
(2008) 11 AP CK 0034
In the Andhra Pradesh High Court
Case No : Appeal Suit No. 684 of 1989

Ravuru Jagannadha Rao and Others	Vs	APPELLANT
Battula Padmavathi and Others		RESPONDENT

Date of Decision : 25-11-2008

Acts Referred:

Hindu Succession Act, 1956 — Section 23, 8
Partition Act, 1893 — Section 4(1)
Transfer of Property Act, 1882 — Section 44

Citation : (2009) 1 ALD 746

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : M.S.K. Sastry, for the Appellant; M. Bhaskara Lakshmi and T.V. Narasimha Murthy, for the Respondent

Final Decision : Dismissed

Judgement

G. Yethirajulu, J.—This appeal has been preferred by defendants 1 to 4 in O.S. No. 32 of 1984. The suit was filed by the plaintiff for partition of the plaint "A" to "G" schedule properties into twelve equal shares and for separate possession of one such share to the plaintiff and for past profits of 1981.

2. The averments made in the plaint are briefly as follows:

The plaintiff and defendants 10 to 13 are daughters and the first defendant is the son of late Ravuru Apparao. Defendant No. 4 is the wife of defendant No. 1. Defendants Nos. 6 to 9 are some of the persons in whose favour defendant No. 1 has executed sale deeds for some of the suit schedule properties. The plaintiff is contending that the sales are not binding upon her. Defendants Nos. 2 and 3 are the sons of defendant No. 1 and defendant No. 4 and Defendant No. 5 is the lessee of some of the lands under the plaintiff. Late Appa Rao died in the year 1971 intestate. By the time of his death the schedule properties are possessed by him and his wife predeceased him. So the plaintiff, D1 and D10 to D13 are the class-I heirs of late Appa Rao and succeeded to his moveable and immovable

properties covered by the suit schedule. The suit schedule properties were kept joint and D1 was managing the properties on behalf of all the heirs as Manager of the joint family. From 1979 D1 evaded payment of profits and cash belonging to the share of the plaintiff and other daughters. The plaintiff and other daughters raised a dispute with D1 for partition of their share of properties. A registered notice was also issued on 07-09-1981 and D1 gave a reply to it. Subsequently, D1 in order to cause loss to the plaintiff and other daughters concocted documents and sale deeds regarding some of the items of the suit schedule. The sale deeds are not binding on the plaintiff and other daughters as they are not parties to the same. It is no longer beneficial to plaintiff to remain joint, hence the suit.

3. The first defendant filed a written statement, which was adopted by the defendants 2 to 4, which is as follows:

The plaintiff's allegations are denied. The extents and values of the plaintiff's schedule properties are not correct. Late Apparao got only Ac.0.33 cents of wetland in Sy. Nos. 210/2, 210/4, 210/5 and 210/7. In the plaintiff's "C" schedule there used to be old ancestral house of the first defendant.

It was in a dilapidated condition by 1972. The D1 with the income from the rice mill re-constructed the house covered by "C" schedule in the years 1974 to 1977. The plaintiff's father has no right in the said house. It is not a joint family property of the plaintiff and other defendants. Even if it is considered as a house standing on the ancestral site, this being the dwelling house, the daughters u/s 23 of the Hindu Succession Act cannot claim any partition. So far as "E" schedule property, which is a rice and flourmill, it is not a joint family property. The flourmill was constructed subsequent to 1961 with the marriage gifts of the first defendant and his wife and construction and installation of the mill was completed in 1962. The mill is constructed during the lifetime of the father without the aid of the joint family funds and the father of the first defendant was joint family Manager also. Construction of the mill was done in the years 1964 and 1965. "E" schedule property was never treated as joint family property. So far as "F" schedule properties are concerned item No. 1 was a vacant site leased out to Challa Suryanarayana for putting up a buddy to run a soda shop and the same do not belong to the first defendant. Item No. 2 is a temporary shed leased out to Kottakota Prasadarao. Items 3, 4 and 5 are vacant sites on which buddies are put up by lessees. Item No. 6 is an improvised shed in which a fancy shop is put up by the lessee. After the death of the defendant's father in the year 1971, there is a family arrangement between the defendants and the plaintiff regarding the partition of the properties of their father. The said arrangement was arrived at among the sisters and the first defendant out of their free consent. As per the said arrangement each sister should take Acs.1.50 cents of the land or cash of Rs. 5,000/-. D10 has taken cash. As per the family settlement the plaintiff and D12 are entitled to each Acs.1.50 cents of wetland in "A" schedule. As the plaintiff and D12 are residing elsewhere, they wanted their lands of Acs.3.00 to

be managed by the first defendant and he is managing the same since 1971 and has been paying 15 putties of paddy to each of them till the issuance of registered notice in September, 1981. In pursuance of the family arrangement the defendant invested Rs. 75,000/- for construction of "C" schedule house. The plaintiff is not entitled to the partition of the plaint schedule properties and she is not entitled to any profits. The suit is not maintainable, therefore, it is liable to be dismissed.

4. D10 filed a separate written statement supporting the contention of the plaintiff and further contended that D1 is not entitled to sell any item of joint family properties and they are not binding upon the daughters of late Apparao. The properties of late Apparao were never divided and they were never given any share till now.

5. D12 filed a separate written statement supporting the plaintiff.

6. D5 died and D6, D8, D9, D11 and D13 to D16 remained ex parte.

7. On the basis of the pleadings appropriate issues have been framed. During the trial, P.Ws.1 and 2 were examined on behalf of plaintiff and Exs.A1 to A6 were marked. The defendants examined D.Ws.1 and 2 and marked Exs. B1 to B18. After conclusion of the trial, the lower Court passed a preliminary decree directing the partition of the plaint schedule properties into 12 equal shares and for delivery of one such share to the plaintiff. Being aggrieved by the preliminary decree passed by the trial Court, the defendants Nos. 1 to 4 preferred the present appeal challenging the validity and legality of judgment of the trial Court.

8. As per the evidence adduced by both parties it is an undisputed fact that the plaintiff and other legal heirs got majority of the properties from their father late Ravuri Apparao who died in 1971. The contention of the plaintiff is that all the properties covered by the suit schedules are the joint family properties, therefore, they are liable to be partitioned. The first defendant has been contending that "C" and "E" schedule properties are his self-acquired properties, therefore, they are not liable for partition. He also contended that as per Section 23 of the Hindu Succession Act, the plaintiff is not entitled for partition in a dwelling house, therefore, the plaintiff and other defendants are not entitled to the share in "C" and "E" schedule properties and they are not liable for partition.

9. The learned Counsel for the appellants submitted that whenever it is pleaded by the plaintiff that all the schedule properties are the joint family properties, the burden is on the plaintiff to prove that the properties are joint family properties, when it is specifically pleaded by the first defendant that plaint "C" and "E" schedule properties are not joint family properties. It is the burden of the plaintiff to establish that they are the joint family properties, but the lower Court by holding that the defendant No. 1 failed to prove that they are self acquired properties, decreed the suit.

10. The learned Counsel for the respondents submitted that the pleadings as well

as the evidence clearly indicate that construction of the dilapidated house and the rice mill was with the moneys secured from the joint family properties and as there was ancestral nucleus for the developments of "C" and "E" schedule properties, they cannot be treated as exclusive properties of the first defendant and further submitted that even according to the admission made by the defendant those properties cannot be treated as self-acquired properties and they will have to be treated as joint family properties.

11. In the light of the contentions raised by both parties the following are the points for consideration by this Court:

(1) Whether "C" and "E" schedule properties are not joint family properties of the plaintiff and defendants and Whether they are not liable for partition? and

(2) Whether the plaintiff is not entitled to seek partition of "C" schedule property in pursuance of the bar u/s 23 of the Hindu Succession Act?

12. Point No. 1:

The plaintiff claimed that all the properties are the joint family properties. The first defendant in the written statement mentioned that "C" schedule house was constructed in the ancestral land, but his only contention is that he reconstructed the house in the place of dilapidated ancestral house with his own funds got by way of gift at the time of marriage and it became his exclusive property, therefore, it has to be excluded from the partition. The first defendant as D.W.1 stated that he constructed a house in "C" schedule after the death of his father. The plan for the house was approved in his name, the existing old house was demolished and a new house was constructed by him from the year 1973 to 1977. The funds for construction was raised from the income of the mill and income from his lands. The mill shown in "C" schedule was constructed in 1962, the plan for the mill was approved and the licence was issued in his name. The said mill was constructed partly with the money got by selling gold ornaments of his wife and partly with the dowry given by his in-laws to a tune of Rs. 15,000/-. His father was alive by the time he constructed the mill. The father acted as the Manager of the joint family till his death. His father never treated the mill as the joint family property.

13. In the cross-examination he stated that he did not maintain any accounts for the construction of the mill. "C" schedule property was purchased by his paternal grand father. He did not inform any of the sisters about the renovation of the house. The amount for renovation was partly got from agricultural income and partly from the income of the mill. The agricultural lands were purchased by his paternal grand father. He has no other source of income except the agricultural land and the mill. He does not know what his father did with the income after the marriage of his youngest sister.

14. From the admissions made by D.W.1 the house was renovated with the funds from the agricultural lands and the income of the mill. The rice mill was

constructed during the lifetime of his father and as his father was Government employee, the licence was obtained in the name of the first defendant.

15. After going through the judgment of the lower Court, I am convinced that "C" and "E" schedule properties were developed on the ancestral land by utilizing the funds from the ancestral nucleus and as there was no independent income for the defendant and as there was no proof placed before the Court as to what was the dowry got by him from his father-in-law at the time of his marriage, they were rightly treated as the joint family properties. From the admissions of the defendant it was established that all the suit properties are the joint family properties, therefore the question of adducing any further evidence to establish that they are joint family properties is unwarranted and after the discharge of the burden by the plaintiff, the defendant did not place any material to show that the properties were acquired by the defendant himself, therefore the lower Court rightly came to a conclusion that they are all the joint family properties and after going through the entire material, I have no hesitation to hold that the lower Court rightly came to a conclusion that they are the joint family properties and there are no grounds to interfere with the finding of the lower Court on this point.

16. The learned Counsel for the appellants submitted that the lower Court went wrong in keeping the burden on the defendants to show that they are the self-acquired properties of the first defendant, whereas the burden ought to have been kept on the plaintiff to prove that they are joint family properties. In support of his contentions he relied on the following judgments.

17. In *Kuppala Obul Reddy v. Bonala Venkata Narayana Reddy* AIR 1984 SC 1171 wherein the Supreme Court held as follows:

There may be presumption that there is a Hindu Joint Family but there can be no presumption that the joint family possesses joint family properties.

18. In AIR 2003 3800 (SC) the Supreme Court while considering the burden of proof regarding the issue whether a particular property is joint Hindu Family Property or self-acquired property held as follows:

There is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

19. In *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, the Supreme Court held as follows:

Proof of the existence of a joint family does not lead to the presumption that

property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.

20. In *Randhi Appalaswami v. Randei Suryanarayanamurti and Ors.* ILR 1948 PC 440 the Privy Council held as follows:

Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon any one asserting that any item of property is joint to establish the fact. But when it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.

21. There is no dispute about the proposition laid down by the Hon"ble Supreme Court, but the factual information available in the suit clearly indicates that the first defendant himself admitted that he has no independent income and the house was constructed with the agricultural income and income from the mill. It is also an undisputed fact that the mill was in existence during the lifetime of his father and the father used to act as the joint family manager and as his father was a Government employee the licence was obtained in the name of the first defendant and the defendant admitted that he has no independent source of income and he failed to place any evidence to show that his in-law"s gave dowry. The above judgments are not applicable to the facts of the present case. The lower Court rightly held that the burden is on the defendant to establish that "C" and "F" schedule properties are his exclusive properties in the light of the admissions made by him regarding the source of income for developing those properties as they constructed on the joint family lands.

22. Point No. 2: It is the contention of the first defendant that by virtue of Section 23 of the Hindu Succession Act the daughter is not entitled to claim a share unless a male member seeks partition of the house property.

23. Section 23 of the Hindu Succession Act reads as follows:

23. Special provision respecting dwelling houses:-- Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

24. The learned Counsel for the plaintiff-respondent relied on certain judgments contending that the daughters can also maintain a suit against a son and other daughters for partition of the joint family properties.

25. In *Narayanan Vs. Meenakshi*, the Kerala High Court held as follows:

The right to claim the benefit of Section 23 is personal to the male heir of the deceased Hindu intestate. Such a right is not heritable or alienable. Therefore, it cannot be said that cessation of such personal right during the pendency of a suit for partition would not entitle the female heir to claim partition taking note of the subsequent events. If the contention that the state of affairs as on the date of the suit alone would be relevant is to be accepted, then it would have the effect of indirectly holding that the personal right of the male heir to resist partition could be continued by his legal representative, in case such male heir dies during the pendency of the suit. The personal right of the male heir cannot be claimed by his legal heirs. Therefore, whenever the personal right of a male heir u/s 23 comes to an end, the right of the female heir to claim partition cannot be defeated. In other words, a defeasible right of a male heir would get defeated the moment his personal right ceases. Such personal right of a male heir is taken away by the omission of Section 23 of the Hindu Succession Act, 1956, by the Hindu Succession Amendment Act, 2005. The effect of such omission would be retroactive. By the omission of Section 23 therefore the right of the male heir to claim the benefit of Section 23 would get defeated even in pending litigations.

26. In *Narashimaha Murthy Vs. Smt. Susheelabai and others*, the Supreme Court while considering the scope of Section 23 held as follows:

Section 23 applies and prohibits partition of dwelling house of the deceased Hindu male or female intestate, who left surviving sole male heir and female heir/heirs and the right to claim partition by female heir is kept in abeyance and deferred during the life of the male heir or till he partitions or ceases to occupy and enjoy it or lets it out or till at a partition action, equities are worked out.

27. The Court further observed as follows:

When succession of a Hindu intestate is open, his/her class-I heirs specified in the Schedule is entitled at a partition to their respective shares. The succession cannot be postponed. However, exception has been engrafted by Section 23 respecting tradition of preserving family dwelling house to effectuate family unity and prevent its fragmentation or disintegration by dividing it by metes and bounds. By Section 23 the right of the female heir for partition of the dwelling house is postponed till the happening of a contingent event, i.e. the decision by the male heirs to partition the dwelling house in occupation of the family. Though the words "the male heirs choose to divide their respective shares", suggest that

at least two such male heirs must exist and decide not to partition the dwelling house in which event the right of the female heir is postponed and kept in abeyance until the male heir or heirs of the Hindu intestate decide to partition it, it does not necessarily lead to the only inevitable conclusion that the operation of Section 23 must stand excluded in the case of the Hindu intestate leaving behind him/her surviving only son and daughter.

The legislature intended that during the life-time of the surviving male heir(s) of the deceased Hindu intestate, he/they should live in the parental dwelling house as partition thereof at the behest of the female heir would render the male heir homeless/shelterless. Obviously, to prevent such hardship and unjust situations, special provision was made in Section 23 of impartibility of the dwelling house. Section 44 of the Transfer of Property Act and also Section 4(1) of the Partition Act appear to prevent such fragmentation of the ancestral dwelling house. The purpose of law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and internal sense of it that makes the law meaningful. Section 23 has therefore to be construed not in strict grammatical manner but by applying common sense, equity, justice and good conscience. So construed it is clear the right of residence to the male member in the dwelling house of the Hindu intestate should be respected and the dwelling house may be kept impartible during the lifetime of the sole male heir of the Hindu intestate or until he chooses to divide and gives a share to his sister or sisters or alienate his share to a stranger or lets it out to others, etc. Until then, the right of the female heir or heirs u/s 8 is deferred and kept in abeyance.

28. As per Section 23 the right of the female heir for partition of the dwelling house is postponed till the happening of contingency of a decision by the male heir for partition of the dwelling house in occupation of the family, but the said bar is not applicable in case of a male class I heir dies or he files a suit for partition. It is also not applicable against the children of sole male class I heir.

29. In the present case the father of the first defendant died long prior to the partition of the properties and as the bar applies only in the event of survival of the son, and as the son died, the other defendants cannot raise any objection for partition of the house.

30. In the light of the above circumstances and the legal position the lower Court was right in coming to a conclusion that the dwelling house is not liable to be excluded for partition. After going through the judgment of the lower Court and the material available on record, I am convinced that the lower Court rightly came to a conclusion that all the properties are liable to be partitioned and I do not find any grounds to interfere with the judgment of the lower Court.

31. In the result, the Appeal is dismissed by confirming the judgment of the lower Court. No order as to costs.