

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE
STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

A.S.No. 1831 OF 1995

Between:

Gutha Sambasiva Rao ... Appellant/Plaintiff

AND

Gutha Hanumantha Rao & others ...
Respondents/Defendants

Date of Judgment Pronounced: 18-08-2015

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SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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| 1. | Whether Reporters of Local newspapers may be allowed to see the judgment? | No |
| 2. | Whether the copy of judgment may be marked to Law Reporters/Journals? | No |
| 3. | Whether Their Lordship wish to see the fair copy of the judgment? | No |

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

A.S.No. 1831 OF 1995

JUDGMENT:

The unsuccessful plaintiff in O.S.No. 118 of 1992 on the file of the Court of Subordinate Judge, Chirala (for short, 'the trial Court'), preferred this appeal challenging the decree and judgment dated 02-08-1995, whereunder the suit filed by the plaintiff for partition and other reliefs was dismissed.

2. The appellant was the plaintiff and the respondents were the defendants. For convenience of reference, the ranks given to the parties before the trial Court in O.S.No. 118 of 1992 will be adopted throughout this judgment.

3. The plaintiff filed the suit; for passing preliminary decree in favour of the plaintiff for partition of schedule property into three equal shares and deliver vacant possession of one such share to the plaintiff; alleging that the 1st defendant is his father, the 2nd defendant is younger brother and the 3rd defendant is married sister of the plaintiff. The plaintiff and defendant Nos. 1 and 2 constituted Hindu undivided coparcenary and the 1st defendant was acting as manager of the coparcenary. The 1st defendant died on 29-01-1993 during pendency of the suit leaving behind him the plaintiff, defendant Nos. 2 and 3 and the 4th defendant, who is his wife, as his legal-representatives to succeed his estate. The marriage of the 3rd defendant was performed about 14 years ago with Dhulipalla Haribabu of Kakumanu Village. Since then, the 3rd defendant has been residing with her husband at Kakumanu Village. The marriage of the plaintiff was performed about 12

years ago and the plaintiff purchased some land with the amount given to his wife at the time of marriage by her father towards pasupu kunkuma. While so, the 1st defendant managed to sell Ac. 2.45 cents of joint family property to one Kapu Nageswara Rao of Devarapalli Village and sale deed was made to execute by the plaintiff with ulterior motive as if there was division of joint family property. The 1st defendant purchased land in the name of the 2nd defendant with the sale consideration received by him by sale of the above Ac. 2.45 cents to Kapu Nageswara Rao. The plaintiff came to know that the defendants joined hands and collusively brought into existence partition deed dated 31-07-1992 with false and frivolous contents. Thus, the alleged partition deed dated 31-07-1992 is illegal, void and not binding on the plaintiff.

The 3rd defendant, being married daughter of the 1st defendant, is not a member of joint family and she was given gold ornaments and cash of Rs.50,000/- at the time of her marriage. Therefore, the 3rd defendant is not entitled to claim any share in schedule property. The plaintiff demanded the defendants to cooperate for partition of schedule property but no purpose was served. Hence, the plaintiff got issued legal notices on 28-09-1992 and 02-10-1992 to the defendants demanding to cancel the alleged partition deed and to divide joint family property. The defendants, acknowledging receipt of notices, got issued contentious reply. Therefore, the plaintiff, having no other alternative, filed the present suit for the aforesaid reliefs.

4. The 2nd defendant resisted the claim of the plaintiff raising the following contentions in his written statement while admitting relationship between them:

(a) The 2nd defendant denied the alleged execution of sale deed in

favour of Kapu Nageswara Rao conveying Ac. 2.45 cents and purchase of the property in his name by the 1st defendant with the sale proceeds of Ac. 2.45 cents while contending that the said property was allotted to the plaintiff in the partition that took place in the year 1981 itself *i.e.* after his marriage and the plaintiff sold away the property to Kapu Nageswara Rao voluntarily;

- (b) It is specifically contended that in the partition that took place in 1981, Ac. 2.45 cents in S.No. 120 of Devarapally Village, which is described as item No. 12 of schedule property; Ac. 1.28 cents in S.No. 64/2, which is shown as item No. 3 of schedule property; Ac. 1.25 cents in S.No. 157/2, which is shown as item No. 7 of schedule property; house bearing D.No. 5-53/5 of Annambotlavaripalem Village, which is described as item No. 14 of schedule property; and vacant site of Ac. 0.05 cents, which is not shown in schedule property; were allotted to the share of the plaintiff. Since then, the plaintiff has been in continuous possession and enjoyment of the said property except Ac. 2.45 cents in S.No. 120 *i.e.* item No. 12 of schedule property due to sale of the property to Kapu Nageswara Rao of Devarapally Village by executing registered sale deed dated 11-08-1983. The plaintiff also purchased land at Mittapalem, which is his father-in-law's place, with the sale proceeds of Ac. 2.45 cents. The registration extract of sale deed dated 11-08-1983 clearly reveals that joint family property was partitioned and the source of title mentioned therein is suffice to conclude that the property of Hindu Undivided Coparcenary was divided amongst the coparceners. Therefore, the plaintiff is not entitled to claim any share in the property described in the schedule;

- (c) After separation of the plaintiff from joint family in the year 1981, defendant Nos. 1 and 2 continued jointly and, later, defendant Nos. 1 and 2 divided the remaining property under partition deed dated 31-07-1992.
- (d) In the partition that took place in the year 1992 under registered partition deed dated 31-07-1992, the 1st defendant was allotted item Nos. 8 and 9 of schedule property towards his share. Later, the 1st defendant, as had promised at the time of marriage, gave Ac. 2.00 cents of land *i.e.* item No. 8 of schedule property to the 3rd defendant towards pasupu kunkuma, which is also included in the schedule falsely, and took item No. 15 of schedule property which is only Ac. 0.04 cents but not Ac. 0.11 cents;
- (e) The 2nd defendant was allotted item Nos. 2, 6, 11 and 13 of schedule property towards his share. However, joint family did not possess land an extent of Ac. 1.32 cents in S.No. 156 which is described as item No. 10 of schedule property. This defendant purchased Ac. 1.36 cents in S.No. 157/1 of Garnepudi Village with the amount paid by the 4th defendant. The 2nd defendant also purchased Ac. 0.04 cents of site which is described as item No. 16 of schedule property. Thus, the land in S.No. 157/1 of Garnepudi Village and item No. 16 of schedule property are exclusive property of the 2nd defendant. Item No. 5 of schedule property belongs to the 4th defendant and the property described as item No. 4 is not in existence and it is not the property of joint family. Thereby, the plaintiff included third parties' property also;

- (f) In view of separation of the plaintiff from joint family in the year 1981 and sale of the property to Kapu Nageswara Rao, disclosing the source of title as allotment in the partition, the plaintiff is not entitled to claim any share in schedule property;
- (g) When the plaintiff got issued legal notices, this defendant also got issued appropriate reply disclosing the true facts and, therefore, the plaintiff is not entitled to claim any relief including partition and separate possession;
- (h) As the plaintiff sold his property, admitting his source of title, under registered sale deed dated 11-08-1983, he is estopped to contend otherwise. Therefore, the suit is frivolous and vexatious and the same is liable to be dismissed with exemplary costs; and
- (i) It is specifically contended that, after death of the 1st defendant during pendency of the suit, S.Radhakrishna Murthy, N.Tirupataiah, G.Subbarao and Ch.Hari Babu settled the claims and the plaintiff and defendant Nos. 2 and 4 agreed to give Ac. 2.00 cents of land, which is shown as item No. 9 of schedule property, to the 4th defendant to enjoy the same during her lifetime and further agreed to take the deposit amount, lying in bank, by the 4th defendant herself. It was also agreed that the plaintiff and defendant Nos. 2 and 3 are entitled to claim equal share in the above property after lifetime of the 4th defendant. Therefore, the plaintiff is not entitled to claim any right in item No. 9 of schedule property during lifetime of the 4th defendant in view of the above arrangement and prayed for dismissal of the suit.

5. Defendant Nos. 3 and 4 filed a memo adopting the written statement filed by the 2nd defendant.

6. On the strength of the above pleadings, the trial Court framed the following issues (extracted):

Issues:

- 1) *Whether the plaintiff is entitled for partition and separate possession of his share in the suit properties as prayed for?*
- 2) *Whether the earlier partition pleaded by the defendants is true?*
- 3) *Whether the arrangement pleaded by the defendants is true?*
- 4) *Whether the plaintiff is entitled for profits?*
- 5) *To what relief?*

7. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 5 were examined and got marked Exs.A1 to A5. On behalf of the defendants, D.Ws.1 to 7 were examined and got marked Exs.B1 to B10. Exs.X1 and X2 were marked through third parties.

8. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court; holding that the plaintiff was separated from joint family in the year 1981, defendant Nos. 1 and 2 thereafter partitioned their property by executing Ex.B7 partition deed dated 31-07-1992 and, therefore, the plaintiff is not entitled to claim relief of partition of schedule property; dismissed the suit.

9. Aggrieved by the decree and judgment of the trial Court, the plaintiff preferred this appeal raising the following contentions:

- (a) The trial Court did not consider the oral evidence adduced on behalf of the plaintiff to believe that Ex.B2 was executed at the instance of the 1st defendant, the plaintiff signed on the document without knowing the contents of Ex.B2 and the plaintiff is an illiterate, innocent and not well versed with the

worldly affairs but the trial Court did not consider the same in proper perspective;

- (b) The trial Court ignored the evidence of P.W.5 and the reason assigned by the trial Court to disbelieve Exs.X1 and X2 is not based on any material and not supported by any legal reasoning;
- (c) The trial Court also gave undue importance to Ex.B7 partition deed and allotment of property to the 3rd defendant, who is married daughter, is not legal as she is disentitled to claim any share since her marriage took place prior to 1986 but the trial Court did not consider the evidence in proper perspective and committed an error; and
- (d) Finally, it is prayed to re-appreciate the entire evidence both oral and documentary and pass preliminary decree in favour of the plaintiff setting aside the decree and judgment of the trial Court.

10. During the course of argument, learned counsel for the plaintiff drawn attention of this Court to the evidence of D.Ws.1 to 3 and also drawn attention of this Court to Exs.X1 and X2 which were produced by third parties who are not interested in the litigation but the trial Court did not consider the evidence of Gutha Venkateswarlu and bank officials without assigning any reason. Thereby, the approach of the trial Court is against the principles of appreciation of evidence. It is the specific case of the plaintiff from the beginning that, at the instance of the 1st defendant alone, the plaintiff executed sale deed in favour of Kapu Nageswara Rao and the amount was appropriated by the 1st defendant alone to purchase property in the name of the 2nd defendant. However, this evidence was not properly appreciated by the trial Court; if the same is accepted, the trial Court ought not to have

accepted separation of the defendants from Hindu undivided coparcenary after marriage of the plaintiff in the year 1981 and finally requested this Court to re-appreciate entire evidence to come to an independent conclusion notwithstanding the findings recorded by the trial Court and pass preliminary decree in favour of the plaintiff dividing the property into three equal shares and to allot one such share to the plaintiff and deliver vacant possession.

11. *Per contra*, learned counsel for the defendants supported the decree and judgment of the trial Court while contending that reference of source of title in the registered sale deed executed by the plaintiff in favour of Kapu Nageswara Rao itself suffice to accept separation of the plaintiff from joint family. If Hindu Undivided Coparcenary is existing, question of sale of property under Ex.B2 to Kapu Nageswara Rao, which was admittedly belongs to Hindu Undivided Coparcenary originally, does not arise. Thereby, execution of original of Ex.B2 and treating the other properties as separate properties of the plaintiff since 1981 are sufficient to accept the plea of the defendants. The trial Court accepting separation of the plaintiff from Hindu Undivided Coparcenary is, therefore, based on evidence; such finding does not call for interference of this Court and finally prayed to dismiss the appeal confirming the decree and judgment of the trial Court.

Learned counsel for the defendants further contended that the property was partitioned under Ex.B7 dated 31-07-1992. That apart, the 3rd defendant was not a member of joint family since she got married but, in fulfillment of his promise made at the time of her marriage, the 1st defendant gave Ac. 2.00 cents of land. Therefore, the property given to the 3rd defendant cannot be partitioned. Even in Ex.A3 legal notice dated 02-10-1992, the plaintiff disclosed about partition but the plaintiff, without seeking cancellation of partition deed, filed the present suit. When partition was already effected, without canceling or re-opening the same, the suit for partition is, therefore,

not maintainable. Even in Ex.B2 sale deed dated 11-08-1983, there was a reference about partition of joint family property and, that apart, the clinching evidence on record established that the plaintiff was given item Nos. 12, 3, 7 and 14 of schedule property and Ac. 0.05 cents of vacant site, which is not shown in the schedule, in the said partition. Since the date of allotment, the plaintiff has been enjoying the same in his own right mutating his name in revenue records and paying property tax to the authorities concerned. Thereby, the property cannot be said to be joint family property. The trial Court, therefore, rightly dismissed the suit declining to pass preliminary decree in favour of the plaintiff. The finding of the trial Court is based on legal evidence and, therefore, the appeal deserves to be dismissed.

12. Considering rival contentions and perusing the material available on record including the decree and judgment under challenge, the points that arise for consideration are as follows:

- (1) *Whether separation of the plaintiff and allotment of item Nos. 12, 3, 7 and 14 of schedule property and Ac. 0.05 cents of vacant site, which is not shown in the schedule, are true, if so, is the plaintiff entitled to claim partition of schedule property again?*
- (2) *Whether arrangement pleaded by the defendants allotting Ac. 2.00 cents of land for enjoyment of the 4th defendant during her lifetime and for division of the same after her lifetime is true, if not, whether the same is liable for partition?*

13. **In Re. Point No. 1:**

The plaintiff filed the suit claiming partition of schedule property into three equal shares and to allot one such share contending that schedule property belongs to Hindu undivided coparcenary. The plaintiff, his father-D1 and younger brother-D2 are in joint possession and enjoyment of the same.

Despite demanding for partition, the defendants did not cooperate for the same. Having no other alternative, the plaintiff got issued Ex.A1 legal notice on 28-09-1982 calling upon the defendants for partition of schedule property into three equal shares and to allot one such share to him. Acknowledging receipt of Ex.A1 notice, the defendants got issued Ex.A2 reply dated 12-10-1992 denying the right of the plaintiff to claim partition while asserting that the plaintiff got himself separated in the year 1981, allotted item Nos. 3, 7, 12 and 14 and vacant site of Ac. 0.05 cents, which is not shown in the schedule, towards his share in the division but defendant Nos. 1 and 2 continued as members of Hindu undivided coparcenary even after separation of the plaintiff from defendant Nos. 1 and 2.

14. The main contention of learned counsel for the defendants is that, after severance of the plaintiff from joint family, the plaintiff sold away Ac. 2.45 cents of land under the original of Ex.B2 dated 11-08-1983; purchased various extents of land under Exs.B3 and B4 with the sale proceeds under Ex.B2; and the plaintiff has no independent source of income, except the share of the property allotted to him when he got separated from the defendants, to acquire the property covered under Exs.B3 and B4. Therefore, the plaintiff, being the divided son of the 1st defendant and brother of the 2nd defendant, is not entitled to claim partition. The trial Court believed severance of the plaintiff from the defendants and also allotment of various items referred above to the share of the plaintiff. The said finding is now challenged before this Court raising several contentions. Even in the plaint itself, the plaintiff contended that, at the instance of the 1st defendant, the plaintiff executed original of Ex.B2 in favour of Kapu Nageswara Rao mentioning source of title to the property as the property was allotted to him in the partition and the amount so realized was appropriated by the 1st defendant to acquire property in the name of the 2nd defendant. Therefore,

the recitals of Ex.B2 are not sufficient to conclude that the plaintiff got separated from the defendants in the year 1981. During the course of argument, learned counsel for the plaintiff, reiterating the said contention, drawn attention of this Court to Exs.X1 and X2 mortgage deeds executed by the 1st defendant in favour of Union Bank of India, Parchur Branch, on 24-11-1978 and 17-09-1991 respectively and, on the strength of execution of Exs.X1 and X2, it is contended that the plaintiff is not separated and the alleged partition is not true. The trial Court based its finding on Ex.B2 alone besides Exs.B3 and B4 under which the plaintiff purchased property with the amount realized by sale of Ac. 2.45 cents under Ex.B2 and recorded its finding. However, this Court, being the first Appellate Court, is under obligation to re-appraise entire evidence to come to an independent conclusion uninfluenced by the finding recorded by the trial Court. Therefore, I would like to re-appraise entire evidence afresh to come to an independent conclusion.

15. The undisputed fact is that the plaintiff executed original of Ex.B2 conveying title in an extent of Ac. 2.45 cents *i.e.* item No. 12 of schedule property but the contention of the plaintiff is that he executed original of Ex.B2 only at the instance of the 1st defendant, the 1st defendant appropriated the sale consideration under Ex.B2 to purchase property in the name of the 2nd defendant and, therefore, the recitals in original of Ex.B2 are not binding on him. To substantiate his contention, the plaintiff himself was examined as P.W.1 and testified, in his examination in chief, in support of his contentions that original of Ex.B2 was executed only at the instance of the 1st defendant and the 1st defendant influenced him to execute original of Ex.B2 but the plaintiff did not disclose as to how the 1st defendant influenced him and under what circumstances he executed the document in favour of Kapu Nageswara Rao. Except making a bald allegation in the plaint, no details, as

required under Order VI Rule 4 of the Code of Civil Procedure (for short, 'C.P.C.'), were furnished.

16. According to Order VI Rule 4 of C.P.C., in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars with dates and items if necessary shall be stated in the pleading. In view of Order VI Rule 4 of C.P.C., even dates and other details of undue influence, misrepresentation *etc.*, are to be disclosed but no such details were disclosed except making a bald statement both in the plaint and in the evidence that original of Ex.B2 was executed at the instance of the 1st defendant. In examination in chief, P.W.1 specifically admitted that his father *i.e.* the 1st defendant told him that he was selling away land to Kapu Nageswara Rao for discharge of joint family debt; on the request of his father, he went to the office of sub-registrar; and signed on the document along with his father but contents of the sale deed were not read over to him while obtaining his signature. The recital in the sale deed to the effect that Ac. 2.43 cents of land sold under the said document was fallen to his share in family partition is not correct and he does not know as to why his father got incorporated such recital in the sale deed. Therefore, the admission regarding execution of original of Ex.B2 clearly established execution of original of Ex.B2 and did not explain under what circumstances he executed original of Ex.B2. In the plaint, P.W.1 contended that he executed the document at the instance of the 1st defendant but, when it comes to evidence, his contention is that he executed the document on the representation of the 1st defendant. Therefore, the plea of undue influence in plaint and evidence regarding misrepresentation or representation is not coexist and distinct in nature. Thus, the plea of misrepresentation is not

pleaded but adduced evidence. Similarly, the plea of undue influence is pleaded but adduced no evidence. Therefore, neither of the pleas are believable to disbelieve execution of original of Ex.B2 either due to undue influence of the 1st defendant or due to misrepresentation of the 1st defendant.

17. In cross-examination, P.W.1 made several admissions with regard to non-availability of several items of schedule property for partition, difference in extents, purchase of item No. 16 by the 2nd defendant and obtaining registered sale deed dated 17-02-1990. In any view of the matter, recitals in the original of Ex.B2 disclosed source of title that the property covered by Ex.B2 was allotted to the plaintiff in the partition between himself and defendant Nos. 1 and 2; since then, the plaintiff has been in possession and enjoyment of the property and the plaintiff undertook to settle all the disputes at his expenses incorporating usual warranty of title. Strangely, the purchaser Kapu Nageswara Rao was not impleaded as a party to the suit though a registered document was executed in his favour conveying the property transferring title to it. When the plaintiff or Hindu undivided coparcenary ceased to be owner of the property, the same cannot be partitioned unless the sale covered by original of Ex.B2 is set aside. Curiously, at page No. 4 of cross-examination, P.W.1 admitted that he did not implead Kapu Nageswara Rao as a party and he signed on original of Ex.B2 as vendor due to pressure of his father on 11-08-1983. It was suggested that P.W.1 himself received sale consideration under original of Ex.B2 and executed original of Ex.B2 voluntarily in favour of Kapu Nageswara Rao but the same was denied. P.W.1 further admitted that there was a reference of prior partition in the document. Thus, the undisputed fact is that the plaintiff executed original of Ex.B2 disclosing source of title to the property and gave warranty of title to the purchaser. If really original of Ex.B2 was executed due to pressure of the 1st defendant or misrepresentation or undue influence, the

plaintiff would not have kept quiet without complaining the same to police or at least reporting the same to any of the elders in the village and nothing prevented the plaintiff to get the registered sale deed, executed in favour of Kapu Nageswara Rao, cancelled under Section 31 of the Specific Relief Act, 1963 (for short, 'the Act of 1963'), in case original of Ex.B2 was executed in the circumstances stated above. The plaintiff is an educated person and able to sign in Telugu. In all the documents including deposition and plaint, the plaintiff signed in Telugu but pleaded ignorance about recitals of original of Ex.B2 on the ground that he is not worldly-wise but this contention is not acceptable and, that apart, the plaintiff has no source of income except the property allotted to his share but he purchased property under the originals of Exs.B3 and B4 on 19-03-1984 and 05-05-1984 respectively. However, purchase of property under the originals of Exs.B3 and B4 is not in dispute but the contention of the defendants is that property under Exs.B3 and B4 was acquired with the sale proceeds covered by original of Ex.B2. The plaintiff strangely raised a contention that the property covered by Exs.B3 and B4 was purchased with Stridhana amount of his wife. The plaintiff's marriage took place in the year 1981, original of Ex.B2 was executed on 11-08-1983 and property under Exs.B3 and B4 was purchased on 19-03-1984 and 05-05-1984 respectively. Thus, there is proximity of time in obtaining Exs.B3 and B4 after execution of original of Ex.B2 and the time gap is only 7 months and 9 months respectively. Therefore, possibility of acquiring property under Exs.B3 and B4 with the sale proceeds covered by Ex.B2 cannot be ruled out.

18. Moreover, it is contended by the plaintiff from the beginning that the 1st defendant purchased item No. 16 of schedule property in the name of the 2nd defendant with the sale proceeds under original of Ex.B2. Ex.B6 is sale deed dated 22-03-1982 obtained in the name of the 2nd defendant,

represented by mother *i.e.* the 4th defendant. If really the property was acquired with the sale proceeds of the property covered by original of Ex.B2 in the name of the 2nd defendant by the 1st defendant, it must be subsequent to Ex.B2 but Ex.B6 was obtained on 22-03-1982 and Ex.B2 was executed on 11-08-1983 *i.e.* almost about one and half years subsequent to Ex.B6. Hence, the contention that the 1st defendant purchased the property in the name of the 6th defendant with the sale proceeds covered by original of Ex.B2 is false on the face of record and the same, therefore, cannot be accepted.

19. Yet, another trump card in the case of the plaintiff is that he executed Ex.B5 mortgage deed dated 18-10-1984 in favour of Union Bank of Uppalapadu. Execution of Ex.B5 is another strong circumstance to disbelieve the contention of the plaintiff that he is continuing as a member of Hindu undivided coparcenary. If really the plaintiff got separated from joint family, question of executing Ex.B5 in favour of Union Bank of Uppalapadu does not arise. This is another strong circumstance to accept the contention of the defendants. Though the plaintiff contended that he acquired property under originals of Exs.B3 and B4 with Stridhana amount of his wife, he did not produce any piece of evidence where the alleged amount of Rs.50,000/-, which was given to his wife, was kept. Of course, P.W.2 supported the contention of the plaintiff. Undisputedly, marriage of the plaintiff was performed in the year 1981 and, if such huge amount during those days was really paid to the wife of P.W.1, where the amount was lying for the last more than three years till purchase of property under originals of Exs.B3 and B4 was not explained. It is not the case of the plaintiff that the amount was kept in deposit in any bank or with anybody and even not disclosed where it was kept. In the absence of disclosing any details as to where the amount was lying till purchase of property under originals of Exs.B3 and B4, the evidence

of P.Ws.1 and 2 with regards to payment of Rs.50,000/- to the wife of P.W.1 is not believable. In view of obtaining originals of Exs.B3 and B4 within a span of 7 and 9 months respectively from the date of execution of Ex.B2, it can safely be concluded that the plaintiff purchased the property covered by Exs.B3 and B4 with the sale proceeds of the property covered by original of Ex.B2 as he did not possess any other source of income other than the property allotted to his share. On this ground alone, the plea of the plaintiff that he is continuing as a member of Hindu undivided coparcenary can be disbelieved.

20. One of the contentions of learned counsel for the plaintiff is that the 1st defendant executed Ex.X1 dated 24-11-1978 and Ex.X2 dated 17-09-1991 mortgaging property in favour of Union Bank of India. Even if Ex.X1 is believed, it is anterior to the severance of the plaintiff from defendant Nos. 1 and 2. Therefore, it is not relevant to decide the real controversy. So far as Ex.X2 is concerned, it is Photostat copy of registered mortgage deed for Rs.15,000/- executed by the 1st defendant creating charge over an extent of Ac. 2.45 cents in S.No. 152/2, Ac. 2.55 cents in S.No. 152/3 and other items of schedule property. The extent of Ac. 2.45 cents in S.No. 152/2 is the property covered by original of Ex.B2. Taking advantage of creation of mortgage in the year 1991 by the 1st defendant, learned counsel for the plaintiff would contend that, unless the property belongs to the 1st defendant, the 1st defendant is not competent to execute Ex.X2 but this contention cannot be accepted for the simple reason that that by the date of the alleged mortgage deed marked as Ex.X2, the property was already sold to Kapu Nageswara Rao by executing original of Ex.B2. Therefore, neither the plaintiff nor the 1st defendant is owner of the property as on the date of execution of Ex.X2. Hence, Ex.X2 is of no assistance to prove the contention of the plaintiff that he is an undivided coparcener along with defendant Nos. 1

and 2.

21. Though the plaintiff contended that schedule property is Hindu undivided coparcenary while denying his separation from defendant Nos. 1 and 2, he failed to prove his continuation as a member of Hindu undivided coparcenary. On the other hand, defendant Nos. 1 and 2 established that the plaintiff got separated from them and living separately. Proof of previous oral partition is normally difficult to establish. However, Courts can take into consideration attending circumstances like payment of property tax, dealing with property in individual capacity and cultivation of property etc.,. In

Digamber Adhar Patil Vs. Devram Girdhar Patil^[1], it was held that

"The entries in the record of rights regarding the factum of partition is a relevant piece of documentary evidence in support of the oral evidence given by the respondent and his brother to prove the factum of partition."

The Supreme Court time and again held that payment of property tax in individual's name and cultivation or enjoyment of property are strong circumstances to infer that it is the divided property of the individual. Following the same in the present facts of the case, more particularly in view of sale of property under original of Ex.B2 and acquisition of property under originals of Exs.B3 and B4 so also mortgaging property under original of Ex.B5 by the plaintiff, it is clinchingly established that the plaintiff is the divided son while defendant Nos. 1 and 2 are continuing as members of joint family till division of property under Ex.B7.

22. Added to the above piece of evidence, the 2nd defendant was examined as D.W.1 and he almost supported the plea of separation of the plaintiff from defendant Nos. 1 and 2 in his examination in chief. Apart from that, in cross-examination dated 01-03-1995, D.W.1 asserted that property allotted to them is in their separate possession and they are cultivating the same including the land allotted to his mother for her enjoyment during her lifetime. In the marathon cross-examination of D.W.1, learned counsel for the

plaintiff could elicit nothing to substantiate the contention that the plaintiff is continuing as a member of Hindu undivided coparcenary. In fact, in the reply notice itself, defendant Nos. 1 and 2 disclosed about the previous partition contending that several items of schedule property were allotted to the share of the plaintiff while defendant Nos. 1 and 2 are continuing as members of Hindu undivided coparcenary but later they partitioned the property under Ex.B7 registered partition deed dated 31-07-1992.

23. D.W.2 is the purchaser under original of Ex.B2. According to D.W.2, he purchased item No. 12 of schedule property from the plaintiff under original of Ex.B2 for consideration of Rs.29,500/-; paid the entire consideration to the plaintiff himself; later, he deposited title deed with Union Bank of India and obtained loan creating mortgage over the property under original of Ex.B5. Thereby, D.W.2 enjoying the property in his own right and his evidence, therefore, disproved mortgage of item No. 12 of schedule property with Union Bank of India under original of Ex.X2.

24. The defendants also got examined Gorantla Subbarao as D.W.3, who is resident of Annambotlavaripalem, to speak about the plaintiff's severance from defendant Nos. 1 and 2 and living separately enjoying his share of the property. The evidence of D.W.3 disclosed about allotment of various items of schedule property to the share of the plaintiff when he got separated from defendant Nos. 1 and 2. In cross-examination, learned counsel for the plaintiff could elicit that he had no intimate acquaintance with the plaintiff and the defendants' family but he is one of the elders in the village and he settled 4 or 5 issues in the village. Therefore, the evidence of D.W.3 is not much helpful to the defendants.

25. The 3rd defendant was examined as D.W.4. D.W.4 also supported separation of the plaintiff from defendant Nos. 1 and 2 and allotment of item No. 8 of schedule property to her share towards pasupu kunkuma. In cross-

examination, it was suggested that D.W.4 was given Rs.50,000/- as gift at the time of marriage besides gold jewelry and, therefore, there is no need to gift item No. 8 of schedule property but D.W.4 denied the same. Thereby, the unrebutted testimony of D.Ws.1 to 4 coupled with documentary evidence established that the plaintiff got separated from defendant Nos. 1 and 2 in the year 1981 and, therefore, he is not entitled to claim partition of schedule property again.

26. The trial Court appreciated the entire evidence with reference to law and rightly concluded that the plaintiff got separated from defendant Nos. 1 and 2 and he was allotted item Nos. 3, 7, 12 and 14 of schedule property besides Ac. 0.05 cents of vacant site, which is not shown in the schedule. Thereby, I find no illegality in the finding recorded by the trial Court since it is based on evidence on record and, therefore, the finding of the trial Court is hereby confirmed holding this point in favour of the defendants and against the plaintiff.

27. **In Re. Point No. 2:**

In view of my finding on point No. 1, it is wholly unnecessary to decide right of the plaintiff and defendant Nos. 2 and 3 after death of the 4th defendant since it is only an arrangement between the plaintiff and defendant Nos. 2 and 3. As on today, question of partition of item No. 9 of schedule property would not arise more particularly during lifetime of the 4th defendant since succession will open only after lifetime of the 4th defendant. Hence, at this stage, the plaintiff is not entitled to claim share in the said property. Accordingly, the point is answered.

28. In view of my findings on point Nos. 1 and 2, I find no illegality or irregularity in the decree and judgment passed by the trial court warranting interference of this Court and, consequently, the appeal deserves to be dismissed.

29. In the result, the appeal is dismissed confirming the decree and judgment dated 02-08-1995 passed in O.S.No. 118 of 1992 on the file of the Court of Subordinate Judge, Chirala. Pending miscellaneous petitions in this appeal, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 18-08-2015.

JSK

[\[1\]](#) AIR 1995 SC 1728