

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

SECOND APPEAL No.1037 of 2013

% 31.12.2013

1. Kommagani Ilaiah and another

... Petitioners

VERSUS

\$ 1. Kommagani Bikshapathi and others

...Respondents

< GIST:

> HEAD NOTE:

! Counsel for the Petitioners : Sri Avinash Desai

^ Learned counsel for respondents : --

? Cases referred:

1. AIR 1963 SC 1917
2. AIR 1988 SC 703
3. (1972) 4 SCC 562
4. (2004) 10 SCC 779
5. (2007) 6 SCC 100

HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

SECOND APPEAL No.1037 of 2013

Date : 31-12-2013

Between :-

1. Kommagani Ilaiah and another.

..... Appellants.

And

1. Kommagani Bikshapathi and others.

.... Respondents.

Learned Counsel for appellants : Sri Avinash Desai

Learned counsel for respondents : --

This Court delivered the following :-

HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

SECOND APPEAL No.1037 of 2013

JUDGMENT:

This Second Appeal is filed challenging the judgment and decree dt.03-06-2013 in A.S.No.12 of 2010 of the Senior Civil Judge at Bhongir (for short "the lower appellate Court"), reversing the judgment and decree dt.04-06-2010 of the Principal Junior Judge, Bhongir in O.S.No.283 of 2003 (for short "the trial Court").

2. The appellants are defendants in the above suit.

The suit was filed by 1st respondent/plaintiff for partition of the plaint schedule properties admeasuring Ac.6-02 gts. (in Sy.Nos. 508/A1, 508/A2, 508/A3, 508/A4, 508/A5, 743/A1, 743/A2 and 747/A2 of Chada village, M.Athmakur Mandal of Nalgonda district) into three equal shares and for

allotment of one such share to him, for the relief of declaration that he is the owner to the extent of 1/3rd share out of Ac.2-06 gts. in Sy.No.508/A of the same village.

3. The plaint schedule properties belong to one late Rajamallu. The plaintiff claims to be the son of Rajamallu through his first wife Pedda Narasamma. Defendant Nos.1 and 2 are admittedly sons of Rajamallu through Chinna Narasamma, his second wife.

4. The plaintiff alleged that the extent of Ac.6-02 gts. mentioned in the plaint schedule belongs to Rajamallu; that he was also a pattedar of an extent of Ac.2-06 gts. in Sy.No.508/A ; although the property was in the name of one Kancharla Mallaiah, father of defendant Nos.3 to 5 nominally, Rajamallu had acquired title to this property also by adverse possession; Rajamallu had died about 10 years prior to filing of the suit; on his death, plaintiff and defendant Nos.1 and 2 succeeded to the plaint schedule properties; that taking advantage of the absence of plaintiff in the village, defendants Nos.1 and 2 got mutated their name in respect of the suit lands except Ac.2-06 gts. in Sy.No.508/A and started enjoying the lands exclusively; and when he demanded for partition, they did not agree. So he had to file the suit.

5. The defendant Nos.1 and 2 filed written statement denying the plaint averments. They contended that plaintiff

is a stranger to the family and he never resided either with Rajamallu or defendant Nos.1 and 2. They also contended that plaintiff was residing with one Bodge Somaiah and Veeramma for more than 60 years by enjoying their properties; that Rajamallu died about 18 years prior to filing of the suit and only defendant Nos.1 and 2 are his legal heirs; that plaintiff never objected when mutation of the plaint schedule property was made in the names of defendant Nos.1 and 2 or when they were issued pattadar pass books and title deed; and that they have also perfected title to the plaint schedule property by adverse possession. They contended that the suit is barred by limitation and the boundaries of the properties mentioned in the plaint schedule are false and incorrect.

6. Defendant Nos.3 to 5 adopted the written statement of defendant Nos.1 and 2 by filing a memo.

7. The Court below framed the following issues:

- “1. Whether the plaintiff is entitled for preliminary decree of partition as prayed for?
2. Whether the plaintiff is entitled for declaration as owner of 1/3rd share out of Ac.2-06 gts. in Sy.No.508/A as prayed for ?
3. Whether the boundaries of the suit schedule properties are incorrect?
4. Whether the suit is barred by limitation?

5. Whether the defendants perfected their right over the suit schedule property by way of adverse possession?
6. To what relief?"

7. The plaintiff examined P.Ws.1 and 2 and marked Exs.A-1 to A-15. The defendants examined D.Ws.1 to 3, but did not mark any documents.

8. By judgment and decree dt.04-06-2010, the trial Court dismissed the suit with costs. The trial Court held that plaintiff failed to prove that he is the son of late Rajamallu or that he resided with the family of Rajamallu and cultivated the plaint schedule property jointly and therefore, he is not entitled to relief of partition. It held that during the life time of Rajamallu itself the plaint schedule properties were partitioned between defendant Nos.1 and 2 and there is no explanation by plaintiff why he kept quiet for 10 years, even after noticing the mutation of the names of 1st defendant and Pedda Swamy in respect of the plaint schedule properties in the Revenue Records without demanding for partition. It also referred to the fact that a house property of Rajamallu was not included in the suit and so the suit is bad for non-joinder of properties of Rajamallu. It held that the plaintiff, if he is the son of Rajamallu, would have performed the last rites of Rajamallu and the fact that he did perform the last rites would show that he is not the son of Rajamallu. It also held that plaintiff

did not examine any villagers to prove his relationship with defendant Nos.1 and 2, that plaintiff had been residing with his family Bodge Somaiah and Veeramma and it was the 1st defendant, who performed the last rites of Rajamallu. Although the plaintiff relied on Exs.A-13 to A-15 voters list and also Exs.A-6 and A-8 to A-12 showing the name of his father as Rajamallu, it held that the surname of Rajamallu was not shown therein. It also held that the extent of Ac.2-06 gts. in Sy.No.508/A is self-acquired property of Rajamallu and plaintiff had no right to seek partition of the plaint schedule property which had been settled between defendant Nos.1 and 2 during the lifetime of Rajamallu itself. It also held that the patta in respect of an extent of Ac.2-06 gts. in Sy.No.508/A stands in the name of defendant Nos.3 to 5, that plaintiff did not file any document to show that late Rajamallu was in possession of the above property for a period of 12 years and therefore, he is not entitled to the relief of declaration of title in respect of 1/3rd share in this land. It held that plaintiff failed to establish the correctness of boundaries of the plaint schedule lands and that the relief of declaration of title sought in respect of Ac.2-06 gts. in Sy.No.508/A by the plaintiff, is barred by limitation. It also held that defendant Nos.1 and 2 failed to prove that they perfected their title over the plaint schedule property by way of adverse possession.

9. Challenging this judgment and decree, the plaintiff

filed A.S.No.12 of 2010 before the Senior Civil Judge, Bhongir. By judgment and decree dt.03-06-2013, the said appeal was allowed.

10. The lower appellate Court held that Exs.A-6, A-10 to A-15 prove that Rajamallu is the father of plaintiff; that defendants did not give any suggestion that these documents are fabricated for the purpose of the case by plaintiff and did not dispute those documents; that they had also not taken a specific plea that their father Rajamallu is different from the father of plaintiff in their pleadings nor did they deny that they are not the sons of Rajamallu through his second wife. As regards the extent of Ac.2-06 cents in Sy.No.508/A, it held that although the defendant Nos.1 and 2 contended that they acquired it, they did not place any evidence in support of the said plea; that Ex.A-2 certified copy of pahani for the year 1986-87 shows that Rajamallu is one of the pattedars along with Kancharla Mallaiah over an extent of Ac.04-12 gts.; therefore, Rajamallu is owner of an extent of Ac.2-06 gts. in Sy.No.508/A; and it was not in the exclusive possession of

1st defendant or 2nd defendant; so it has to be treated as joint family property of plaintiff and defendant Nos.1 and 2; and therefore, plaintiff is entitled to 1/3rd share therein. It held that the property cannot be said to be not joint family property merely because the plaintiff was having a separate residence. It noticed that defendant Nos.1 and 2

did not set up any plea of non-inclusion of house property but only made a suggestion to plaintiff about the existence of such a house and its non-inclusion and in the absence of a pleading by defendants that a house property is also joint family property, the suggestion by defendants or its response thereto by plaintiff cannot be taken into consideration. It also held that defendants failed to file any documentary proof in support of the plea of oral partition nor did they mention the date, month and year in which it is said to have taken place.

11. Challenging the same, this appeal is filed.

12. The learned counsel for appellants contended that the Court below erred in holding that plaintiff is the son of Rajamallu through Pedda Narasamma and that the said finding has been given on the basis of irrelevant evidence. The learned counsel for the appellant relied upon **Gurbaksh Singh Vs. Nikka Singh**^[1] and **J.B.Sharma Vs. State of Madhya Pradesh and Anr.**^[2] in support of this plea. He further contended that the plaintiff did not prove Exs.A-6 and A-10 to A-15 on the basis of which the trial Court gave a finding that he is the son of Rajamallu as no witness was examined to prove these documents. He further contended that even if there is no challenge to these documents, the burden is on the plaintiff to prove them. He relied upon **Sait Tarajee Khimchand and Ors. Vs.**

Yelamarti Satyam @ Satteyya and Ors. ^[3] in this regard.

He also contended that there is no evidence led by plaintiff as contemplated under Section 50 of the Indian Evidence Act, 1872 (for short “the Act”) for coming to a conclusion about the relationship of Rajamallu with plaintiff and his alleged mother Pedda Narasamma. He contended that the lower Appellate Court failed to consider the issue of adverse possession as the plaintiff had to plead and prove from which day his possession has become adverse to defendant Nos.3 to 5. He also relied upon **Karnataka**

Board of Wakf Vs. Government of India and Ors. ^[4] in this regard. He also contended that the evidence on record would reveal that a portion of the property had been sold to third parties, that the purchasers are in possession of the property and they should have been made parties to the suit. On account of their non-joinder, the suit is liable to be dismissed.

13. I have noted the submissions of the learned counsel for the appellants.

14. In the present case, the first issue to be considered is whether plaintiff is the son of Rajamallu. The trial Court held that plaintiff is not the son of Rajamallu but the lower appellate Court, on appreciation of documentary evidence on record, took a contrary view. The lower appellate Court relied upon Exs.A-6 and A-10 to A-15 to

hold that plaintiff is the son of Rajamallu. It held that the defendants had not suggested that these documents are fabricated for the purpose of the case; that they have never disputed these documents; that Ex.A-6 is a rice distribution card issued by State which shows Rajamallu as the father of Kommagani Bikshapathi, the plaintiff; Ex.A-10 is a residential certificate issued by the Village Revenue Officer, Chada village;

Ex.A-11 is the Caste certificate; Ex.A-12 is a pension grant card issued by the M.P.D.O. and Exs.A-13 to A-15 are true copies of voters list for the years 1995, 2006 and 2007' and all of them show that father of the plaintiff is Rajamallu. I completely agree with this view of the lower appellate court.

15. I am unable to accept the contention of the learned counsel for appellants that plaintiff should prove that he is the son of late Rajamallu through his first wife Pedda Narasamma. In all official documents, the mother's name is not mentioned normally and only the father's name is mentioned. Therefore, there is nothing wrong in the lower appellate Court in relying on Exs.A-6 and A-10 to A-15 to hold that plaintiff is the son of Rajamallu, particularly when defendants did not plead that their father Rajamallu is different from the father of plaintiff or deny that they are born to Rajamallu through his second wife. Therefore, I do not agree with the learned counsel for appellants that the

judgment of the lower appellate Court is based on no evidence or based on irrelevant evidence.

16. I also do not agree with the contention of the learned counsel for the appellants that since none connected with Exs.A-6 and A-10 to A-15 were examined, they could not have been relied upon. Exs.A-6 and A-10 to A-12 have been issued by the officials of Government while Exs.A-13 to A-15 are true copies of voters list of the village and in all these documents the name of plaintiff's father is shown as Rajamallu. When the defendants have never disputed the authenticity of these documents in any manner, it was not necessary for plaintiff to examine the authors of these documents. It is not as if they are private documents which require to be proved by examining the author of the documents. In **Sait Tarajee Khimchand** (3 supra) relied upon by the learned counsel for appellants, the documents sought to be relied upon was a day book and a ledger maintained in a partnership firm and since these were private documents, the Court held that unless they are proved by examining the author of the entries therein, they could not have been accepted in evidence. The said judgment has no application to the present case since Exs.A-6 and A-10 to A-12 are issued by Officials of the State Government and even Exs.A-13 to A-15 are true copies of voters list of the village, and as they are not private documents, they were rightly relied upon to prove

the fact that plaintiff is the son of Rajamallu.

17. Although the learned counsel for the appellants contended that the lower appellate Court had held that the plaintiff was born to Rajamallu and Pedda Lakshmmamma, there is no such finding in the judgment passed by the lower appellate Court.

18. The reliance by the learned counsel for the appellants on Section 50 of the Evidence Act, 1872 is also misplaced. Section 50 of the Act states :

“50. Opinion or relationship, when relevant

:- When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).”

19. Admittedly, the plaintiff was living away from the family of Rajamallu and only defendant Nos.1 and 2 were living with Rajamallu. So, it is difficult for plaintiff to procure evidence by examining the members of family of Rajamallu to prove his relationship with Rajamallu, but it was open to the plaintiff to establish his relationship with Rajamallu through other means such as Exs.A-6 and A-10 to A-15, which he did. In this view of the matter, I hold that

the plaintiff need prove his relationship with Late Rajamallu only in the manner provided in Section 50.

20. Admittedly, plaintiff had examined P.W.2, whose father Rama Swamy is a brother of Rajamallu, and he categorically stated that plaintiff is the son of Rajamallu. Merely because there is a dispute between 1st defendant and P.W.2, his evidence cannot be ignored. There was also no suggestion given to P.W.2 that his father was not the brother of Rajamallu. Therefore, the plaintiff can be said to have proved that he is the son of Rajamallu through P.W.2, even by the method in Section 50.

21. Coming to the contention of learned counsel for the appellants that the lower appellate Court did not consider the plea of adverse possession with regard to 1/3rd share in Sy.No.508/A of an extent of Ac.2-06 gts., it has to be borne in mind that the trial Court had gone into the issue in view of its finding that plaintiff was not the son of Rajamallu and therefore, it held that the relief of declaration in respect of this item is barred by limitation. But once the lower appellate Court had reversed this finding and held, on appreciation of evidence, that plaintiff is also a son of Rajamallu, he becomes a co-sharer along with defendant Nos.1 and 2 in the property of Rajamallu. In such an event, there has to be a plea of ouster raised by defendant Nos.1 and 2. There is no specific plea of ouster

by defendant Nos.1 and 2. Once such a plea is not raised or established, the title of plaintiff must be held to have been accepted.

22. In **Binapani Paul Vs. Pratima Ghosh and others**^[5], the Supreme Court held:

“39. Interestingly, Amal pleaded ouster. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a fortiori the title of other co-sharers must be held to have been accepted.

... ..

41. Amal, therefore, could not have turned around and challenged the title of the appellant and other respondents. (See Syed Abdul Khader v. Rami Reddy ((1979) 2 SCC 601).” (emphasis supplied)

23. Interestingly, the plea of learned counsel for the appellants is that the plaintiff himself should plead and prove that his possession has become adverse to defendant Nos.3 to 5 and not against defendant Nos.1 and 2. I may point out that the plaintiff’s specific plea was that Rajamallu had perfected title in respect of Ac.2-06 cents of land in Sy.No.508/A even though the pattedar in respect of this land is Kancharla Mallaiah, the father of defendant Nos.3 to 5. Therefore, the plaintiff had not pleaded that he acquired title by adverse possession against defendant Nos.3 to 5 but that his father Rajamallu had acquired title as against defendant Nos.3 to 5’s father Kancharla Mallaiah.

When the lower appellate Court had held that this extent of land is the property of Rajamallu and the said finding has not been challenged by defendant Nos.3 to 5, it is not open to appellants to plead the cause of defendant Nos.3 to 5.

24. As regards the plea of non-joinder of properties raised by the learned counsel for appellants, there is no such plea in the counter affidavit filed by defendant Nos.1 and 2. Such a contention had not been raised by defendants either in the trial Court or in the lower appellate Court at any stage. It is not open to the appellants to raise this contention without pleading and without evidence in support of this plea for the first time in the Second Appeal.

25. I do not accept the contention of the learned counsel for appellants that the findings of the lower appellate Court are not based on evidence. I am satisfied that the lower appellate Court had given valid reasons for coming to the conclusion that plaintiff is the son of Rajamallu; that on the death of Rajamallu, he along with defendant Nos.1 and 2 became the co-sharers of the properties of Rajamallu; that even the extent of Ac.2-06 gts. in Sy.No.508/A belongs to Rajamallu and the plaintiff would be entitled to $\frac{1}{3}^{\text{rd}}$ share therein. There is no substantial question of law arising for consideration in the Second Appeal.

26. I therefore do not find any merit in the Second Appeal and the same is accordingly dismissed at the stage of admission. No costs.

27. Miscellaneous applications pending if any in this Second Appeal shall stand closed.

JUSTICE M.S. RAMACHANDRA RAO

Date: 31-12-2013

LR COPY TO BE MARKED : **YES/NO**

B/o.

vsv/*

[\[1\]](#) AIR 1963 SC 1917

[\[2\]](#) AIR 1988 SC 703

[\[3\]](#) (1972) 4 SCC 562

[\[4\]](#) (2004) 10 SCC 779

[\[5\]](#) (2007) 6 SCC 100