be entitled to a half share in his father's share. In the result, the plaintiff is entitled to an undivided 1/4th share in all the joint family properties, if the sale transactions under Exs.B-10 and B-11 are not binding on the plaintiff. As already stated, the plaintiff who was a minor at that time was not a party to the said sale transaction. Even the grandfather, late Gangireddy was also not a party to these transactions and as such, they are not binding on him even. No doubt, the father of the plaintiff as Manager of a joint Hindu family, has power to alienate the joint family property including the share of his sons and grand sons for legal necessity and for discharge of antecedent debts, provided, the debts are not tainted with illegality or immorality.

14. In the instant case, the brother of the first defendant was examined as D.W.1; while the first defendant himself was examined as D.W.2. D.Ws.4 & 5 are the attestors of Exs.B-10 and B-11 respectively. D.W.6 is the Revenue Inspector. D.Ws.7 & 8 are the accountant of the village and loans cleark of Taluk office respectively.

15. The trial Court as well as the learned single Judge on a consideration of the entire oral and documentary evidence came to the conclusion that the sales are not for legal necessity and so they cannot bind the minor plaintiff.

16. Ex.B-10 contains a recital that the sale was effected for improvements of agricultural lands. In fact, after selling items 1 to 4 under Ex.B-10, there will not be any agricultural land for the family, except Ac.0-20 cents of land where item No. 5 - motor and pump set are located. In Ex.B-11 no purpose for the alienation is mentioned. In the written statement of the first defendant it is stated that the second defendant sold the properties to the first defendant for necessities of the joint family and also for agricultural purchases and for the marriage of his daughter, Nirmaladevi. It transpired that Nirmaladevi was married in the year 1967 - long after the sale under Ex.B-10. Reliance has been placed on Ex.B-12- registration copy of sale deed executed by one Kondakka in favour of Nirmaladevi, to show that this property was purchased by the second defendant. The property covered by Ex.B-12 was purchased by Nirmaladevi and her husband. It does not show that the second defendant has paid the consideration for this property. Therefore, Ex.B-12 does not render any assistance to the first defendant.

17. An attempt was also made to show that the sale under Ex.B-11 was made to discharge the "takkavi" loan and manure loan contracted by the second defendant. D.Ws.7 & 8 are examined and Exs.B-29 to B-40 were marked. Exs. B-37 to B-40 are the receipts evidencing payment of some amount towards loan by the second defendant. They are dated 2-1-1974 i.e., long after the sale under Ex.B-11. That apart, they are signed by the second defendant himself. Ex.B-29 relates to a loan borrowed by the second defendant on 31-7-1952. The loan under Ex.B-31 was closed in the year 1957 itself. The other loans, in the name of Gangireddy, the grandfather of the plaintiff were also closed by 1957. Although the loans were taken long back in 1952 and 1962 it is sought to be established that they were discharged by making payment on 2-4-1974 without any pressure from anybody. Therefore, the trial Court was right in observing that there was no pressing demand on the joint family for discharge of these loans by selling the property. Therefore, in view of these circumstances, it is clear that there was no pressure on the joint family to sell away the property and discharge the said loans. In the above circumstances, we entirely agree with the finding of the trial Court, as confirmed by the learned single Judge that there was neither legal necessity nor was any proof of discharge of antecedent debts under the alienations covered by Exs.B-10 & B-11. Hence, these transactions are not binding on the plaintiff and as such, the sales are not binding on the 1/4th share

of the plaintiff in the joint family properties. For the same reasons we hold that the sales are not binding on Gangireddy also. If such is the case, the sales would be valid in respect of the 1/4th share of the second defendant alone. However, the matter does not end there. Gangireddy, the grand father of the plaintiff admittedly died in the year 1966. Therefore, what is the effect of the death of Gangireddy on these alienations is the next question that falls for consideration.

18. The learned Counsel for the appellant-plaintiff contends that by virtue of Section 6 of the Hindu Succession Act, the interest of late Gangireddy would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Hindu Succession Act, and therefore, himself and the second defendant would take equally. However, the learned Counsel for the appellant-first defendant maintains that the sale transaction under Ex.B-10 was entered into by the second defendant even during the life time of late Gangireddy and as he has acquiesced therein the same cannot be challenged by the plaintiff. Therefore, the question that falls for consideration is, whether Section 6 of the Hindu Succession Act, has application to the facts of this case, as claimed by the plaintiff.

19. Section 6 of the Hindu Succession Act is extracted hereunder: Section 6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation.:- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2:- Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

20. In this case, admittedly, the plaintiff's paternal uncle who constituted a joint Hindu family along with his father -Gangireddy, and brother, the second defendant has got separated from the joint family and walked away with some properties. Therefore, the other coparceners viz., the plaintiff, his father - the second defendant, and his grandfather, Gangireddy constituted a joint Hindu family. Gangireddy has got a half share in the joint family properties at the time of his death; whereas, the plaintiff and his father, the second defendant are the

other two coparceners who are entitled to the other half share. As already stated, the plaintiff by virtue of right by birth, is entitled to an equal share along with his father in the half share that would be allotted to his father on a notional partition with his grandfather, Gangireddy. While that is the situation Gangireddy, grandfather of the plaintiff died intestate in 1966. Therefore, when a male Hindu coparcener dies leaving an interest in the Mitakshara coparcenary property, his interest devolves by survivorship upon the surviving members of the coparcenary only. But there is an exception carved out in the proviso to Section 6 of the Act. If the deceased had left behind him surviving a female relative specified in Class I of the Schedule or a male relative specified in that Class, who claims through such female relative, the interest of the deceased shall not devolve by survivorship, but by testamentary or intestate succession. Explanation 1, clarifies that the interest of a Hindu Mitakshara coparcener shall be deemed to be a share in the property that would have been allotted to him if a partition had taken place immediately before his death. Explanation 2 gives further clarification that a divided son or his heir shall not claim any interest in the property of the deceased.

21. In this case, admittedly, the deceased Gangireddy had not left behind him surviving a female relative specified in Class I or a male relative who claims through such female relative. So, the proviso is not attracted. In the absence of application of proviso, Section 6 of the Hindu Succession Act, squarely applies to the facts of this case. Explanation 2 also does not leave us in doubt whether the separated son can claim any interest in the property left by the deceased as it is clear that the separated son or his heir cannot claim any share in the interest of the deceased.

22. Section 6 of the Act, is an attempt to preserve the institution of Hindu coparcenary and the unity of members of a joint family. The essence of coparcenary under the Mitakshara law is unity of ownership. Hence, Section 6 which preserves survivorship is in the nature of an exception to the general law of succession and when a coparcener dies, the Mitakshara coparcenary will not be disrupted, and the surviving coparceners continue the coparcenary and subject to the exceptions engrafted in the proviso, the undivided interest of the coparcener will devolve by survivorship on his death upon the surviving coparceners only. Therefore, by virtue of Section 6 of the Hindu Succession Act, the undivided half share of late Gangireddy, the grandfather of the plaintiff in the joint family properties (plaint schedule properties) devolved by survivorship upon the surviving members of the coparcenary viz., the second defendant and the plaintiff in equal shares. Therefore, on the death of late Gangireddy, by virtue of Section 6 of the Hindu Succession Act, the plaintiff's interest in the joint family properties is increased to a half share from 1/4th share.

23. Even assuming that Gangireddy and his undivided son, the second defendant alone constituted Hindu Mitakshara coparcenary, on the death of Gangireddy the interest of Gangireddy devolved by survivorship on his undivided son, the second

defendant by virtue of Section 6 of the Act, it would not make any difference for the plaintiff since the moment the interest of Gangireddy devolves by survivorship on the second defendant, the plaintiff is entitled to claim an equal share in those properties also along with his father, the second defendant by virtue of right by birth, since the property that fell into the hands of his father is his ancestral property. At the most, D-1 can retain the property that fell to the share of the second defendant on the death of late Gangireddy, since the sale transactions are binding on the second defendant and none else. Therefore, the first defendant cannot contend that the share of late Gangireddy has devolved on the second defendant and the same should be passed on to him by virtue of sale transactions under Exs.B-10 and B-11 effected by the second defendant. So, viewed from any angle it is clear that the plaintiff is entitled to a half share which cannot be alienated by his father, the second defendant. Therefore, in view of the foregoing discussion, we cannot agree with the finding of the learned single Judge that the plaintiff is entitled to the share only in items 1 to 4 of the plaint schedule.

24. The learned Counsel for the plaintiff-appellant also contended that the learned single Judge having found that the plaintiff is entitled to a half share in item No. 5 of the plaint- schedule, has merely granted decree for a sum of Rs. 500/- representing half share, instead of granting decree for half share as claimed. No doubt, both the trial Court as well as the learned single Judge found the entitlement of the plaintiff in respect of a half share in item No. 5 of the plaint schedule. The learned single Judge, however, observed that this item which is an electrical motor being subjected to use is liable for wear and tear, and, therefore the same cannot be divided between the parties. But the question of effecting division of the plaint schedule properties, will have to be gone into in the final decree proceedings. Therefore, we are of the view that the plaintiff is entitled to a half share in item No. 5 of the plaint schedule as found by the trial Court and confirmed by the learned single Judge. Therefore, the decree passed by the learned single Judge also requires modification.

25. The learned Counsel for the first defendant-appellant contended that since the plaintiff has based his cause of action for filing the suit on the basis of the two sale transactions covered by Exs.B-10 and B-11, the share of the plaintiff should be decided with reference to the dates of sale transactions. He relied upon a decision reported in *In Re: D. Lakshminarayana Chettiar and Another*, to show that the cause of action for the suit is only what is mentioned in the plaint.

26. The learned Counsel has also relied upon another decision reported in *In the Matter of In Re: Amirthalinga Thevan*, . In this decision it is held that "after born son" cannot object to the alienations made prior to his birth. These decisions have no application to the facts of this case.

27. For the fore-going discussion, we allow Letters Patent Appeal No. 133 of 1991, set aside the decree of the learned single Judge and restore the decree of the trial Court. No costs. The Letters Patent Appeal No. 39 of 1992 is dismissed.

No costs.