

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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APPEAL SUIT No.251 of 1997

JUDGMENT:

The unsuccessful plaintiffs in O.S.No.02 of 1988 on the file of Subordinate Judge, Bodhan, preferred this appeal against the judgment and decree, dated 26.07.1996, whereby the suit filed for partition, was dismissed.

2. For convenience, the ranks given to the parties before the Court below will be adopted throughout the judgment.

3. Originally the 1st plaintiff filed the suit and during pendency of the suit, he died and his legal representatives were brought on record as plaintiffs 2 to 5 as per order, dated 05.10.1990 in I.A.No.152 of 1990.

4. The suit O.S.No.02 of 1988 was filed for partition and separate possession of half share in the suit premises bearing Nos.1-4-602 and 1-4-603 in plot No.7, situated within the municipal limits of Bodhan Town and for past mesne profits of Rs.18,000/- and future mesne profits from the date of suit till the 1st plaintiff put in separate possession of his share alleging that himself, late Gangareddy, husband of the defendant and one Papireddy are the natural brothers, who constituted as Members of Hindu Joint Family. While they were living as Members of joint family, they purchased vacant site measuring 50 x 100 feet at Bodhan in the name of late Gangareddy and constructed a building and mulgies with joint family funds. Thus, the 1st plaintiff, late Gangareddy and Papireddy are entitled to equal share in the said property and the constructions made therein.

5. While the matter stood thus, in the year 1960, at the request of Papireddy, 1/3rd share in the schedule property was partitioned by metes and bounds, allotted to Papireddy and since then he has been in possession and enjoyment of the same

and the remaining $\frac{2}{3}$ rd share property was kept as joint family property and the same has been in possession and enjoyment of late Gangareddy and the 1st plaintiff. The said late Gangareddy was managing the property by paying $\frac{1}{2}$ nd share of the income to the 1st the plaintiff till his death. Gangareddy died on 01.01.1985 and after his death, his wife, the defendant, is managing the property bearing H.Nos.1-4-602 and 1-4-603 shown as 'ABCDFGHA and ABIJA' in the rough sketch annexed to the plaint. The premises were let-out for running a hotel and Ice-cream shop and out of the total amount, an amount of Rs.3,000/- per year is paid to the 1st plaintiff towards his half share. After death of late Gangareddy, the defendant is managing the property and she enhanced the rent to Rs.12,000/- per year and out of which, the 1st plaintiff is entitled to Rs.6,000/- per year towards his share amount. Despite the request made by the 1st plaintiff to pay his half share amount, the defendant is postponing the same for one reason or the other. Therefore, the 1st plaintiff requested the defendant to partition the suit property, but the defendant did not cooperate for partition. Having no other alternative, the 1st plaintiff got issued legal notice on 10.12.1987 for partition and separate possession of the property and for mesne profits. The defendant issued a contentious reply denying the right of the 1st plaintiff and other reliefs. Hence, the 1st plaintiff instituted suit for aforesaid reliefs.

6. The defendant, while admitting the relationship between the parties, resisted the claim on various grounds. The following are the specific contentions raised by the defendant.

- (a) the partition between the 1st plaintiff, late Gangareddy and Papireddy was effected long ago and since the date of partition in the year 1960, the schedule property is in possession and enjoyment of late Gangareddy, whereas the 1st plaintiff is in possession and enjoyment of other property including Mango garden allotted in the earlier partition and since then late Gangareddy and the 1st plaintiff are living separately by enjoying their respective shares in the schedule property.
- (b) In the earlier partition, at the request of Papireddy, his $\frac{1}{3}$ rd share was partitioned from the schedule property and since date of partition, he has been in possession and enjoyment of the same. Therefore, no joint family is in existence by the date of filing of the suit and that the 1st plaintiff is not entitled

to claim any relief and prayed for dismissal of the suit.

7. Basing on the above pleadings, the following issues were framed by the trial Court for trial:

“1. Whether the plaintiffs and the defendant are joint family and the suit property is the joint family property of the plaintiffs and the defendant as pleaded by the plaintiffs?

2. Whether in the joint family partition between the plaintiffs, Papireddy and late Gangareddy, the husband of the defendant, the suit property has gone to the joint share i.e., $\frac{1}{3}^{\text{rd}}$ share of the plaintiffs and the late Gangareddy as pleaded by the plaintiffs?

3. Whether after partition of $\frac{1}{3}^{\text{rd}}$ share of the Papireddy in the year 1960, the suit property is in joint possession of the plaintiffs and late Gangareddy and late Gangareddy was managing and giving $\frac{1}{2}^{\text{nd}}$ share in the net profit of the suit property to the plaintiffs till 01.11.1985, the date of his death as pleaded by the plaintiff?

4. Whether the plaintiffs are entitled for $\frac{1}{2}^{\text{nd}}$ share in the suit properties and for partition and separate possession of $\frac{1}{2}^{\text{nd}}$ share in the suit properties as prayed for?

5. Whether the plaintiffs are entitled for past profits of Rs.18,000/- towards his half share as prayed for?

6. Whether the plaintiffs are entitled to future profits from the date of suit till the plaintiffs are put in possession of his half share as prayed for?

7. To what relief?”

8. During trial, on behalf of 1st plaintiff, P.Ws.1 and 2 were examined and Exs.A.1 to A.3 were marked. On behalf of the defendant, D.Ws.1 to 7 were examined and Exs.B.1 to B.9 were marked.

9. Upon hearing argument and considering oral and documentary evidence on record, the trial Court dismissed the suit. Aggrieved by the said decree and judgment, the appellants/plaintiffs preferred the present appeal on various grounds mainly contending that the conclusion arrived by the trial Court that Ac.9.00 and odd of Mango garden was allotted to the share of the 1st plaintiff in lieu of his share in the residential house is not supported by any credible evidence and that the conclusion arrived by the trial Court is without any basis.

10. It is further contended that when the defendant filed I.A.No387/94 for amendment of written statement to incorporate a plea that the 1st plaintiff has given Ac.16-00 of land to his son Sailoo and the same was dismissed. The trial Court would not have permitted the 1st plaintiff to adduce any evidence about partition among brothers and allotment of Ac.9-00 and odd of Mango garden to him in addition to other property. But, the trial Court on erroneous appreciation of evidence on record, gave much credence to Exs.B.1 to B.9 and dismissed the suit and finally the 1st plaintiff requested the Court to reappraise the entire evidence both oral and documentary and record an independent finding and pass a decree in favour of the plaintiffs for the aforesaid reliefs.

11. During course of hearing, learned counsel for the appellants (plaintiffs) while reiterating the grounds urged in the grounds of appeal, drawn the attention of this Court about dismissal of I.A.No.387/94 for amendment of written statement and in the absence of any plea about partition etc., and allotment of Ac.9-00 and odd of Mango garden to the 1st plaintiff, whatever evidence adduced before the trial Court to prove partition, cannot be looked into. But, the trial Court gave much credence to various documents produced by the defendant, including the evidence and therefore, the approach of the trial Court is erroneous and prayed to set aside the decree and judgment passed by the trial Court and pass a decree in favour of the plaintiffs.

12. Per contra, learned counsel for the defendant (respondent) supported the finding recorded by the trial Court and contended that in view of admissions made by P.W.1,

son of the 1st plaintiff, about allotment of Ac.9-00 and odd of Mango Garden to his father in lieu of his share in the residential house apart from other property and declaration given to the Land Reforms Tribunal would suffice to conclude that there is a partition and the 1st plaintiff was allotted Ac.9-00 and odd of Mango garden in addition to other property in lieu of share in the residential house. Therefore, no joint family was subsisting by the date of filing of the suit and prayed to confirm the decree and judgment passed by the trial Court.

13. Considering rival contentions and perusing oral and documentary evidence including judgment and decree, the points that arise for consideration are:

1. Whether oral partition pleaded by the defendant in the year 1969 and allotment of Ac.9-00 and odd of Mango garden to the 1st plaintiff in lieu of his share in the residential house, is true and valid?
2. Whether the 1st plaintiff is entitled to claim half share in the house property and mesne profits both past and future?

14. Point No.1:

The undisputed fact is that the 1st plaintiff, late Gangareddy and Papireddy are brothers and they purchased open site measuring 50 x 100 feet at Bodhan with joint family funds in the Court auction and constructed a building with joint family funds. Thereafter, at the request of Papireddy, the schedule property was partitioned and allotted 1/3rd share to him in the year 1960 under a registered partition deed-Ex.A.1, which is not in dispute. After partition, the remaining 2/3rd share of the schedule property was kept as joint property of late Gangareddy and the 1st plaintiff.

15. The main contention of the defendant is that in the year 1969 an oral partition had taken place between late Gangareddy and the 1st plaintiff and in the said partition, the residential house was allotted to late Gangareddy towards his share in the suit property, whereas the 1st plaintiff was allotted Ac.9-00 and odd of Mango garden in lieu of his share in the residential house and shops in addition to other property. The trial Court believed the contention of the defendant and dismissed the

suit filed by the 1st plaintiff. Now, the finding of the trial Court is assailed in this appeal on various grounds.

16. The defendant set up plea of separate partition, while admitting the original status as members of joint family, it is for her to prove the alleged partition that allegedly took place in the year 1969 and alleged allotment of residential house to late Gangareddy towards his share in the schedule property and allotment of Ac.9-00 and odd Mango garden to the 1st plaintiff in lieu of his share in the residential house in addition to other property. To substantiate her contention, she herself was examined as D.W.1 and testified that the earlier partition, which took place in the year 1969, between the 1st plaintiff and late Gangareddy, who died subsequently in the year 1985 and since the date of partition, late Gangareddy was in possession of residential house till his death and after his death the defendant succeeded the estate of late Gangareddy and she is in continuous possession and enjoyment of the same. She also examined the tenants- D.Ws.5 and 6, who categorically testified about payment of rent to late Gangareddy during his life time and after his death to the defendant. In the entire cross-examination of D.Ws, 5 and 6, nothing was elicited to impeach their trustworthiness. No doubt, D.Ws.5 and 6 are only tenants, but they cannot be termed as interested witnesses since they are not going to get any benefit out of this litigation. Therefore, the trial Court rightly believed the testimony of D.Ws.5 and 6 that they are paying rent to late Gangareddy from 1969 till 1985 and after his death to the defendant. But, before partition in the year 1969, the rent paid to the 1st plaintiff. If really, defendants 5 and 6 are interested, they would not have testified that they paid rent to the 1st plaintiff prior to 1969. Hence, the conclusion arrived by the trial Court that D.Ws.5 and 6 are not interested witnesses do not call for interference by this Court.

17. Apart from oral evidence of tenants, the defendant also examined D.Ws.2 to 4, who are close relatives of late Gangareddy and 1st plaintiff, who acted as elders at the time of partition both in the year 1960 and 1969. Their testimony is also free from any doubts and nothing was elicited in the cross-examination to discredit their

testimony. Even if, oral testimony of D.Ws.2 to 4 is ignored, there is lot of documentary evidence on record to substantiate the contention of the defendant. Exs.B.1 to B.6 are the official records relating to declaration filed before Land Reforms Tribunal by the 1st plaintiff, his sons and the defendant. Ex.B.1 is Certified Copy of proceedings of Land Reforms Tribunal, dated 17.02.1976 in C.C.No.258/BANS/75 and Ex.B.2 is Certified Copy of proceedings of Land Reforms Tribunal, dated 31.07.1977 in C.C.No.352 and 353/Bans/75. A perusal of Exs.B.1, B.8 and B.9 would go to show that the land possessed by 2nd son of the 1st plaintiff reveals that the 1st plaintiff got almost double units of the ancestral property as was declared, verified and found by the Land Reforms Tribunal. If really the plaintiff was not allotted excess land in the partition, the question of declaring his entire holding before the Tribunal under the original of Ex.B.1 does not arise. This is another strong circumstance to believe allotment of Ac.9-00 and odd of Mango garden to the 1st plaintiff in lieu of his share in the residential house. Wife of the 1st plaintiff also filed a separate declaration and the land purchased by her son Sailoo were also shown in the declaration. In any view of the matter, the declarations filed before the Land Reforms Tribunal are suffice to conclude that Ac.9-00 and odd of Mango garden was allotted to the 1st plaintiff in lieu of his share in the residential house apart from other property in the partition that took place in the year 1969. Exs.B.3 to B.6 are the verification reports which would clearly show that the lands are in possession of individual declarants. On the strength of Exs.B.1 to B.6, the trial Court accepted allotment of Ac.9-00 and odd of Mango garden to the 1st plaintiff in lieu of his share in the residential house in the earlier partition that took place in the year 1969. If really Ac.9-00 and odd of Mango garden was not allotted to the share of the 1st plaintiff in the oral partition, the question of declaring Ac.9-00 and odd of Mango garden as holding in addition to other property does not arise. Hence, on the strength of declarations filed before the Land Reforms Tribunal, the trial Court believed the partition pleaded by the defendant in the year 1969.

18. Learned counsel for the defendant placed strong reliance in **Potluri Saraswathi V. Vallabhaneni Veerabhadra Rao**, wherein this Court had an occasion consider fairly the value and declarations filed before the Land Reforms Tribunal and held as follows (paras 26, 27 and 28):

“26. In *Sahu Madho Das Vs. Mukand Ram* (AIR 1955 SC 481), the Supreme Court observed that where the Privy Council has construed a certain document namely a Will, though the decision is not binding on a person, not a party to the litigation, the learned Counsel would submit that Ex.A.8 though not directly binding on the defendant, it operates as a judicial precedent and the finding rendered by the Land Reforms Appellate Tribunal is valid against all the persons.

27. The Division Bench of this Court in *Chanumolu Nirmala's* case (supra), held that when once the interpretation placed by the Land Reforms Appellate Tribunal was accepted by the High Court in a civil revision, affirming that a document evidenced partition between 'A' and his son, it constitutes judicial precedent in all subsequent proceedings even between the parties, who were not the parties to original proceedings.

28. In *Gosain's case* (supra), the Supreme Court observed as follows:

“(10) Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.” [See: *Verschures Creameries Limited v. Hull and Netherlands Steamship Company Limited*, Scrutton, L.J). According to *Halsbury's Laws of England*, 4th Edn., Vol.16, “after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside.”

19. If the principle laid down in the above judgment is applied to the present facts of the case, the Court can accept the previous partition pleaded by the defendants in view of declarations filed before the Land Reforms Tribunal. In similar circumstances, when similar question came up before the Hon'ble Apex Court in **Digambar Adhar Patil V. Degvram Girdhar Patil**, the Hon'ble Apex Court considered the value of declarations filed before Land Reforms Tribunal.

20. In **Mashetty Venkatesham and others Vs. Joint Collector and others**, held as follows:

“the parties could not be permitted to plead one legal relationship before land ceiling authorities and another relationship when matters comes to Civil Court. As a matter of public policy, parties could not be permitted to raise

pleas, which were contrary to cases set up by them or their predecessors in title before land ceiling authorities. However, a declarant who made a statements and gets benefit out of such statement in getting excluded that land from his holding would not be permitted to turn around at a later stage. Moreover, first petitioner claimed property to be joint family property and did not demour when 1/4th share was computed to his share in land ceiling proceedings. Therefore, his legal heirs could not be permitted to take a different stand before authorities under ROR Act.”

From the principle laid down by the Hon’ble Apex Court and this Court in the above judgments, when a party having pleaded before the Land Reforms Tribunal that the schedule property was partitioned and allotment of shares was made to the individual declarant, he cannot come around and say that no partition took place. Parties are not allowed to approbate or reprobate basing on the principle of estoppel. The plaintiffs having gained the advantage of allowing the holding as individual being separated members of a joint family, now cannot be permitted to resile from his statements recorded by the Revenue Divisional Officer in the land ceiling proceedings to defeat the right of the defendant. Hence, the plea of the defendant that property was partitioned earlier in the year 1969 orally is to be accepted.

21. Apart from documentary evidence produced by the defendant, there are clear admissions in the evidence of P.W.1 regarding allotment of additional extent of Ac-9-00 and odd of Mango garden to the share of the 1st plaintiff in lieu of his share in the residential house apart from other property. The son of the 1st plaintiff was examined as P.W.1 and he admitted about allotment of Ac-9-00 and odd of Mango garden to his father in lieu of his share in the residential house at Bodhan. Even as per Ex.B.4-declaration filed before the Land Reforms Tribunal, the son of the 1st plaintiff admitted that he owns Ac.27-89 guntas of land and he got Ac.02.3 guntas in partition with the 1st plaintiff in one survey number and another Ac.2.31 cents in the same partition and another Ac.0.10 cents and in total he is found to be in possession of 1.3358 units. If that is taken into consideration, the 1st plaintiff gave more than Ac-6-00 of land to his son Sailoo. Thus, the cumulative effect of oral and documentary evidence, more particularly, declaration filed before the Land Reforms Tribunal and the oral admissions of P.W.1, it would suffice to conclude that there was an oral partition in the year 1969 and in the said partition, the 1st plaintiff was allotted Ac-9-

00 and odd of Mango garden in lieu of his share in the residential house. Therefore, since 1969 onwards there was no joint family and in the absence of existence of joint family, the 1st plaintiff is not entitled to claim partition of the property.

22. In a suit for partition, it is duty of the plaintiff to prove existence of joint family and holding property jointly. But, here the 1st plaintiff miserably failed to prove the existence of joint family and possessing any property jointly, enabling the Court to declare the share of the 1st plaintiff and the defendant. In the absence of proof of existence of joint family, the question of granting decree in favour of the 1st plaintiff does not arise. Hence, the trial Court rightly disbelieved the case set up by the 1st plaintiff that there was a joint family by the date of filing of the suit. Therefore, the finding of the trial Court is free from legal infirmities. Hence, this point is answered in favour of the defendant and against the 1st plaintiff.

23. POINT No.2:

In view of my finding on point No.1, as the 1st plaintiff miserably failed to prove existence of joint family and possession of any property jointly, I find that the defendant succeeded in proving that there was an oral partition in the year 1969 and in that partition of Ac.9-00 and odd of Mango garden was allotted to the 1st plaintiff in lieu of share in the residential house and the same is reflected in Exs.B.1 to B.9 supported by oral evidence including the evidentiary admissions made by P.W.1. Hence, the trial Court rightly concluded that the 1st plaintiff is not entitled to claim the relief of partition of schedule property and other consequential reliefs. Therefore, the finding of the trial Court does not call for interference by this Court, even after reappraisal of the entire facts and evidence afresh, as such the finding of the trial Court is upheld and this point is answered in favour of the defendant and against the 1st plaintiff.

24. In view of my finding on points 1 and 2, I find no grounds to interfere with the

decree and judgment, dated 26.07.1996 in O.S.No.02 of 1988 passed by Sub-ordinate Judge, Bodhan and the appeal deserves to be dismissed.

25. In the result, the appeal suit is dismissed, however, in the circumstances without costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M.SATYANARAYANA MURTHY, J

SEPTEMBER 21, 2015

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THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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APPEAL SUIT No.251 of 1997

Dt: 21.09.2015

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