

(1968) 08 AP CK 0004

In the Andhra Pradesh High Court

Case No : Second Appeal No. 758 of 1965

Pootheraju Papayamma and Another

APPELLANT

Vs

Mallapragada Gopalakrishnamurthy and Others

RESPONDENT

Date of Decision : 13-08-1968

Acts Referred:

Hindu Womens Right to Property Act, 1937 — Section 3
Specific Relief Act, 1963 — Section 34

Citation : AIR 1969 AP 341 : (1969) 1 APLJ 131

Hon'ble Judges : Krishna Rao, J

Bench : Single Bench

Advocate : P. Balakrishna Murthy, for the Appellant; A.V. Krishna Rao, for the Respondent

Judgement

1. This second Appeal is filed by defendants 2nd 3 in the following circumstances: In order to appreciate the dispute between the parties it is necessary to set out the relationship between them which is as follows:

Sri Ramulu

(died 9-8- 1941)

Ramayamma (died 25-6-53)

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Venktata Subba Rao Chittemma (5th deft.)

(died 25-2-47) : Krishnaiah (1st deft.)

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Ramakrishna Rao (died 1-12-45] Papayamma (2nd deft.)

: Papayamma (2nd deft.)

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(adopted) Parthasarathi

(3rd defendant)

2. Sriramulu executed a deed of a gift conveying the suit property which is Ac. 0-10 cents of building site out of love and affection, in favour of his nephew Ghantayya, who is the father of plaintiffs 1 to 4 and the 4th defendant and the husband of the 5th plaintiff, on 30-6-48, and on the same by delivered possession of the property. Subsequent to the death of Ghantayya in June 1951 disputes arose between the plaintiffs and defendants 1 and 2 which resulted in proceedings u/s 145 Criminal Procedure Code in M. S. No. 53/58 on the file of the Additional Munsif Magistrate, Bandar. The said proceedings terminated in an order for possession in favour of defendants 1 to 3. Hence the plaintiffs filed the present suit for declaration that they are entitled to the suit property, that they are entitled to be in possession thereof and also for an injunction restraining of the defendants from interfering with the possession. The plaintiffs also amended the plaint by adding a prayer in the alternative that if the Court finds that the alternative that if the Court finds that the plaintiffs are out of possession a decree for possession may be granted to them.

Defendants 1 to 3 resisted the suit stating that the deed of gift relied upon by the plaintiffs is invalid and that it does not bind the second defendant who is entitled to a share in the suit property under the Hindu Women's Rights to Property Act, being the widow of a predeceased son of a predeceased son of Sriramulu, that the plaintiffs had no right to possession of the suit property. The trial Court dismissed the suit holding that the plaintiffs were not in possession of the property and that the deed of gift is invalid and not binding on the defendants. On appeal by the plaintiff in A. S. No. 32 of 1964, the Subordinate judge, Masulipatnam reversed the said judgment holding that the plaintiffs were in possession of the suit property, that the deed of gift is not void and that the right of the second defendant to obtain a partition of the property is not in any way affected. It was further observed by the learned Subordinate Judge, that the gift comprised only of Ac. 0-10 cents out of a larger extent Ac. 1-00 cents of land and that the second defendant's half share in the said one acre is left intact, for the reason that the property gifted is far less than the other half share.

3. In this second appeal, it is argued by the learned counsel for the appellants Sri Balakrishna Murthy that the view taken by the lower appellate Court is unsustainable in law and that the second defendant is entitled to challenge the gift deed even in this very suit filed by the plaintiffs to establish their right under the deed of gift irrespective of the fact whether it is possible to allot the alienated item towards the share of the alienating coparcener.

On the other hand, Sri A. V. Krishna Rao, the learned counsel for the plaintiffs

raised the following contention: (i) the only right of the second defendant under the Hindu Women's Rights to Property Act is to sue for partition and recover the share of her deceased husband; (ii) that it is not open to her as a defendant in the present suit to challenge the claim of the plaintiffs for a declaration of their title based upon the alienation that as they were in possession of the property got by their father under the deed of gift it is not necessary for them to file a suit for a general partition to work out their rights; and (iii) that the plaintiffs and their father who claim under the alienation from Sriramulu are in the position of a co-owner in relation to the second defendant and that their possession of the suit property being of an extent of only Ac. 0-10 cents not over and above the half share of the alienating coparcener, they are entitled to be in such possession.

4. Turning to the facts of the present case, Sriramulu executed the gift deed in question when he was the sole-surviving coparcener with respect to the property which was admittedly joint family property. It is not suggested that the gift deed is valid under the Hindu law in the sense that it was with respect to a small fraction of the property for a pious purpose recognised by the Hindu law . It cannot therefore be disputed that the second defendant's husband Ramakrishna Rao had been alive on the date of the gift deed, namely, 30-6-48, he could have successfully challenged the validity of the deed of gift. Under the provisions of Section 3 of the Hindu Women's Right Property Act (18 of 1937), the second defendant, being the widow of a predeceased son of a predeceased son of Sriramulu, has got same right to claim partition as a male owner and has in the property the same interest as her husband had. The position of a widow under the above provisions has been the subject matter of more than one judicial pronouncement. It is held that the expression "shall have the same interest as here husband" does not equate her to coparcener under the Hindu law, for, a person acquires the status of a coparcener only by birth or adoption, which, by fiction, is equivalent to birth in the family. She is said to acquire her interest neither by survivorship nor by inheritance but by reason of statute. It is however not necessary for the purpose of this case to enter into any discussion as to the proper description and the nature of the right which she claims. Her right is defined in Section 3 of the Hindu Women's Right to Property Act as a right to claim partition as a male owner and that she has in the property the same interest as her husband had. It therefore, follows, as a matter of logic, that at the time when Sriramulu defendant who is the only person alive in family, who can demand a partition, can question, the alienation in the same manner as her husband would have done if he were alive.

As the property which is the subject matter of alienation is joint family property in which the second defendant had a right to claim a share, the interest of the second defendant in so far as her claim for partition in the properties is concerned are certainly jeopardised and she is therefore entitled under law to challenge the said question. Even without her filing a suit for partition, it is always open to her to challenge the said alienation. If that be so, she will be equally entitled to challenge the alienation in a suit filed by the alience to declare

his right based on the said alienation. The learned counsel for the appellant placed reliance on a judgment of a Division Bench of the Madras High Court (Rajamannar, C. J., and Jagadisan, J.) reported in Lakshmi Ammal and Others Vs. Ramachandra Reddiar, , which is directly in point. Therein similar question was considered in a suit filed for a declaration of title on the basis of a deed of settlement, Jagadisan, J., who delivered the judgment on behalf of the Division Bench observed as follows:

"We are of opinion that even within the strict terms of Section 3(2) of the Hindu Women's Right of Property Act, the interest which a widow has being that of her deceased husband she cannot be a mere spectator of the properties being alienated by the surviving coparcener with the result of nullifying her rights totally and completely."

Following the ruling of the Madras High Court, I hold that the second defendant is entitled to challenge the alienation, and being a gift of the joint family property it is void in law.

5. Turning to the contentions of the learned counsel appearing for the respondents, I do not agree that it is the second defendant (widow) that should file a suit for partition in the first instance. It is now settled law (in Bombay and Madras) that a purchaser of an undivided interest of a coparcener in a specific item of property belonging to the joint family is not entitled to a partition of that property alone or his vendor himself could not have claimed it unless the other coparceners consent to it. He can only enforce his rights by a suit for general partition. The non-alienating coparceners, on the other hand, are entitled to sue the purchaser for partition of the alienated property without bringing a suit for partition. Where a suit is brought by the non-alienating coparceners against the purchaser for partition only of the property alienated, as they are entitled to do, the purchaser is not entitled in that suit to counter-claim for a general partition.

He must bring suit of his own for general partition. The alienation of a specific property or of the undivided interest of a coparcener in such property has on a general partition an equitable right to have that property or his alienor's share in that property, as the case may be, assigned to him if it could be done without injustice to the other coparceners. But there be equities between the coparceners or liabilities attaching to the alienor's share which may render it inequitable or impracticable to do so. If the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the whole of the property for the benefit of the joint family including the vendor. The purchaser is not entitled in such suit to an order for partition either of the specific property sold to him or of the joint family properties in general he must, if he wants to realise his vendor's interest, bring a suit of his own for a general partition (vide Sec. 261, Mulla's Hindu Law Thirteenth Edition).

6. From the above principles which are now well settled it follows that even if the alienation happens to obtain possession of the specific item of property alienated in

his favour, he cannot obtain any declaration as against the other coparceners that he is permanently entitled to be in possession of such property. His possession should be deemed to be only tentative, that is to say, he is entitled to be in such possession so long as such possession is not questioned by the other coparceners or till he filed a suit for general partition. It is therefore not open to the plaintiffs to obtain a declaration in this suit that they are entitled to be in possession of the property by virtue of the alienation. Even at such a partition, as already pointed out, they have only an equity in their favour that the alienated property may be allotted to the share of the alienor. But it is doubtful whether a gratuitous transferee as in the present case is entitled to any equity.

7. Lastly, it is contended on behalf of the respondents that so long as one co-share is not in possession of any property over and above his legitimate share, such possession cannot be questioned by the other co-shares. In support of this argument, the learned counsel for the respondents contends that the plaintiffs are in the position of co-owners in relation to the widow, the second defendant, and that they are in possession of the Ac. 0-10 cents of land, far less in extent than the half share possessed by the alienating coparcener, Sriramulu. On this question also it is settled by authority in Madras that a purchaser of an undivided interest of a coparcener in a specific property does not acquire a right to joint possession with the other coparceners. Such a purchaser acquires merely the right to compel a partition which the coparcener whose interest he has purchased might have compelled, had he been so minded, before the sale of his interest took place. When the purchaser is not regarded as a person entitled to joint possession along with the other coparceners, he cannot regard himself as a co-owner entitled to be in possession of property within the limits of the share of the alienating coparcener.

It follows, therefore that the purchaser, having regard to the state of the law, cannot claim to be entitled to any right in the property as such, much less as a co-share but he is entitled to an equity which can be shown to him, if possible, if he brings a general suit for partition. On the other hand, the second defendant who is widow entitled to sue for partition under the Hindu women's Right to Property Act, stands on a higher footing, as she has a legal right to demand a partition and recover possession of her husband's share in every bit of the property.

8. Reliance is placed by the learned counsel for the respondents, on a ruling of the Supreme Court in Potti Lakshmi Perumallu Vs. Potti Krishnavenamma, , in which it was pointed out that the interest which devolves upon the widow under the Act is only by reason of the statute and not by either survivorship or inheritance and that the quantum of interest to which is entitled is to be determined as on the date when she seeks to enforce partition. This decision does not however throw any light on the points raised by the respondent's learned counsel.

9. For the above reason, the judgment of the lower appellate Court is set aside

and that of the first Court restored. The Second Appeal is therefore allowed with cost throughout.

10. Appeal allowed.