THE HON'BLE SMT. JUSTICE M.G. PRIYADARSINI

A.S. No. 645 of 2005

JUDGMENT:

This appeal is preferred by the plaintiffs in O.S. No. 13 of 2003 challenging the judgment and decree passed by the Senior Civil Judge at Bhongir, dated 02.04.2005. By the impugned judgment, the learned Senior Civil Judge dismissed the suit filed by the plaintiffs seeking partition of the suit schedule properties into four equal shares and for allotment of two such shares in their favour.

2. For the sake of convenience, hereinafter, the parties will be referred to in terms of their rank and status before the Trial Court.

3. The brief facts of the case are that the plaintiff No.1 is the brother of plaintiff No. 2 and they being minors, represented by the their natural guardian and mother, namely Kumbam Sabitha, have filed suit claiming partition of the suit schedule properties against defendant Nos.1 to 3. Defendant Nos.2 and 3 are daughter and first wife of defendant No.1 respectively. Kumbam Sabitha, who is the mother of the plaintiffs, is the second wife of defendant No.1. It is the case of the plaintiffs

that defendant No.3 herself arranged the marriage of plaintiffs' mother with defendant No.1 in the year 1993 as she was not blessed with male issues. The plaintiffs and defendants constitute Hindu undivided joint family. The suit lands are the ancestral property of the defendant No. 1 and the said lands were devolved on him after the death of his parents, Narayana Reddy and Manikyamma. The defendant No. 1 is managing the joint family in the capacity of *Kartha*. The defendant No. 1, in order to please his wives, nominally made patta of suit lands on their names. Though the Khathas were separated and the names of the wives of defendant No. 1 were entered in revenue records, the suit lands were not partitioned with metes and bounds. However, the defendant No. 1 sold away the land in Sy.No.49 admeasuring Ac.04.10 guntas in the year 1999 with the consent of the family members to meet family necessities. Meanwhile, the marriage of defendant No. 2 was performed on 11.12.2002. The defendants, without there being any necessity and without having any right, were making negotiations with third parties to alienate the suit lands to deprive the legitimate rights of the plaintiffs in the suit properties. Hence, the suit by the plaintiffs seeking partition and separate possession of

the suit lands into four equal shares and for allotment of two such shares in their favour.

4. Defendant Nos.1 and 3 filed separate written statements and defendant No.2 adopted the written statement filed by her mother i.e., defendant No.3. Defendant No.1 filed written statement conceding the claim of the plaintiffs and stating that he has no objection for decreeing the suit in favour of the plaintiffs. On the other hand, defendant No.3 filed written statement denying the plaint averments and contended that the suit is not maintainable in view of the collusion of plaintiffs with defendant No.1. It is further contended that the marriage of defendant No.1 with the mother of the plaintiffs was performed without the consent and knowledge of defendant No.3. Soon after knowing the second marriage of defendant No.1, defendant No.3 raised a dispute and in connection therewith, elders of both the parties called for a meeting, wherein the defendant No.1 was advised to settle part of agricultural lands in favour of defendant Nos.2 and 3. On such advice, defendant No.1 executed a gift deed vide document bearing No.2738 of 1993 dated 22.06.1993 in respect of land admeasuring Ac.15.27 guntas falling under Sy.Nos.8, 9, 10, 37,

39 and 40 in favour of defendant No.3. So also, he executed another gift document bearing No.2737 of 1993 dated 22.06.1993 in respect of land admeasuring Ac.16.18 guntas falling under Sy.No. 37 in favour of defendant No.2. Similarly, he executed another gift document dated 22.06.1993 in respect of land admeasuring Ac.11.02 guntas in Sy.No.38/2/2 and land admeasuring Ac.1.38 guntas in Sy. No.47, totally admeasuring Ac.13.00 guntas in favour of mother of plaintiffs. The remaining land in Sy.No.48 (Ac.4.10 guntas) and Sy.No.49 (Ac.1.09 guntas) was retained by the defendant No.1. As per the documents executed by defendant No.1, necessary mutations were effected in the revenue records in the names of defendant Nos.2 and 3 and mother of the plaintiffs and in pursuance thereof, pattedar pass books and title deeds were also issued in their favour. Since 22.06.1993, defendant Nos.2 and 3 are residing separately without having any contacts with defendant No.1 and whereas defendant No.1 was living with his second wife i.e., mother of the plaintiffs. By the time of settlement of the lands in favour of defendant Nos.2 and 3, plaintiffs were not born, as such the suit of the plaintiffs for partition of the lands belonging to defendant Nos.2 and 3 is not maintainable. Further, defendant No.1, who alienated land

admeasuring Ac.4.10 guntas in Sy. No.49, has spent the entire sale consideration for the benefit of plaintiffs and their mother and defendant Nos.2 and 3 were not at all benefitted with the sale consideration of land in Sy.No.49. The marriage of defendant No. 2 was performed with own expenses of defendant No.3 without any contribution of defendant No.1 and kanyadhaanam was made by her maternal uncle and his wife, namely Prathap Reddy and Anasuya. Defendant No.1 did not attend the marriage of defendant No. 2 though the invitation card got printed in the name of defendant No.1. Defendant Nos.2 and 3, who are the absolute owners and possessors of the land in Sy.Nos.8, 9, 10, 37, 39, 40 with effect from 22.06.1993 are entitled to deal with the said properties according to their requirements and plaintiffs are not entitled to claim partition of the said lands. The plaintiffs are not entitled for partition of the lands held by defendant Nos.2 and 3. The suit filed by the plaintiffs against defendant Nos.2 and 3 is without any cause of action because the lands held by them are not liable for partition. Moreover, the plaintiffs neither made any demand for partition nor gave any notice before filing the suit. It is further contended that the suit is barred by limitation and finally prayed to dismiss the suit.

5. Based on the above pleadings, the trial Court framed the following issues for trial:

1. *Whether the suit properties are the ancestral property of first defendant?*
2. *Whether the gift deeds executed by first defendant in favour of defendant No.2 and defendant No.3 in Survey Nos.8, 9. 10, 37, 39 and 40 are valid and binding on plaintiffs?*
3. *Whether the plaintiffs are entitled to seek partition of suit property?*
4. *To what relief?*

6. During the course of trial, on behalf of plaintiffs, PWs 1 to 3 were examined and Exs.A1 to A12 were marked on their behalf. On behalf of the defendants, DWs 1 to 3 were examined and Exs.B1 to B9 were marked.

7. Considering the oral and documentary evidence available on record, the Trial Court dismissed the suit holding that the plaintiffs are not entitled for partition and separate possession of the suit schedule properties. Aggrieved thereby, the present appeal is filed by the plaintiffs.

8. Learned counsel for the appellants/plaintiffs submitted that the Trial Court gravely erred in dismissing the suit holding that the children born out of void marriage cannot claim inheritance in the ancestral properties on par with legitimate children in view of Section 16(3) of the Hindu Marriage Act. The learned counsel submitted that the plaintiffs are legitimate children of defendant No.1 and P.W.1 and as their marriage is valid, the plaintiffs, being legitimate children, are entitled for equal share in the joint family properties as coparceners along with defendant Nos. 2 & 3. The evidence of independent witnesses i.e., P.Ws.2 & 3, discloses that as there was no male issues, defendant No. 3, who is the first wife of defendant No. 1, herself performed the second marriage of defendant No. 1 with P.W.1, as such the marriage of P.W.1 with defendant No. 1 is valid unless a petition is filed under Section 11 of the Hindu Marriage Act before the competent Court. The plaintiffs being the children of defendant No. 1 with P.W.1, even though the marriage is void, by virtue of Section 16(1) of the Hindu Marriage Act, being legitimate children are equally entitled to a share in the joint family properties along with defendant Nos. 2 & 3. In this regard, the learned counsel placed reliance on a

decision of the Apex Court reported in of **Revannasiddappa and Another v. Mallikarjun and Others**[1].

9. The learned Counsel appearing on behalf of defendants-respondents herein sought to sustain the impugned judgment passed by the Trial Court contending that the Trial Court, after evaluating the oral and documentary evidence available on record in proper perspective, has rightly dismissed the suit and the same needs no interference by this Court.

10. Now the point for consideration in this appeal is whether the judgment and decree passed by the Trial Court below is sustainable under law?

11. According to the plaintiffs, they are the children of defendant No. 1 and P.W.1, whose marriage took place in the year 1993 with the consent of defendant No. 3, the first wife of defendant No. 1, as she was not blessed with any male issue. Whereas, defendant Nos. 2 & 3 contend that defendant No. 1 married P.W.1 without the consent and knowledge of defendant No. 3. Thus, the marriage of defendant No. 1 with P.W.1, mother of plaintiffs, during the substance of marriage with

[1] (2011) 11 SCC 1

defendant No. 3 is not in dispute. In this regard, it is relevant to mention that the marriage of defendant No. 1 even according to the parties, with P.W.1 took place during the subsistence of first marriage with defendant No. 3. It is apposite to refer the relevant provisions of the Hindu Marriage Act, 1955 which came into force on 18.05.1955. Section 5 of the Act reads as under:-

> "***5. Conditions for a Hindu marriage.—****A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:— (i) neither party has a spouse living at the time of the marriage; (ii) at the time of the marriage, neither party— (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity; (iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.*"

12. Section 11 deals with the void marriages, which reads thus:-

> "***11. Void marriages.—****Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition*

presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."

13. Thus, in view of the above provisions, in the present case, the marriage between the defendant No. 1 with P.W.1, the mother of plaintiffs, is a void marriage since the defendant No. 3, first wife of defendant No. 1, was very much alive by then. Now, Section 16 is relevant to refer, which deals with the legitimacy of children born out of void and voidable marriages, which reads as under:-

"***16. Legitimacy of children of void and voidable marriages.—****(1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity. (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12,* ***any rights in or to the property of any person, other than the parents****, in any case where, but for the passing of this Act, such child would have been incapable of possessing*

or acquiring any such rights by reason of his not being the legitimate child of his parents."

(Emphasis added)

14. A plain reading of Section 16 of the Act would make it abundantly clear that the right conferred upon the illegitimate children is, only as regards the property left by their parents and nothing more. Section 16 of the Act, while engrafting a rule of fiction in ordaining the children, through illegitimate, to be treated as legitimate, notwithstanding that the marriage was void or voidable, chose also to confine its application, so far as succession or inheritance by such children is concerned, to the properties of the parents only. In this view, as rightly observed by the Trial Court, the plaintiffs being the children of defendant No. 1, through the second wife, P.W.1, whose marriage is *null and void*, could not claim any inheritance in the joint family property, that too while the father was alive. The Apex Court in the decision rendered in **Neelamma and Ors. v. Sarojamma and Ors.**[2] while dealing with the point *as to whether an illegitimate child can acquire/claim as of right a share in the joint Hindu family property*, referring to its earlier decision rendered

[2] (2006) 9 SCC 612

in **Jinia Keotin v. Kumar Sitaram manjhi**[3] has categorically held that *an illegitimate child cannot succeed/claim a share in the joint Hindu Family property. Such illegitimate child would only be entitled to a share in the self-acquired property of the parents.* Further, the Apex Court in **Bharatha Matha and Anr. V. R. Vijaya Renganathan and Ors.**[4] referring to its earlier decisions in **Neelamma** (supra) and **Jinia Keotin** (supra) and analyzing Section 16 of the Act, has held that *a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenery property but is entitled only to claim share in self acquired properties, if any.*

15. It must be noted that the Apex Court in the case of **Revannasiddappa** (supra) had took note of Section 16(3) of the Hindu Marriage Act and has observed at para-45 as follows:-

> "*45. In the instant case, Section 16(3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self-acquired or ancestral.*"

[3] (2003) 1 SCC 730
[4] AIR 2010 SC 2685

Thus, the Two-Judge Bench, while opining that such children will have a right to whatever becomes the property of their parents, whether self-acquired or ancestral, differed with the view taken by coordinate Benches in the earlier decisions quoted supra and referred the matter for reconsideration by a Larger Bench. Be that as it may, the reference by itself will not tie the hands of the Court in deciding the matters on the basis of the enunciation of law prevailing as on date.

16. The Trial Court, considering the pleadings and the evidence adduced by the parties, more particularly, considering the evidence of P.Ws.1 and D.Ws.2 and 3, has rightly held that the suit schedule properties are ancestral properties of defendant No. 1. Thus, when the plaintiffs are not entitled for share in the ancestral properties of defendant No. 1, they cannot question the execution of gift deeds i.e., Exs.B.5 and B.6 by the defendant No. 1 in favour of defendant Nos. 3 and 2. In this regard, considering Exs.B.5 and B.6, the gift deeds, executed by defendant No. 1, the trial Court at para No. 34 observed as under:-

> *"34. Exs.B.5 and B.6 are the gift deeds executed by first defendant in favour of defendant Nos. 3 and 2 gifting part of the suit land to defendants Nos.3 and 2. Those gift deeds were executed in*

June, 1993. The age of the plaintiffs even according to the plaint averments is 5 years and 3 ½ years. This suit was filed in the year 2003. Therefore, plaintiffs must have been born in 1999 or 2000. Therefore, by the date of Exs.B.5 and B.6 gift deeds, P.W.1 did not give birth to plaintiffs. Therefore, plaintiffs who have not born by the dates of Exs.B.5 and B.6 cannot question Exs.B.5 and B.6 gift deeds."

17. In light of the above discussion, this Court holds that the Trial Court was absolutely right in holding that the plaintiffs, who are born out of a void marriage between defendant No. 1 and P.W.1, cannot claim partition of the joint family properties or even in the separate properties of defendant No. 1 during his lifetime. Therefore, the impugned judgment of the Trial Court needs no interference by this Court and the appeal is liable to be dismissed.

18. In the result, the appeal is dismissed confirming the judgment of the learned Senior Civil Judge, Bhongir, dated 02.04.2005 in O.S. No. 13 of 2003 in dismissing the suit of the appellants-plaintiffs. No order as to costs.

Pending Miscellaneous Petitions, if any, shall stand closed.

M.G.PRIYADARSINI, J

28.08.2023
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THE HON'BLE JUSTICE M.G. PRIYADARSINI

A.S.No.645 of 2005

DATE: 28-08-2023