(2004) 03 AP CK 0013

Andhra Pradesh High Court

Case No: A.S. No''s. 2172 of 1989 and 233 of 1990 and CRP No''s. 2429 of 1996 and 2588 and 2589 of 1994

Vulavala Nagamani		APPELLANT
	Vs	
Devu Suranarayana and Others		RESPONDENT

Date of Decision: March 5, 2004

Hon'ble Judges: Gopala Krishna Tamada, J; Bilal Nazki, J

Bench: Division Bench

Advocate: C.K.S.V. Ramana Murthy, for the Appellant; M.S.R. Subrahmanyam, V.L.N. Gopala Krishna Murthy and M.V. Durga Prasad, for the Respondent

Final Decision: Dismissed

Judgement

Bilal Nazki, J.
AS Nos. 2172 of 1989 and 233 of 1990:

These two appeals have been filed against the same judgment and decree passed in O.S. No. 52 of 1987 on 3.7.1989 by Subordinate Judge, Pithapuram. AS No. 2172 of 1989 has been filed by 5th defendant and AS No. 233 of 1990 has been filed by plaintiff. The parties shall be referred to as "the plaintiff" and "the defendants". Since both the appeals have been filed against the same judgment, they are disposed of by this common judgment.

2. The plaintiff filed the suit contending that he and the defendants 2 and 3 are the brothers and 1st defendant was their father. The plaintiff further asserted that he and the defendants 1 to 3 were members of joint family. The 1st defendant was the manager of the family and the family owned plaint A and C schedule properties. Plaint B schedule property was being cultivated by the family as tenants. Plaint E schedule properties were moveable properties belonging to the joint family. Items 1 to 3 of plaint A schedule property were purchased by the manager of the joint family with joint family funds and items 4 to 6 were ancestral properties. Item No.7 of plaint A schedule was also purchased in the name of 1st defendant with joint family

funds. On the basis of these assertions the plaintiff contended that he was entitled to 1/4th share in plaint A schedule properties. He contended that in plaint B schedule properties the 1st defendant had no share as they were acquired by the plaintiff and the defendants 2 and 3 with their own funds, therefore he claimed 1/3rd share in the plaint B schedule properties. In plaint C schedule property he claimed 1/4th share. He also claimed 1/4th share of lease hold rights in item No.1 of plaint D schedule properties. He also claimed 1/4th share in items 1 and 2 of plaint D schedule properties. He also claimed 1/4th share in plaint E schedule properties. He also claimed past and future profits. 1st defendant had died and defendants 4 and 5 were added as his legal representatives. The plaintiff claimed that the properties of 1st defendant who was his father had to be partitioned between him and the defendants 2 to 5.

3. Defendants 2 and 3 filed their written statement. The relationship of the parties was admitted. The plaint schedule properties were not admitted to be correct, but it was accepted that the joint family of the plaintiff and the defendants owned plaint A and C schedule properties. The correct extent of item No.2 of plaint A schedule was Ac.4.70 cents and not Ac.4.20 cents as shown in the plaint schedule. Item No.1 of the plaint D schedule property was being cultivated by 1st defendant as a tenant for the benefit of the family. A suit being O.S. No. 74 of 1974 had been filed before the II-Addl. Subordinate Judge, Kakinada by the children of landlord Pantham Bulli Kamaraju against 1st defendant and Pantham Buli Kamaraju. In that suit a receiver had been appointed by the Court to auction the lease hold rights of the land every year and deposit the sale proceeds in the Court. An appeal against the decree and judgment passed in O.S. No. 74 of 1974 was pending, but the receiver continued to hold the property. Item No.2 of plaint D schedule property was being cultivated by the plaintiff for the benefit of the joint family, but the landlord obtained eviction orders in ATC No. 53 of 1981 on the ground that the plaintiff had committed default in payment of rents. Subsequently by a mutual agreement the landlord agreed to sell separate extents of the land to the plaintiff and the defendants 2 and 3, therefore they obtained separate sale deeds in respect of their respective extents, as such the plaintiff was not entitled to seek partition of this property. The defendants 2 and 3 did not accept or admit the correctness of plaint E schedule properties. All the valuables as well as moveables were in the custody of 1st defendant till his death, thereafter the 4th defendant and the plaintiff took possession of all the moveables. The defendants 2 and 3 also claimed that the plaintiff and the 4th defendant had also recovered some of the debts. The defendants 2 and 3 were also entitled to equal share along with the plaintiff in plaint A schedule properties. Plaint B schedule properties were not accepted to be joint family properties. It was not correct that plaint B schedule properties were acquired jointly by the plaintiff and the defendants 2 and 3 with the income derived from the land. The plaintiff and the defendants 2 and 3 had no separate income to acquire plaint B schedule properties. All the properties were acquired with the joint family

funds only for the benefit of the family. The extent of item No.4 of plaint B schedule property was not correct. The correct extent was Ac.2.57 cents and an extent of 0.43 cents in this survey number was also purchased with the joint family funds in the name of the plaintiff''s wife for the benefit of the joint family. This piece of land was also being enjoyed by the family. The extent of 0.43 cents of land which was standing in the name of the plaintiff''s wife has to be included for the purpose of partition. The plaintiff and the defendants 1 to 3 were each entitled to 1/4th share in all those properties. They also contended that the plaintiff was liable to account for all the income and expenditure, money lending, realization etc. of the family for the period prior to filing of the suit and also after the suit. The plaintiff was not entitled to claim any past profits. In December, 1980 an extent of 0.84 cents in Sy. No. 135, Ac.0.12 cents in Sy. No. 135 and Ac.1.58 cents in Sy. No. 105, situated at Agraharam village were purchased for the joint family and gifted to the daughter of the plaintiff at the time of her marriage on the understanding that equal share would be made to defendants 2 and 3 from the remaining joint family properties. So the defendants 2 and 3 had to be compensated by awarding proportionate extents. In 1982 an extent of 0.50 cents of wet land called Toorupu Doddei of Pithapuram village belonging to Gadam Sooramma, wife of Appalaraju, was also purchased through an agreement to sell. Advance sale consideration was paid out of the joint family funds, but the plaintiff dishonestly obtained sale deed in his name by paying the balance sale consideration from the joint family funds. This caused misunderstandings and the plaintiff has filed the suit to cover up his actions. The defendants 2 and 3 submitted that they were entitled to 1/4th share in all the joint family properties and on the death of 1st defendant, they were entitled to 1/5th out of 1/4th share of 1st defendant. They also contended that the will allegedly executed by 1st defendant was not true, valid and binding. The defendants 2 and 3 denied that the 1st defendant had executed any will. In any case the 1st defendant could not bequeath the properties of joint family more than what he was entitled to. All the properties covered by the will were joint family properties, as such the will was not valid and binding.

4. 3rd defendant filed an additional written statement stating that the will dt. 20.12.1983 and another will dt. 20.12.1986 were not true, valid and binding on the defendants 2 and 3.

5. 4th defendant is the mother and 5th defendant is the sister of the plaintiff and the defendants 2 and 3. Defendants 4 and 5 filed separate written statements. 4th defendant denied almost all the averments made in the plaint and pressed into service a will allegedly executed by 1st defendant on 20.12.1983. She stated that this was the will he had made in sound and disposing state of mind and by this will the 1st defendant had bequeathed to her life interest in Ac.3.51 cents in S. No. 162, Ac.1.82 cents in S. No. 102, 0.71 cents in S. No. 139 situated at Agraharam, Ac.2.22 cents in S. No. 22 situated at Navakandravada and about Ac.1.00 in S. Nos. 673/3 and 673/4 and Ac.1.72 cents in S. No. 676 situated at Pithapuram. 1st defendant had

died on 13.5.1984. By virtue of the will the 5th defendant got absolute rights in those items. Therefore she denied that the plaintiff and the defendants 1 to 3 were entitled to 1/4th share in plaint A, C, D, E and B schedule properties of 1st defendant which were his self acquired properties. These properties were nominally put in the names of other defendants apprehending land ceiling litigation.

6. 5th defendant who is the daughter of 4th defendant and sister of plaintiff and defendants 2 and 3 also denied all the assertions made in the plaint and submitted that most of the properties were self acquired properties of 1st defendant and they were kept in the names of the plaintiff and other defendants only in view of land reforms laws. Plaint C schedule properties were the self acquired properties of 1st defendant. Plaint D schedule properties were the lease hold properties of 1st defendant. She stated that 1st defendant had executed a will on 20.12.1983 in a sound and disposing state of mind in favour of 4th defendant. 5th defendant filed an additional written statement in which she also claimed that her mother-4th defendant who had become owner by virtue of the will dt. 20.12.1983, had executed a will in her favour on 20.12.1986. Her mother-4th defendant died in February, 1987. The will executed by her mother was the last will. As per the terms of the will her mother-4th defendant bequeathed all her moveable and immovable properties to her which she got by virtue of the will executed by her father on 20.12.1983. This assertion was made by the 5th defendant in the additional written statement filed by her after the death of her mother. In the earlier written statement she had claimed 1/5th share in plaint ABCD and items 1 and 2 of plaint E schedule properties.

7. On the basis of these pleadings, the trial Court framed the following issues,

(i) In what item 1 of D schedule property is to be partitioned?

(ii) Whether item 2 of A schedule is correct?

(iii) Whether plaintiff is entitled for partition of item 2 of D schedule?

(iv) Whether E schedule is correct and who is to account for the schedule property?

(v) Whether B schedule property is joint property of plaintiff and defendants 2 and 3 or the joint family property of plaintiff and 1 to 3 defendants?

(vi) Whether item- IV of B schedule is correct?

(vii) Whether Ac.0.43 cents of S. No. 136 of Agraharam village was purchased with the joint funds of joint family and if so whether it is also liable for partition between plaintiff and 1,2,3 defendants?

(viii) Whether item -5 of B schedule is correct?

(ix) Whether Ac.0.50 cents called Turupu Doddi is brought into hotch pot for partition and how it is to be partitioned?

(x) Whether the will executed by 1st defendant is true, valid and binding on the defendants 2 and 3?

(xi) Whether defendants 2 and 3 are not each entitled to 1/4th thereof 1st defendant there?

(xii) To what relief is the plaintiff entitled?

On 14.10.1988 the trail Court framed the following additional issue,

(i) Whether the 5th defendant''s mother executed a will in her favour on 20.2.1986 in a sound disposing state of mind?

8. Finally a decree was passed for partition of the plaint schedule properties. The plaintiff was held entitled to 1/4th share in plaint A,C and D schedule properties and 1/3rd share in the plaint B schedule property. Defendants 2 and 3 were held entitled to equal share in the plaint A to D schedule properties. As regards plaint E schedule property the suit was dismissed.

9. No appeals have been filed by defendants except 5th defendant and another appeal has been filed by the plaintiff. In the grounds of appeal filed by the plaintiff i.e., AS No. 233 of 1990 he appears to have been aggrieved of not getting 1/4th share in plaint E schedule properties. He is not aggrieved of the judgment on any other count. 5th defendant who filed AS No. 2172 of 1989 is aggrieved of the findings on Ex.B4 allegedly executed by her father in favour of 4th defendant and also on Ex.B5 allegedly executed in her favour by her mother-4th defendant. Therefore the questions which fall for consideration before this Court are limited to the grievance of the plaintiff with regard to his claim in plaint E schedule property and to the grievance of 5th defendant as regards two wills Exs.B4 and B5. Taking the first question with regard to plaintiff''s grievance of plaint E schedule properties, item No.1 are the debts allegedly due from various persons to the family, totaling to Rs.52,000/- and the plaintiff claimed Rs.13,000/- towards 1/4th share. Item No.2 are the bank deposits of Rs.52,000/- and the plaintiff''s share in this item was Rs.13,000/-. Item No.3 are two tulas of Kasula Peru worth Rs.20,000/-, 10 sovereigns of panu worth Rs.10,000/- and silver worth Rs.20,000/-, totaling to Rs.50,000/- and the plaintiff claimed Rs.12,500/- towards his 1/4th share in this item. An issue being issue No. (iv) was framed by the trial Court on this count and decided against the plaintiff. Let us examine this question in the light of the evidence led by the plaintiff. The plaintiff had not stated in his statement anything about plaint E schedule property. But in cross-examination he stated, "It is not true to say that the amounts covered by item 1 of E schedule belonged to my father. It is not true to say that myself and my brothers are having no right over the E schedule properties." Since the plaintiff did not say anything about this property in his deposition nor did he lead any evidence even as to its existence, therefore the trial Court was right in dismissing the claim of the plaintiff on this count. Even the defendants'' witnesses have not stated anything with regard to plaint E schedule property. Therefore it was

not even established whether the plaint E schedule properties existed or not. Therefore the appeal of the plaintiff fails and has to be dismissed.

10. Now coming to the appeal filed by 5th defendant, the fate of this appeal revolves around the legality of two wills-Exs.B4 and B5. Two issues on this count have been framed by the trial Court being issue No. (x) and additional issue (i) and decided against the 5th defendant. The fate of Ex.B5 depends upon the fate of Ex.B4 and if Ex.B4 is held to be invalid, then the question whether Ex.B5 was executed or not would be of no interest. Now coming to the validity of Ex.B4, it will be first necessary to examine whether the trial Court was right in coming to the conclusion that the properties in question were joint family properties. There is no serious challenge to the finding that the properties were joint family properties, but the contention of 5th defendant alone was that the properties were self acquired properties of 1st defendant-her father. But in her cross-examination she stated, "From my ancestors our family is an agriculturist family. All are jointly cultivating the lands. My father also acquired the lands with joint family funds. I do not know about the documents relating to my family. In respect of the suit lands also I do not know about the documents. My marriage was also performed by joint family. I do not know about the debts personally. My father used to get promotes. All the moveable property was with my father till his death. I do not know Ex.B4 will personally." Now there is no serious dispute that there was a joint family and the properties were joint family properties. Whether with respect to joint family properties a will could have been made is the question which has to be decided in this case. In a judgment reported in Raghvamma Vs. Chenchamma 1 the Supreme Court held,
"the will speaks only from the date of the death of the testator. A member of undivided coparcenary has the legal capacity to execute a will but he cannot validly bequeath his undivided interest in the joint family property. If he died as an undivided Hindu, his interest survives to the other members of the family and therefore the will cannot operate on the interest of the joint family property. But he was separate from the family before his death, bequest would take effect."

11. Similarly a Division Bench of this Court in a judgment reported in B.V. Suryanarayana Raju Vs. M. Apparao 2 held,

"Bequeathing of undivided interest by a member of the joint family is void and inoperative."

12. Mulla in his principles of Hindu Law, Volume I, in the 17th Edition published in 1999 at page 565 stated,

"According to Mitakshara law, no coparcener, not even a father, could dispose of by will his undivided coparcenary interest even if the other coparceners consented to the disposition, the reason being that at the moment of death the right of survivorship (of the other coparceners) is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of

that by devise. A sole surviving coparcener could, however, bequeath the joint family property as if it was his separate property."

13. Now the issue appears to have been clinched by the judgment of the Supreme Court reported in M.N. Aryamurthi Vs. M.L. Subbaraya 3 and the doubts, if any, have been cleared by it in para-8 of the judgment. In this case a will of father Lachiah was the subject matter of discussion before the Supreme Court. The Supreme Court held,

"But unfortunately Lachiah, though a father, could not under the Hindu Law, dispose of, by will, joint family property or any part thereof and as a will, it was clearly inoperative on the various dispositions made by him."

14. Then it referred to many previous judgments of various Courts. Then again the Supreme Court held,

"The decisions proceed on the principle which was well-settled in Vital Putten Vs. Yamenamma (1874) 8 Mad. HCR 6 and Lakshaman Dada Naik Vs. Ramachandra Dada Naik ILR 1879 Bom. 48 that a coparcener cannot devise joint family property by will, because, on the date of his death when the will takes effect, there is nothing for the will to operate on, as, at the moment of his death, his interest passes by survivorship to the other coparceners."

15. The judgment of the Supreme Court in M.N. Aryamurthi Vs. M.L. Subbaraya (3rd supra) has similarity with the case on hand in another aspect also. In the will i.e., Ex.B4 which was allegedly executed by the executant in favour of his wife, he states,

"Previously I purchased lands on my son''s name with myself acquired money and giving to them. I have no parental properties and ancestral properties. All the properties are being self acquired."

16. This was exactly what had been stated by Lachiah Setty in the case which was before the Supreme Court. The Supreme Court doubted the will itself finding that the executant was conscious that if the property was joint family property, then he could not execute a will, therefore he stated in the document itself that it was his self-acquired property in order to come out of the hurdle of executing a will with respect to joint family property. The Supreme Court considered this aspect of the matter in the following words,

"In the beginning and at the end, Lachiah described the document as his will which he was making in his old age, while in good mental state. The will shows his awareness that, if the family properties were regarded as joint family properties, he would not be in a position to make any disposition of the same by a will. So, although two of his elder sons had contributed largely to the family acquisitions, all those acquisitions, he insisted, were his self-acquired properties, over which, he claimed, he had absolute power of disposition. As a matter of fact, if the properties as claimed by him had been self-acquired, there is no doubt that the document

would have absolutely operated as the last will and testament of Lechiah Setty."

17. Now that is the legal position about Ex.B4. Therefore, in our view, Ex.B4 was correctly held to be inoperative by the trial Court. Ex.A1-partition deed has also been proved by which partition of joint family properties was made between Devu Suranna and Devu Venkatraju (1st defendant) who was the father of the plaintiff and defendants 2 and 3. The property he got after partition with his brother are items 4 to 6 in plaint A schedule properties. That proves beyond doubt that the 1st defendant had ancestral property which formed nucleus with which other properties grew.

18. Additionally it may be stated that there were two witnesses to Ex.B4 and there was a scribe, but the defendants produced only one witness-D.W.6. D.W.6 who was an advocate stated that he knew Devu Venkatraju and a few days before his death, Devu Venkatraju had come to him and asked him to attest a will. He also stated that he went to the Registrar''s office at the request of Devu Venkatraju to attest the will. His clerk Kameswara Rao was also with him. He did not know who scribed the will. He did not remember the year in which the will was written. By the time he went, the will had already been written. He read the contents of the will to Venkatraju and he told him that the contents were true. Then in his presence Venkatraju put his thumb impression on the will. Ex.B4 was the will. Then he clarified that he and Kameswara Rao were identifying witnesses at the Registrar''s office. He also accepted that 1st defendant was his client and he had filed vakalat on his behalf in a suit at Kakinanda. He had no knowledge whether the contents of the will were correct or not. He attested the will as the testator asked him to do so. The mode of even proving the will does not satisfy the conscience of the Court. Therefore the appeal filed by 5th defendant has also to be dismissed.

19. Both the appeals are dismissed. In the peculiar circumstances of the case, no costs.

CRP No. 2429 of 1996, CRP No. 2588 of 1994 and CRP No. 2589 of 1994

20. These revision petitions be listed separately before the appropriate Bench for hearing.