

**HON'BLE SRI JUSTICE A. SHANKAR
NARAYANA**

SECOND APPEAL No.359 OF 2000

JUDGMENT:

The unsuccessful plaintiffs in O.S. No.91 of 1989 on the file of District Munsif, Tuni, even did fail in A.S. No.89 of 1996 on the file of III Additional District Judge, Kakinada, approached this Court by the instant second appeal.

2. Adverting to the facts, since the original plaintiff Sureddy Swami Naidu died during the pendency of the first appeal, his legal representatives were brought on record as appellant Nos.2 to 5.

The original plaintiff, defendant No.1 and the father of defendant No.2 being natural brothers, they said to have effected partition without reducing the same into writing, sought to partition the properties by metes and bounds to the extent of $\frac{1}{3}^{\text{rd}}$ share each to the three branches. Incidentally, they also added defendant Nos.3 to 6, who purchased certain extents mentioned in their (defendant Nos.3 to 6) respective sale deeds from the father of defendant No.2.

The original plaintiff also sought for the relief of permanent injunction also.

3. Before the trial Court, defendant Nos.1 and 2

sailed with the deceased plaintiff, whereas defendant Nos.3 to 6 contested the suit.

4. The trial Court framed the following four (4) issues based on the rival pleadings.

“(1) Whether the plaintiff is entitled for relief of partition as prayed for?

(2) Whether the plaintiff is entitled for separate possession and one such share?

(3) Whether the plaintiff is entitled for relief of permanent injunction?

(4) To what relief?”

5. The deceased plaintiff examined himself as PW.1 besides examining Kuchumanchi Suryanarayana Murthy, Village Administrative Officer of N.N. Patnam as PW.2 and marked Exs.A-1 to A-8. On behalf of defendant Nos.3 to 6, defendant No.3 examined himself as DW.1 besides examining Medapureddi Demudu as DW.2 and Gullapalli Pydi Raju as DW.3, and marked Exs.B-1 to B-15, amongst which Ex.B-4 is the registered sale deed executed by Sureddi Suryarao in favour of defendant No.3 viz., Bangaru Appalanaidu.

6. The trial Court on appraisal of evidence let in by both sides observed that when once partition was effected, there cannot be a second partition concerning the same properties and that the original plaintiff did not choose to establish that the items 1 to 3 of the subject property were not equally partitioned and also basing on the probabilities aiding documentary evidence, favoured defendant Nos.3 to 6 by recording a finding against the original plaintiff on issue Nos.1 and 2. Consequently, held issue No.3 also against the plaintiff and dismissed the suit.

7. Aggrieved of the trial Court's decision, the deceased plaintiff approached the first appellate Court by filing A.S. No.89 of 1996 and during pendency of the same, as he died, his legal representatives were brought on record as appellant Nos.2 to 5, who prosecuted the appeal. The first appellate Court, having formulated the point for determination, dealt with the evidence on record and the findings recorded by the trial Court and commenting on the inconsistent stand put-forth by the plaintiff (appellants), dismissed the appeal suit.

8. Further aggrieved of the decision of the first appellate Court, appellants approached this Court by the present second appeal contending in the grounds of appeal that there was a partial partition of the properties among three branches, but no partition took place with

regard to the subject property (plaint schedule property), which, both the Courts below, somehow, sidelined, and also referred to the presumption of joint family unless contrary is established by the contesting respondents. However, concerning substantial questions of law, they projected in paragraph No.6, thus:

"a. Whether, on the facts and in the circumstances of the case, the lower appellate court is right in confirming the Judgment of the trial Court ignoring the settled law that every Hindu Family is presumed to be joint unless the contrary is proved especially when there is no evidence adduced by the respondents/ defts. 3 to 6 to show that there was a partition of plaint schedule properties among the plaintiff, D1 and father of D.2 as the burden is always on the person who pleads partition.

b. Whether on the facts and in the circumstances of the case whether both the lower courts are correct in not taking into consideration of pleadings and evidence of the appellant that there was partial partition among them and no partition took place among them with regard to the plaint schedule properties especially when the respondent/defts. 3 to 6 failed to adduce any evidence contrary to the evidence adduced by the appellant.

c. Whether on the facts and in the circumstances of the Judgment of the lower appellate Court is vitiated for non-compliance of Order 41 rule 31 CPC."

9. Heard Sri M.S.R. Subrahmanyam, learned counsel for the appellants, and Sri Ch. Dhananjaya, learned counsel for respondent Nos.3 to 6.

10. Despite service of notice on respondent Nos.1 and 2, none appeared on their behalf.

11. Perused the judgments rendered by the trial Court as well as the first appellate Court and the material on record.

12. The very relief claimed by the appellants appears to be misconceived. As seen from the pleadings, the deceased plaintiff not only sought for partition of the respective shares as alleged by him, but also for perpetual injunction against the defendants. Even as seen from the evidence on record and the judgments rendered by both the Courts below, it is clear that partition had already taken place and the deceased plaintiff had approached the trial Court seeking partition on the ground that plaint schedule properties were kept joint and again put forth yet another ground that the partition effected by them earlier was unequal. The definite case of the deceased plaintiff and his successors, who are his legal representatives, is based on unequal partition. It was open for them to seek reopening of partition, but not a fresh partition of the plaint schedule items.

13. Even on merits, as seen from the evidence on record, the findings recorded by both the Courts below, clearly establish that all the three branches have been in possession and enjoyment of their respective distinct 1/3rd shares and that that has been the reason, the father of defendant No.2 sold his 1/3rd share to defendant Nos.3 to 6 and that has been the reason that the defendant Nos.1 and 2 have not stepped into the box and sailed with the plaintiff, perhaps with some oblique motive to cause inconvenience to the rights of defendant Nos.3 to 6 by virtue of purchase under Ex.B-4. Therefore, the substantial questions of law, as formulated by the appellants in this case, as projected, are not substantiated by the appellants herein. Thus, viewed from any angle, there is absolutely no merit in the appeal.

14. Therefore, the Second Appeal is dismissed on the ground that it does not merit for consideration. There shall be no order as to costs.

15. As a sequel thereto, Miscellaneous Applications, if any, pending in the appeal stand disposed of.

A. SHANKAR NARAYANA, J

July 10, 2015.

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