HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

SECOND APPEAL No.427 OF 2010

J U D G M E N T:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908, is filed by the unsuccessful appellants/defendants No.1 and 2 assailing the decree and judgment, dated 08.04.2010, of the learned Judge, Family Court-cum-Addl.District Court, East Godavari at Rajahmundry, passed in A.S.No.138 of 2009.

02. By the said decree and judgment, the learned Judge, Family Court-cum-Addl.District Court, East Godavari at Rajahmundry dismissed the first appeal, and confirmed the decree and judgment, dated 02.04.2009 of the learned Senior Civil Judge, Ramachandrapuram, delivered in O.S.No.181 of 2004.

03. Heard the submissions of Sri T.V.S.Prabhakara Rao, learned counsel appearing for the Appellants/Defendants No.1 and 2 ('defendants', for brevity) and Sri P.Prabhakar, learned counsel for the 1st Respondent/Plaintiff. Perused the material record.

04. The appellants are the defendants No.1 and 2. The 1st respondent is the plaintiff. The respondents No.2 and 3 are the defendants No.3 and 4 in the original suit. The parties in this second

appeal shall hereinafter be referred to as arrayed in the original suit, for convenience and clarity.

05. To begin with, it is necessary to take note of the respective pleadings/cases of the parties and the events that led to the filing of this second appeal by the defendants No.1 and 2.

06. The plaintiff filed the suit against the defendants for partition of the plaint 'A' schedule land properties and 'B' schedule house properties, which are situated in Biccavole village. One Guvvala Venkata Reddy, who is husband of 2nd defendant and father of defendants No.1 and 3, developed along with his sons 1st defendant and plaintiff the ancestral estate of G.Venkata Reddy and acquired the plaint schedule 'A' and 'B' properties and he left the house and his whereabouts are not known from 1995 till 2004. The plaintiff, defendants No.1 and 3 are the only children to him and that the 3rd defendant was given in marriage to the 4th defendant, who is no one else than the brother of 2nd defendant. While so, taking advantage of absence of G.Venkata Reddy, the defendants are hatching plan to grab the entire property for themselves by creating some litigation against the plaintiff and therefore, the plaintiff filed the suit for partition of plaint schedule properties into three equal shares and also for future profits etc.

07. The 2nd defendant filed written statement and defendants No.1, 3 and 4 adopted the same. The 2nd defendant while admitting that her husband G.Venkata Reddy is absconding and not seen from the year 1995; and that the plaintiff is separated from the family long back; and that some properties were acquired in his name by her husband; and that the plaintiff acquired the property nominally in the name of his wife with the income realized from sale proceeds of the property, which was allotted to his share. It is further contended that a part of property in sub item No.1, sub item No.2 and sub item No.3 in item No.1of plaint 'A' schedule properties are self acquired properties of her husband G.Venkata Reddy; and that she purchased Ac.1-00 of land, a part of sub item No.1 of item No.1 of plaint 'A' schedule property; and she purchased five different sale deeds some of the plaint 'A' schedule properties; and thus, they are her self-acquired properties. It is further contended that her husband G.Venkata Reddy executed a will dated 27.09.1995 where under, he bequeathed item No.2 of plaint schedule property in favour of the 1st defendant; and that he also executed a codicil dated 01.06.1996 where under, he bequeathed sub item No.3 of item No.1 of plaint 'A' schedule property. Item No.II of plaint 'B' schedule in favour of the 1st defendant apart from Ac.1-00 covered by R.S.No.71/1; and Ac.0.33 cents covered by R.S.No.71/3, which are

sub items 1 and 2 in item No.1 of plaint 'A' schedule and since there was already partition between the plaintiff and her husband G.Venkata Reddy, the plaintiff has no right to file the suit for partition; and therefore, prayed to dismiss the suit.

08. Taking into consideration the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled for partition of the schedule property?
2. Whether the plaintiff is entitled for future profits?
3. To what relief?

09. Subsequently, the following additional issues were framed:

1. Whether the plaint schedule properties are self-acquired properties of D-2 and her husband?
2. Whether the husband of the D-2 executed will deed dated 27.09.1995 and codicil dated 01.06.1996 in favour of the D-1 and D-3?
3. Whether the will and codicil can be accepted have force in law?

10. At trial, on behalf of the plaintiff, he examined himself as P.W-1; no documents were marked. On behalf of the defendants, D. Ws-1 to 5 were examined and Exs.B-1 to B-20 were marked.

11. On appreciation of pleadings and the oral and documentary evidence, the trial Court decreed the suit with costs by holding that

the plaintiff is entitled for preliminary decree for partition of plaint schedule properties into 16 equal shares and 5 such shares are allotted to the plaintiff which should include 229 sq. yards of house site sold by the plaintiff under the original of Ex.B-19 to third party, which has to be worked out at the time of final decree proceedings. The appeal preferred by the defendants No.1 and 2 against the said decree and judgment was dismissed by the First Appellate Court, by the impugned decree and judgment. Aggrieved thereof, the defendants No.1 and 2 preferred this Second Appeal.

12. The learned counsel for defendants No.1 and 2 contended as follows: The decree and judgment of the lower Appellate Court is contrary to law, weight of evidence and probabilities of the case; the courts below should have seen that the suit itself is not maintainable without there being any prayer for declaration as to death of Venkata Reddy; the Courts below should have seen that it is the duty of the plaintiff to establish his plea of death of his father by name G.Venkata Reddy and non-failure of defendants in raising an objection in written statement as to maintainability of suit, does not entitle the plaintiff to get such a relief; the Courts below erred in holding that the plaint schedule properties are joint family properties and that the plaintiff is entitled to a 5/16 share therein; the Courts below should have seen

that the plaintiff separated from the family long back and that he was given property to his share by his father and that by alienating the same, he purchased properties in the name of his wife; the Courts below should have seen except the oral testimony of P.W-1 there was absolutely no material on record to come to a conclusion that plaint schedule properties are joint family properties; the Courts below should have seen that there was no ancestral nucleus at all and that the plaintiff did not even place any proof to arrive as such a conclusion; the Courts below should have seen that the 2nd defendant herself alone has been in possession and enjoyment of her properties as absolute owner and that the question of treating the same as joint family properties does not arise; the Courts below failed to give opportunity to defendants to adduce their evidence and advance their arguments; the Courts below erred in not considering the documentary and oral evidence adduced on behalf of the defendants.

13. Having so contended, it is submitted on behalf of the appellants/defendants No.1 and 2 that the following substantial questions of law would involve in the Second Appeal:

i) Whether the suit for partition is maintainable without impleading the father against whose properties the partition is sought for?

ii) Whether the suit is maintainable without seeking declaration whether a person is dead or alive while seeking partition of the properties of such person?

iii) Whether the non-proving of registered will, will give automatic right of partition of properties without substantiating whether the properties acquired with joint nucleus or not?

iv) Whether the burden is on the plaintiff to prove that all the plaint schedule properties are joint family properties or not ignoring the fact that Exs.B-1 to B-20 which are exclusively stands in the name of D-1 to D-3?

v) Whether the court below are right in rejecting the specific stand of D-1 to D-3 that the son of the plaint schedule properties are their self-acquired properties which are not liable for partition?

14. The learned counsel for plaintiff would submit that no substantial question of law required U/s.100 of the Code of Civil Procedure is involved in the Second Appeal, and therefore, the appeal be dismissed at the threshold.

15. The learned counsel for plaintiff would further submit that any question raised in Second Appeal must be a substantial

question of law to attract section 100 of Code of Civil Procedure; and the condition precedent for entertaining and deciding a Second Appeal is the existence of a substantial question of law, and such substantial question of law must be a public importance or question related substantial rights of parties or questions which have not been finally settled by the trial Court; and a question of law having a material bearing and the decision of the case will be a substantial question of law; and further, if it is not covered by any specific provision of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue; and to raise such a question of law, there must be first, a foundation for it laid in the pleadings, and question to emerge from the sustainable findings of the fact, arrived at by Courts of facts; and it must be necessary to decide that question of law for just and proper decision of the case.

16. He would further submit that an entirely new point raised for the first time, before the High Court, is not a question involved in the case, unless it goes to the root of the matter; and in the case on hand the questions raised in the appeal as substantial questions of law, are questions of facts only, which were already been decided by the trial Court and the First Appellate Court.

17. In support of his arguments, he relied on judgment of the Hon'ble Apex Court in the case of **Nazir Mohamed Vs. J.Kamala and others**[1]. Hon'ble Apex Court referred the judgment of Constitutional Bench of the Hon'ble Apex Court in the case of **Chunilal V. Mehta & Sons Ltd., Vs. Century Spg. & Mfg. Co.Ltd**[2]. The Constitutional Bench of Hon'ble Apex Court held as under:

> *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

18. The Hon'ble Apex Court in **Nazir Mohamed Vs. J.Kamala and others**, also referred the judgment of the Hon'ble Apex Court in

[1] 2020 (19) SCC 57

[2] AIR 1962 SC 1314

Hero Vinoth Vs. Seshammal[3], where the tests to find out whether a given set of questions of law are mere questions of law or substantial questions of law are summarized. The relevant paragraphs of the judgment of the Hon'ble Apex Court in **Hero Vinoth Vs. Seshammal** are as under:

> *"The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with- technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal 2(2006) 5 SCC 545 shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. Ram Ditta, the phrase substantial question of law as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In*

[3] 2006 (5) SCC 545

Chunilal case, the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju (Chunilal case."

"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."

19. The Hon'ble Apex Court held that "*to be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way."*

The Hon'ble Apex Court further held as under:

"To be a question of law "involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case."

In the case of **Nazir Mohamed Vs. J.Kamala and others**, the Hon'ble Apex Court held in para 28 to 32 as under:

> *"28. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.*
>
> *29. To be a question of law "involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.*
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> *30. Where no such question of law, nor even a mixed question of law and fact was urged before the Trial Court or the First Appellate Court, as in this case, a second appeal cannot be entertained, as held by this Court in* ***Panchagopal Barua v. Vinesh Chandra Goswami***[4]*.*
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> *31. Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to do justice at all stages and the impelling necessity of avoiding prolongation in the life of any lis.*

[4] 1997 (4) SCC 713

This proposition finds support from ***Santosh Hazari v. Purushottam Tiwari***[5]*.*

32. In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect as held in ***Ramchandra Ayyar v. Ramalingam Chettiar***[6]*. An entirely new point, raised for the first time, before the High Court, is not a question involved in the case, unless it goes to the root of the matter."*

20. Thus, the Hon'ble Apex Court summarised the principles relating to section 100 Code of Civil Procedure as under:

"(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material

[5] 2001(3) SCC 179

[6] AIR 1963 SC 302

bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered 5 AIR 1963 SC 302 on a material question, violates the settled position of law.

(iv) The general rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where

(i) the courts below have ignored material evidence or acted on no evidence;

(ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or

(iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but

also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

21. In the case on hand, the Court at the time of admission of the appeal, basing on the five questions raised as substantial questions of law, referred above in para 13 of this judgment observed that father of the 1st defendant was not issued notice, and, therefore, treated it as a question of substantial law and admitted the appeal.

22. The first question among the five questions, is whether the suit for partition is maintainable without impleading the father against whose properties a partition is sought for?. The second question is whether the suit is maintainable without seeking declaration whether a person is dead or alive while seeking partition of the properties of such person?.

23. Hon'ble Apex Court in the case of Nazir Mohamed Vs. J.Kamala and others referring the Constitutional Bench in Chunilal V. Mehta & Sons Ltd., Vs. Century Spg. & Mfg. Co.Ltd's case and Hero Vinoth Vs. Seshammal, summarized the principles relating to section 100 of Code of Civil Procedure, as stated supra.

24. To be a substantial question of law, there must be a foundation for it laid in the pleadings, and the question should emerge from the

sustainable findings of the fact, arrived at by the Courts of facts, and it must be necessary to decide that substantial question of law for a just and proper decision of the case.

25. The material contentions emerging from the plaint and written statement in the case has already been referred at para 6 and 7 of this judgment. The plaintiff contended that Sri G.Venkata Reddy, who is father of plaintiff, 1st defendant and 3rd defendant and husband of the 2nd defendant, who was acting as kartha of the family and he left the house long ago, and his whereabouts are not known since 1995; the suit for partition was filed in the year 2004; Therefore, Sri G.Venkata Reddy was not impleaded as a party to the suit.

26. The 2nd defendant i.e., wife of Sri G.Venkata Reddy filed the written statement. It was adopted by defendants No.1, 3 and 4. In the written statement it is admitted that Sri G.Venkata Reddy is not seen since 1995 and his whereabouts are not known. The learned trial Court discussed the issue relating to maintainability of the suit in the absence of Sri G.Venkata Reddy. The trial Court observed that the defendants did not take any plea that the suit is not maintainable in the absence of Sri G.Venkata Reddy, and on the other hand, admitted that his whereabouts are not known since 1995, and therefore, in view of section 108 of Evidence Act, burden of proving that a person is alive

who has not been heard of for 7 years, is by those who would only have heard of him, if he had been alive, and rejected the contention of the defendants. The First Appellate Court concurred with the said finding of the trial Court. The general rule is that the High Court will not interfere with the concurrent findings of the Courts below. Exception is where the Courts below have ignored the material evidence or acted on no evidence or drawn wrong inference from proved facts by applying the law erroneously.

27. In the case on hand, it is the case of both the parties that Sri G.Venkata Reddy has not been heard of for 7 years by the date of suit. The defendants relied on a will dated 27.09.1995 and codicil dated 01.06.1996 contending that Sri G.Venkata Reddy bequeathed some properties in favour of the 1st defendant and the 3rd defendant, and claimed right over the said properties and sought exclusion of said properties from the partition. Therefore, admittedly the defendants did not lay any foundation the pleadings that suit is not maintainable as Sri.G.Venkata Reddy is not a party. On the other hand, claimed rights under the will, pleading as if the testator is not alive, since his where abouts are not known for 7 years prior to the date of the suit.

28. The learned counsel for plaintiff would submit that the defendants cannot “blow hot and cold” and a party cannot be permitted “approbate or reprobate” at the same time.

29. It is a settled legal position that a party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. The defendants knowingly accepted the benefits of the fact that Sri G.Venkata Reddy has not been heard of for 7 years, and tried to get benefit from the will and codicil, and they allowed the suit proceedings to go on in the absence of Sri G.Venkata Reddy. Therefore, they cannot be permitted to “blow hot and cold” “fast and loose” or “approbate or reprobate”, at a later stage.

30. It is also pertinent to note down an important happening in this case after filing of the suit for partition. The defendants No.1, 2 and 3 filed a suit in O.S.603/2009 against the plaintiff, seeking declaration that Sri G.Venkata Reddy is deemed to be died. The said suit was decreed by the Junior Civil Judge, Anaparthy. This fact was suppressed before the First Appellate Court and in the grounds of second appeal.

31. The plaintiff filed an application before this Court in I.A.1/2017 (SAMP 736/2017) in SAMP 2239/2013 in S.A.427/2010 requesting

the Court to receive a copy of judgment in O.S.603/2009 filed by the defendants No.1, 2 and 3. It is not under dispute. Therefore, the defendants suppressed decree, and raised same question at para 27 in the grounds of appeal. Meaning thereby they suppressed the truth about the decree in O.S.603/2009 and tried to "blow hot and cold", fast and loose" or "approbate or reprobate" from the beginning of the proceedings in the suit before the trial Court, before the First Appellate Court and now in the Second appeal.

32. In that view of the matter, this Court is of the opinion that the defendants cannot be permitted to "blow hot and cold", fast and loose" or "approbate or reprobate". Accordingly, it is answered that the two questions do not involve any substantial questions of law.

33. The other questions raised in the Second Appeal are that 'non-proving of Will would not give an automatic right of partition of properties' and that 'the burden of proof is on the plaintiff to prove that all the plaint schedule properties are joint family properties' and that 'some of the plaint schedule properties are self acquired properties of the 1st defendant and 2nd defendant'.

34. The trial Court in its well-reasoned judgment, discussed the evidence of plaintiff, defendants and Exs.B-1 to B-20. On appreciation

of the facts, the learned trial Court held that the plaint schedule properties are joint family properties of the plaintiff and defendants, and ordered partition by considering the amendment to Hindu law, treating the 3rd defendant/daughter also as a co-parcener; allotted equal share to her with sons i.e., plaintiff and the 1st defendant; the share of Sri G.Venkata Reddy was ordered to be partitioned among the plaintiff, 1st defendant, 2nd defendant-wife of Sri G.Venkata Reddy and the 3rd defendant; The 4th defendant is not a member of the joint family; he is husband of the 3rd defendant and brother of the 2nd defendant. Therefore, no share was allotted to the 4th defendant.

35. The First Appellate Court considering the evidence on record, concurred with all findings of the trial Court. As already stated supra, the Hon'ble Apex Court in **Nazir Mohamed Vs. J.Kamala and others**, summarized the principles in respect of section 100 of Code of Civil Procedure and held that the general rule is that High Court will not interfere with the concurrent findings of the Courts below, except where the Court below have ignored the material evidence, or acting on no evidence or drawn wrong inference by applying the law erroneously.

36. The learned counsel for the appellants/defendants would submit that it is the contention of the appellants that some of the properties of plaint 'A' schedule landed properties are self acquired properties of the

2nd defendant and the 1st defendant, and the defendants placed Exs.B-5 to B-10 establishing that item No.2 of plaint 'A' schedule property was purchased by the 2nd defendant-mother and as per Exs.B-11 and B-12 item No.3 of plaint 'A' schedule property was purchased by the 1st defendant, and therefore, it was established that they are the self-acquired properties of the defendants No.1 and 2; but the trial Court erroneously placed the burden on the defendants to establish that they are not joint family properties.

37. The learned counsel for plaintiff would submit that the plaintiff was examined as P.W-1; on oath he categorically deposed that either the 1st defendant or the 2nd defendant had no income of their own at the material point in time i.e., at the time of purchasing lands under the above sale deeds; nothing was elicited in cross-examination to probable the plea of the defendants that those properties were purchased by the defendants No.1 and 2 with their own income, though they are members of the joint family at the relevant point in time; on the other hand, the 2nd defendant, who filed the written statement did not enter into witness box tendering herself for cross-examination, to give an opportunity to the plaintiff to elicit truth about her plea, and therefore, the learned trial Court and First Appellate Court has had drawn adverse inference against the defendants;

further, the 1st defendant was examined as D.W-1 and the 4th defendant was examined as D.W-4, in the cross-examination of plaintiff, they admitted that the 1st defendant and the 2nd defendant were not having income of their own to purchase the said properties; and in those circumstances, the trial Court rightly held that the plaintiff proved that those properties are joint family properties; thus the onus shifted to the defendants, but the defendants failed to rebut the case of the plaintiff; and therefore, answered the issues in favour of the plaintiff; and in the said circumstances and in view of the concurrent findings of the trial Court and the First Appellate Court, there are no grounds to interfere with the findings of the Courts below.

38. The Hon'ble Privy Council in the case of **Appalaswamy Vs. Suryanarayanamurty**[7] held that *"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*

[7] 1948 ILR (Mad) 440

was acquired without the aid of the joint family property", and that "*the burden rests upon any one asserting that any item of the property was joint to establish the fact, and also that where it is established that the family possessed some joint property, which from its nature and relative valuation 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 aid of joint family property".*

39. The Hon'ble Supreme Court in **Bhagwat Sharan (Dead Thr LRs) Vs. Purushottam and others**[8], referred the above judgment of Privy Council and also judgment of the Hon'ble Apex Court in the case of **Bhagwan Dayal Vs. Reoti Devi**[9], and **Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and others**[10], **D.S.Lakshmaiah and others Vs. V.Balasubramanyam and others**[11], held that *"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*

[8] AIR 2020 SC 2361

[9] AIR 1962 (SC) 287

[10] 1955 (1) SCR 1

[11] 2013 (10) SCC 310

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."

40. The Hon'ble Supreme Court in the above judgment held that this view was also taken in **Mst Rukhmabai v. Lala Laxminarayan and Others**[12] and **Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade**[13].

41. Therefore, the law is well settled that the burden lies upon the person, who alleges the existence of the Hindu undivided family to prove the same, and if the persons so asserting proves that there was no 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.

[12] 1960 2 SCR 253

[13] 2007 1 SCC 521

42. In the case on hand, the trial Court at paras 12, 13, 14 and 15 of the judgment, in detail discussed about the evidence of P.W-1, D.W-1 and D.W-4 as well as Exs.B-1 to B-20 placed by the defendants. The judgement shows that Trial Court was conscious of the law that the one who asserts must prove that the property is a joint family property.

43. It is an admitted fact that the 2nd defendant i.e., wife of Sri G.Venkata Reddy and mother of plaintiff, defendants No.1 and 3 and sister of 4th defendant filed the written statement taking plea that item No.2 of plaint 'A' schedule property was purchased by her out of her own income, though she was a joint family member at material point in time i.e., at the time of Exs.B-5 to B-10 sale deeds standing in her name. The plaintiff as P.W-1 on oath reiterated the plaint averments stating that either the 1st defendant or the 2nddefendant did not have any income of their own at the material point in time to acquire the properties covered under Exs.B-5 to B-10 or the documents relied by the 1st defendant. But the 2nd defendant to contradict the testimony of the plaintiff, did not enter into witness box.

44. Hon'ble Supreme Court in the case of **Iswar Bhai C.Patel Vs. Harihar Behara**[14], held that if a party does not enter into witness box, an adverse presumption has to be drawn against that party, applying principles U/s.114 of the Evidence Act. In the case on hand, the 2nd defendant abstained from the witness box and did not make any statement on oath in respect of her pleadings set up in the written statement. Therefore, an adverse inference has to be drawn against her.

45. The 1st defendant was examined as D.W-1, As observed by the trial Court, in the cross-examination, he admitted that by the date of Exs.B-11 and B-12, he was aged about 20 years and he was a student till 1987 and started cultivating lands later only. Therefore, it cannot be said that he purchased properties under Exs.B-11 and B-12 in the year 1991 out of his own income.

46. The 4th defendant, who is brother of the 2nd defendant and husband of the 3rd defendant was examined as D.W-4. The learned trial Court appreciated his evidence and observed that as per his testimony, Sri G.Venkata Reddy used to purchase properties one after other in the name of each member of the joint family, and the 2nd

[14] AIR 1999 SC 1341

defendant, who is sister has no properties in Voolapalli village, and they are all living by doing coolie work prior to her marriage. Therefore, the learned trial Judge considering the above facts and circumstances culled out from the evidence, which would establish that properties were purchased from funds raised out of joint family nucleus, held that the plaintiff proved that the plaint schedule properties are the joint family properties. Therefore, shifted the onus to the defendants. But they failed to prove that the properties covered by item No.2 and 3 of plaint 'A' schedule landed properties are the self-acquired properties.

47. The learned First Appellate Court also considered the said evidence and concurred with the trial Court. In that view of the matter, this Court is of the opinion that there are no grounds to interfere with the said concurrent findings of the Courts below. Therefore, three questions raised at para 27 in the grounds of appeal which relates to this aspect do not involve any substantial questions of law. They are drafted cleverly to say that they involve substantial questions of law though they are only questions of fact already decided by the trial Court and First Appellate Court concurrently.

48. Coming to the aspect relating to will and codicil, the defendants claimed right over certain plaint schedule properties basing on the said

will and codicil. The defendants to prove the will and codicil, made attempt to examine attestors of the will and codicil; filed their chief-examination affidavits as D. Ws-2 and 3 respectively, but for the reasons best known to them, those two witnesses were not tendered for cross-examination. Hence, the trial Court and First Appellate Court rightly ignored the chief-examination affidavits.

49. The defendants examined a relative of the scribe of the will as D.W-5 to depose that he identified the signature of the scribe on the will.

50. Section 68 of Indian Evidence Act 1872, mandates that if a document is required by law to be attested, it shall not be used as evidence, until one attesting witness has been called for the purpose of proving its execution, if attesting witness is alive and subject to the process of the Court and capable of giving evidence. The defendants shall take steps to call the attesting witness, who is alive and subject to the process of Court and capable of giving evidence. But the defendants without any tenable reason failed to do so.

51. Section 69 of Indian Evidence Act 1872, would speak that if any attesting witness cannot be found, it must be proved that the attestation of one attesting witness at least is in his hand writing, and

that the signature of the person executing the document is in the hand writing of that person.

52. In that view of the above legal position, the evidence of D.W-5 identifying signature of the scribe, will not prove the will or codicil.

53. In the light of foregoing discussion, there are no grounds to interfere with the judgment of the learned First Appellate Court and the trial Court. The Second Appeal is liable to be dismissed.

54. In the result, the Second Appeal is dismissed, by confirming the judgment and decree dated 08.04.2010 passed in A.S.138/2009 on the file of Judge, Family Court-cum-Additional District Court, East Godavari District, Rajahmundry. There shall be no order as to costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

B.V.L.N. CHAKRAVARTHI, J.

26.12.2023

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B/o. psk

HON'BLE SRI JUSTICE B.V.L.N.CHAKRAVARTHI

S.A.No.427 OF 2010

Note: Mark L.R.Copy

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26th December, 2023

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