

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

C.R.P.No.2724 of 2010

ORDER:

This Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.16-04-2010 in I.A.No.1381 of 2007 in O.S.No.183 of 2006 on the file of the VII Additional Senior Civil Judge, Ranga Reddy District.

2. The petitioner herein is the plaintiff in the suit. He filed the suit for partition of the plaint schedule properties and for separate possession of a share therein. The respondent/defendant contended that there was a prior partition.

3. The Court below framed the following issues:

“1. Whether an oral partition took place between the plaintiff and defendant on 01-07-1988 and the joint family property including the plaint schedule properties partitioned between the plaintiff and defendant as contended by the defendant in his written statement?

2. Whether the plaintiff is entitled for the relief of partition as prayed for?

3. To what relief?”

4. The petitioner filed an application

I.A.No.1381 of 2007 under Order XVIII Rule 1 CPC to direct the defendant to lead his evidence first and thereafter to permit him to lead rebuttal evidence.

5. This application was opposed by the respondent. He contended that since the petitioner contended that the suit schedule properties are in joint possession of the parties, the initial burden lies on him to prove the joint possession and then only the burden shifts to the respondent to prove prior partition and as such the petitioner ought to lead evidence in the first instance.

6. By order dt.16-04-2010, the Court below dismissed I.A.No.1381 of 2007.

7. It observed that since the petitioner had approached the Court seeking partition, he has to plead and prove that the plaint schedule properties are joint family properties and that he is in joint possession of the same and that he is entitled for partition irrespective of the fact that the defendant took a plea of prior partition. It held that the petitioner has to discharge his initial burden of proof of the said facts. It relied upon a decision of this Court in **Sundarigiri Ramulu Vs. Sundaragiri Siddi Rajaiah @ Siddi Raju**^[1]. It held that the initial burden of proof lies on the petitioner to lead evidence and he cannot seek a direction to the defendant to lead evidence in the first instance as he approached the Court for partition and

separate possession.

8. Challenging the same, this Revision Petition is filed.

9. Heard Sri E.Madan Mohan Rao, learned counsel for the petitioner and Sri M.V.Raja Ram, learned counsel for the respondent.

10. Learned counsel for the petitioner contended that the order passed by the Court below cannot be sustained and that in a suit for partition if the defendant pleads prior partition, it is settled law that the burden is on the defendant to prove the said fact. He pointed out that the petitioner's plea that the property was joint family property having been admitted by the respondent impliedly and the latter having pleaded previous partition, the respondent will lose if neither party adduced evidence, since the burden is on respondent to prove previous partition. He contended that only if the respondent leads some evidence in proof of previous partition, the petitioner would be obliged to lead evidence in rebuttal and that the Court below therefore ought to have called upon the respondent to begin.

11. Learned counsel for the respondent on the other hand contended that the order passed by the Court below is correct and did not warrant any interference by this Court. He contended that this Court in **Sundaragiri**

Ramulu (1 supra) had already held that in a suit for partition, even if the defendant pleads prior partition of the properties, it would not alter the sequence provided for in Order XVIII CPC. He also placed reliance on the judgment in **Madam Vidhyavathi and others Vs. A.Veera Setty and others**^[2] and **Kesharbai @ Pushpabai Eknathrao Nalawade (dead) by LRs. And another Vs. Tarabai Prabhakarrao Nalawade and others**^[3].

12. I have noted the submissions of both parties.

13. Order XVIII Rule 1 CPC states:

“Order XVIII: Hearing of the Suit and Examination of Witnesses:

1. Right to begin:-

The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin....”

From the above provision, it is clear that a plaintiff has the right to begin evidence unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the

relief which he seeks in which case the defendant has the right to begin.

14. The right to begin is to be determined by the rules of evidence, namely, burden of proof. The party on whom the burden of proof lies has to begin the case. In order to come to conclusion concerning the question on whom the legal burden of proof rests, in addition to the substantive law, the pleadings of the parties coupled with the documents that they produce may have to be taken into account. If on the issue or issues of fact, the burden of proof is on the defendant, he has the right to begin. One of the guiding principles in this regard is Section 102 of the Evidence Act, 1872 which lays down that burden of proof rests on the party who would fail if no evidence at all were given on either side.

15. In the present case, admittedly, the court below had framed issue no.1 as:

“Whether a oral partition took place between the plaintiff and defendant on 1.7.1988 and the joint family properties including the plaint schedule properties partitioned between the plaintiff and defendant as contended by the defendant in his written statement?”

The way this issue has been framed by the trial court clearly indicates that the burden of proof to prove prior partition has to be on the defendant.

16. Even otherwise, it is settled law that in a suit

for partition, if the defendant pleads prior partition, the burden is on him to prove the prior partition.

17. In **Prit Koer Vs. Mahadeo Pershad Singh and others**^[4], a daughter, in the absence of sons after the deaths of her father's widows, claimed to inherit the estate alleging that it belonged to her father separately. It was found that the estate had been at one time in her father's possession jointly with his only brother, they having been members of a joint family under the Mitakshara. On the death of plaintiff's uncle, his sons became entitled to the property jointly with plaintiff's father as survivors. It was held that it was for the plaintiff to adduce evidence that there had been a separation between her father and his co-sharer or co-sharers.

18. This principle was reiterated by the Supreme Court in **Bhagwan Dayal (since deceased) Vs. Reoti Devi**^[5]. It held:

“16. The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It is also settled that there is no presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the

transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time.”

19. Recently in **Chinthamani Ammal Vs. Nandagopal Gounder and another**^[6], the Supreme Court held:

“17. In law there exists a presumption in regard to the continuance of a joint family. The party which raises a plea of partition is to prove the same. Even separate possession of portion of the property by the co-sharers itself would not lead to a presumption of partition.”

20. A Division Bench of Orissa High Court in **Purastam @ Purosottam Gaigouria and others Vs. Chatru @ Chatrubhuja Gaigouria**^[7]. It held:

“ 6. In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant-petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal. Rightly, therefore, the learned Subordinate Judge called upon the defendants to begin. We, therefore, see no merit in this revision which is

accordingly dismissed.”

21. Although the learned counsel for the respondent sought to rely on **Kesharbai** (3 supra) and contend that in a suit for partition, if prior partition is pleaded, the burden of proof to prove the prior partition is not on the defendant, the said decision does not support the said view. In that case, the Court reiterated that the joint and undivided family is the normal condition of a Hindu family and that it is usually presumed, until the contrary is proved, that every Hindu family is joint and undivided and all its property is joint. It held that this presumption, however cannot be made once a partition (of status or property), whether general or partial, is shown to have taken place in a family. It held that once a partition in the sense of division of right, title or status is proved or admitted, the presumption is that all joint property was partitioned or divided. So this case deals with presumption after it is admitted that there was a prior partition and does not deal with a situation when there is no such admission. In that case, the High Court had affirmed the findings of the trial Court that in 1985, there was a complete partition by virtue of a family settlement. The Supreme Court therefore held that the presumption would be that there was a complete partition of *a//* the properties and consequently the burden of proof that certain property was excluded from partition would be on

the party that alleges the same to be joint property. This judgment is therefore clearly distinguishable and inapplicable to the facts of the present case.

22. In the facts of the present case, the petitioner has alleged that the plaint schedule properties are joint family properties and he is in joint possession thereof with the respondent and therefore they may be partitioned. The respondent has raised a plea in his written statement that the plaint schedule properties were already partitioned in 1988 between the parties. Therefore by implication he admits that the plaint schedule properties are joint family properties. Since the respondent had pleaded that there is a prior partition, burden of proof is on the respondent to prove the earlier partition. So the respondent would lose if neither party adduced evidence. Only when the respondent leads some evidence in proof of the previous partition, the petitioner would be obliged to lead evidence in rebuttal. Therefore in my considered opinion, the Court below ought to have accepted the plea of the petitioner in I.A.No.1381 of 2007 that the respondent, having raised the plea of prior partition, ought to begin the trial by leading evidence.

23. In **Sundaragiri Ramulu** (1 supra) cited by the learned counsel for the respondent, this Court held that in a suit for partition, the burden squarely rests upon the plaintiff, not only to prove, that the suit schedule

property is liable to be partitioned, but also to establish his entitlement for a share in it and the denial by the defendant, in such a suit, of any plea raised by the plaintiff, would only lead to a necessity to undertake trial. It held that the mere fact that the defendant had pleaded prior partition of the properties, does not alter the sequence, provided for, under Order XVIII CPC.

24. Similar view was expressed in **Madam Vidhyavathi** (2 supra). In that case this Court observed:

“As rightly opined by the lower Court, the initial burden is on the petitioners to substantiate their case with reference to the evidence that they are entitled to passing of a preliminary decree. As respondent No.17 pleaded that there was an earlier partition under document, dt.04-05-1986, he may, in his turn, adduce evidence to substantiate his claim. Even if respondent No.17 could not discharge the burden placed on him regarding the past partition, that will not automatically entitle the petitioners to the passing of a preliminary decree unless they adduce positive evidence on their side. In this view of the matter, the provisions of Order XVIII Rule 1 CPC would not, in strict terms, apply to the facts of this case. The lower Court has, therefore, rightly dismissed I.A.No.216 of 2014.”

25. With respect to the above decisions, I am of the opinion that the said decisions did not consider the issue of the right to begin from the perspective of burden of proof. In my opinion, the right to begin is interconnected with the burden of proof. Moreover, once

the defendant pleads a prior partition, it implies that he is admitting that there was a joint family having joint family properties. Therefore, unless he establishes the prior partition, the suit is bound to be decreed because if he fails, the plaintiff would automatically get a decree for partition. In these circumstances, it is not necessary for the plaintiff to lead evidence first and prove joint possession of the plaint schedule properties.

26. Therefore in my opinion the fact that the defendant had pleaded prior partition of the plaint schedule properties, does alter the sequence provided under Order XVIII CPC and the view expressed in **Sundaragiri Ramulu** (1 supra) to the contra, is not correct. Similarly the view expressed in **Madam Vidhyavathi** (2 supra) that if the defendant does not discharge the burden placed on him regarding past partition, it will not automatically entitle the plaintiff for a decree of partition unless they adduce positive evidence on their side, is also not correct. So I disagree with the views expressed therein and hold that in view of the issue 1 framed by the Court below in the present case, the respondent ought to be directed to lead evidence first.

27. Therefore the Civil Revision is allowed and order dt. dt.16-04-2010 in I.A.No.1381 of 2007 in O.S.No.183 of 2006 on the file of the VII Additional Senior Civil Judge, Ranga Reddy District is set aside and the

said I.A is allowed.

28. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 10-07-2015

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[\[1\]](#) 2008 (6) ALT 314

[\[2\]](#) C.R.P.No.1239 of 2015 dt.10-04-2015

[\[3\]](#) (2014) 4 S.C.C. 707

[\[4\]](#) (1894) ILR 22 P.C. 85 = 21 M.I.A. 134

[\[5\]](#) AIR 1962 S.C. 287

[\[6\]](#) (2007) 4 S.C.C. 163

[\[7\]](#) 1992 (1) OLR 72 = MANU/OR/0316/1991