

T. Venkata Narayana and Others

Vs

Venkata Subbamma (dead) and Others

Civil Appeal No. 7107 of 1996

(K. Ramaswamy, G. B. Pattanaik JJ)

29.03.1996

### JUDGMENT

1. Leave granted.

2. We have heard the counsel on both sides.

3. Admittedly, T. Ramesh Chandra Chowdhry and his mother Smt. T. Venkata Subbamma had a compromise in a suit for partition between them. Compromise decree came to be passed on August 28, 1996 by the District Court, Khammam. It would appear that thereafter when Smt. Venakata Subbamma was attempting to alienate the properties given to her under the compromise decree, the appellants filed O.S. No. 313/89 in the Court of the District Musif at Khammam for a perpetual injunction restraining her from alienating the property. The contest in the suit centers round the question whether Venkata Subbamma got an absolute estate under the compromise decree so as to enable her to alienate the properties to third parties or she had a limited estate thereunder covered under Section 14 (2) of Hindu Succession Act, 1956. Pending suit, she died. Respondents have come on record under Order 22 Rule 4 CPC claiming that Venkata Subbamma had executed a Will in her favour. It was also further contend that she had lost the original will as sought to adduce secondary evidence under Section 65 of the Evidence Act. The District Munsif had refused to permit her to adduce secondary evidence. Thereon the matter was carried in revision. The High Court of A.P. in the impugned order made in C.R.P. No. 1935/92, dated November 5, 1993 directed adduction of secondary evidence. Thus, this appeal by special leave.

4. The only question is : whether the respondent is entitled to adduce secondary evidence to prove the alleged will said to have been executed by Venkata Subbamma in her favour? The admitted position is that in partition suit, after the Succession Act came into force, namely, August 28, 1969 Venkata Subbamma had compromised with her son and obtained a decree with covenants contained therein. What is the effect of that decree is the subject matter in the pending suit. Whatever rights that were available to her thereunder would be available to the respondent who has come on record as legal representative. The mere suit for injunction cannot be converted into a suit for probate of a will where ever the will is to be proved. If the will is to be proved according to law, it has to be by way of probate in the Court having competency and jurisdiction according to the procedure provided under the Indian Succession Act. That procedure cannot be converted in a suit for mere injunction as a probate suit and direct the parties to adduce as the circumstances may warrant. The High Court has committed error of law and jurisdiction in directing adduction of secondary evidence in the suit for injunction to prove the will alleged to have been executed by Venkata Subbamma.

5. The appeal is accordingly allowed. The order of the High Court is set aside and that of the District Munsif is confirmed. It would be open to the respondent to establish her rights, if any under the will, in accordance with law, but the trial in the suit would, as stated earlier, be limited to the interpretation of the compromise decree. No costs. Appeal allowed.