

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT No.1546 OF 1997

JUDGMENT:

The unsuccessful plaintiff in O.S. No.10 of 1988 on the file of Subordinate Judge Court, Visakhapatnam District, preferred this appeal challenging the decree and judgment, dated 29.09.1997, whereunder the suit filed by the plaintiff for partition of A and B schedule property into two half (equal) shares and to allot one such half share was dismissed.

02. For convenience of reference, the ranks given to the parties in O.S. No.10 of 1988 before the trial court will be adopted through out the judgment.

03. The plaintiff filed a suit for partition of A and B schedule property into two equal shares and for separate possession of the plaintiff's half share alleging that the plaintiff and first defendant are brothers and sons of Pothu Raju. The plaintiff and first defendant by cultivation of land and tailoring profession, acquired suit schedule property by joint exertions. Thus, the property is the joint family property of the plaintiff and first defendant.

04. The second defendant is the son of first defendant. Even though the plaint A schedule wet land was purchased from Nagulapally Pedda Atchiaiah with the joint family earning of both plaintiff and first defendant, the document was obtained in the name of their sister - Nagulapally Appayamma, due to disputes between the first defendant and his wife, since then, the suit land has been in the joint family possession and enjoyment of the plaintiff and first defendant only. Thus, the plaint A schedule property is the joint family property of the plaintiff and first defendant.

05. The B schedule house and house site is joint family property, acquired and constructed with the joint earning. The 'B' schedule property is also in the joint possession of both the plaintiff and first defendant. As the first defendant filed a suit before the District Munisiff, Narsipatnam, claiming exclusive right over the schedule property, the plaintiff demanded the first defendant for partition of the schedule property, but his attempt was in vain. Thereupon, he got issued legal notice, demanding the first defendant to partition the schedule property. The first defendant having acknowledged, receipt of the notice got issued a contentious reply and

claimed exclusive right over the property. Hence the suit.

06. The first defendant filed written statement admitting the relationship between the plaintiff and himself, while denying purchase of 'A' schedule property with the joint exertions of both plaintiff and first defendant. It is specifically contended that 'A' schedule land was purchased by Nagulapally Appayamma, who is sister of the first defendant, with her money under registered sale deed dated 08.02.1956. For performing the marriage of her son and also for discharging the debts, she sold away the land by registered sale deed dated 28.07.1966. Since then the first defendant has been enjoying the land purchased by him in his own right to the knowledge of the plaintiff. Initially, the land was under mortgage with Narsipatnam Co-operative Bank. Nagulapally Appayamma also executed settlement deed in favour of her adopted son, Babu Rao @ Kannayya, gifting Ac.0.50 cents of land on 08.04.1966 out of Ac.1.80 cents, she purchased under the registered sale deed dated 08.02.1956. The said Babu Rao also sold Ac.0.50 cents of land by registered sale deed dated 26.03.1968 to the first defendant. Since then the first defendant alone has been in possession and enjoyment of 'A' - schedule property in his own right.

07. The first defendant denied the allegation that the property was purchased by the plaintiff and first defendant nominally in the name of Nagulapally Appayamma due to disputes between the first defendant and his wife.

08. 'B' schedule vacant land originally belongs to the father of the plaintiff and first defendant, he purchased the same under registered sale deed dated 19.03.1949, constructed the thatched house in the west ten cents. Later indebted to several persons, sold the western part of Ac.0.10 cents of land to Javvaji Ramam under registered sale deed. In the eastern part of Ac.0.10 cents, the first defendant constructed a house with his self exertion and thereafter his father executed a settlement deed dated 31.03.1973 in his favour. Since then the first defendant has been in possession and enjoyment of the property without any interruption and that it is exclusive property of the first defendant.

09. The plaintiff's marriage was performed in the year 1960 and he set up a tailoring business obtaining sewing machine from the first defendant on a monthly rent and later sold away the sewing machine, shifted his residence to Ramachandrapuram, later, Rajahmundry and Varahapuram and other villages finally settled at

Narsipatnam and that he filed present suit to harass the defendants.

10. The first defendant also filed O.S. No.316 of 1986 on the file of District Munisiff Court, Narsipatnam, against the plaintiff and some others and the same is pending.

11. Thus 'A' and 'B' schedule property is the separate and exclusive property of first defendant and the plaintiff has no right to claim partition of the property.

12. It is further contended that the suit is liable for dismissal for non joinder of necessary parties and that the suit is barred by limitation, finally prayed to dismiss the suit.

13. On the strength of the above pleadings, the trial court framed the following issues:

- 1) Whether the plaintiff is entitled for partition and separate possession of his share in the plaint schedule property?
- 2) Whether the defendants have perfected their title to the suit schedule properties by adverse possession?
- 3) Whether the plaintiff is entitled for mesne profits from out of the suit schedule properties?
- 4) To what relief?

14. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.6 were marked and on behalf of the defendants, D.Ws.1 to 4 were examined and Exs.B.1 to B.82 were marked.

15. Upon hearing argument of both the learned counsel, considering oral and documentary evidence on record, the trial court dismissed the suit holding that the plaintiff miserably failed to establish that 'A' and 'B' schedule property was acquired with the joint exertions by both the plaintiff and first defendant, declined to pass decree for partition of the schedule property.

16. Aggrieved by the decree and judgment, the plaintiff being unsuccessful preferred this appeal raising several contentions. The main contentions of the plaintiff in the grounds of appeal are that,

(a) The trial court did not consider the evidence of P.W.2, who is no other than the nephew of the parties and son of Appayamma, which clinches the issue. The trial court also failed to consider the physical possession and enjoyment of Nagulapally

Appayamma, mother of P.W.2, in respect of 'A' schedule property, non production of revenue record like adangals and tax receipts, which are suffice to conclude that she was never in possession and enjoyment of the property, but the trial court did not consider the material on record in proper perspective.

(b) It is further contended that Ac.0.10 cents of land was sold by the father of P.W.1 to Javvadi Ramu under Ex.A.2 and in the remaining site, the plaintiff and first defendant raised construction jointly. The voluminous evidence brought on record to prove that both 'A' and 'B' schedule property is the joint family property of the plaintiff and first defendant. But the trial court on erroneous appreciation of evidence on record concluded that the schedule property is joint family property and dismissed the suit. Finally, prayed this court to reappraise entire evidence and pass decree in favour of plaintiff, setting aside the decree and judgment of the trial court.

19. During the course of argument, Smt. N.P. Anjana Devi, learned counsel for the appellant, contended that the admissions of P.W.2 would suffice to believe that A schedule property was purchased nominally in the name of Nagulapally Appayamma, but they did not assign any reason. The trial court ignored the evidence of P.W.2, who is the best witness to testify about the purchase of property, and further non production of any revenue record to establish the possession and enjoyment by plaintiff/ appellant is fatal to the defence set up by the defendant. In the absence of any evidence to establish enjoyment, the trial court ought to have decreed the suit holding that the purchase of 'B' schedule property is nominal in the name of Appayamma by plaintiff and the first defendant, due to pending litigation and finally prayed to set aside the decree and judgment and pass a decree and judgment for the aforesaid reliefs in favour of the plaintiff/ appellant.

20. Though notice was served in this appeal, none put up appearance on behalf of the respondents/ defendants.

21. Considering the contentions of learned counsel for the appellant/ plaintiff, perusing the judgment and decree, oral and documentary evidence, the points that arise for consideration are as follows:

1. Whether 'A' schedule property was acquired with the joint exertion of both the plaintiff and the first defendant and obtained registered sale deed in the name of Nagulapally Appayamma, sister of both the plaintiff and first defendant? If so, is the property liable for partition?
2. Whether 'B' schedule property belongs to the father of plaintiff and first

defendant and constructed house in that land by both plaintiff and first defendant? If so, is it liable for partition?

Point No.1:

22. The relationship between the plaintiff and the first defendant is not in dispute. The only dispute is acquisition of property by both the plaintiff and the first defendant with their joint exertions. Admittedly, the plaintiff is a tailor by profession and similarly, the first defendant was also tailor for some time and established a tailoring shop even at the age of 15 years, later joined in the service working as Junior Assistant in Collector's Office i.e. Revenue Department. The main contention of the plaintiff is that 'A' schedule property was purchased in the name of Nagulapally Appayamma by both the plaintiff and first defendant due to pendency of maintenance case filed by the wife of first defendant.

23. 'A' schedule property was purchased in the year, 1956 and disputes between the first defendant and his wife in M.C. No.69 of 1955 is also an admitted fact. The Maintenance case was dismissed on 25.02.1956, whereas 'A' schedule property was purchased on 08.02.1956, the sale deed was marked as Ex.B.1. Thus, by the date of pronouncing the order in M.C. No.69 of 1955 which was filed against the first defendant by his wife, the property was purchased from Atchaiah and allegedly obtained registered document in the name of Appayamma, sister of the plaintiff and first defendant. In fact, the property was under mortgage with Primary Agricultural Co-operative Society, Narsipatnam payable by her Vendor, Nagulapally Pedda Atchaiah. Ex.B.2 is the simple mortgage bond dated 10.01.1955. Later, she mortgaged the property under the original of Ex.B.3, dated 14.03.1957, obtained loan and discharged the loan by herself. Exs.B.4 to B.6 are the receipts evidencing the discharge of mortgage debt. Thus, the voluminous evidence on record disclosed that the property was purchased by Appayamma in the year 1956. The plaintiff might be aged 15 years by the date of alleged purchase and thereby the question of his earning and contributing any amount for purchasing the property in the year, 1956, is highly improbable. The recitals of Ex.B.1 clearly show that the property was purchased by Appayamma by paying sale consideration thereunder to Nagulapally Pedda Atchaiah.

24. Yet, the main contention of the first defendant is that out of Ac.1.80 cents,

Appayamma purchased 'A' schedule property under the original of Ex.B.1, executed settlement deed to an extent of Ac.0.50 cents of land to her adopted son, P.W.2. If really the property belongs to the plaintiff and the first defendant, the question of settling the property by Appayamma in favour of her adopted son does not arise and in such case question of payment of Rs.1500/- to adopted son of Appayamma and obtaining registered sale deed – Ex.B.10 does not arise. Therefore, execution of settlement deed by Appayamma in favour of her adopted son to an extent of Ac.0.50 cents is strong circumstances to disbelieve the contention of the plaintiff that the property was purchased nominally in the name of Appayamma by plaintiff and the first defendant.

25. The first defendant purchased Ac.1.30 cents from Appayamma under registered sale deed dated 28.07.1966 for consideration of Rs.1300/- under the original of Ex.B.9. Thus, the first defendant became an absolute owner of item Nos.1 and 2 of 'A' schedule property by virtue of the registered sale deed - Ex.B.9 and B.10 and in exclusive possession and enjoyment of the same.

26. One of the contentions of the plaintiff is that the sale deed was obtained by plaintiff and the first defendant nominally in the name of their sister - Appayamma. But this fact was not established by adducing any satisfactory and cogent evidence by the plaintiff. However, in the evidence of P.W.1, he made crucial admission which supports the case of the defendant at page 7 last 10 lines, which goes to the root of his case and his admissions are extracted hereunder for better appreciation of facts.

"I am not filing any revenue records to show that we cultivated the plaint B-schedule lands. It is true that out of Ac.1.80 cents of land purchased in the name of my elder sister she gifted under a registered settlement deed Ac.0.5 cents of land to her adopted son – Babu Rao. It is true that the first defendant purchased from our sister Appayamma Ac.1.30 cents. It is true that the balance extract of Ac.0.50 cents and the site in Ramannapet were purchased by the first defendant from Babu rao. It is true that our father executed a settlement deed in respect of the Ramannapeta site in favour of Babu Rao. It is true the extent of the Ramannapeta site purchased by my father is Ac.0.20 cents. It is true that out of that extent my father sold away Ac.0.10 cents to Javvadi people. I do not know that for the balance Ac.0.10 cents my father executed a registered settlement deed in favour of the first defendant."

27. According to the above admission, the first defendant purchased items 1 and 2 of 'A' schedule property. If really the property was nominally purchased by plaintiff and first defendant in the name of their sister, Appayamma, the question of obtaining

registered sale deed by paying consideration Rs.1300/- by the first defendant does not arise. Therefore, purchase of property under Exs.B.9 and B.10 is suffice to conclude that the property was not purchased nominally by the plaintiff and first defendant in the name of Appayamma.

28. P.W.2 is Nagulapally Baburao, son of Appayamma, who totally supported the case of the plaintiff. In the examination in chief he admitted that P.W.2 himself and his mother executed sale deeds in respect of 'A' schedule property without receiving any consideration. At the end of page 2 of examination in chief, P.W.2 admitted that in connection with the marriage of the daughter of the plaintiff requested the defendant for money and arose differences between them. In view of the difference, it appears the present suit is filed.

29. In the cross-examination of P.W.2, he pleaded ignorance about the land cultivated by Pothu raju. But admitted about the execution of sale deed for Ac.0.50 cents in the year 1968 so also the sale deed by his mother Appayamma in favour of the first defendant for Ac.1.30 cents, but denied payment of any consideration. The evidence of P.W.2 is not worthy of credence for the reason that he having sold the property to the extent of Ac.0.50 cents wanted to support the plaintiff's case obviously for different reasons and he is neither wholly reliable nor unreliable. In the absence of any corroboration, his testimony cannot be believed. Added to that, by the date of his examination in the month of February, 1997 he was aged 53 years therefore, he might have born in the year 1944 and by the date of purchase of the property in the month of February 1956 he might be aged 12 years. In such case it is impossible for him to say as to who paid consideration for purchasing the property by Appayamma and it is nominal or not. Therefore, his evidence inspires no confidence of the court and the same was rejected by the trial court. P.Ws.3 and 4 are mediators between the plaintiff and first defendant and their evidence is not much relevant.

30. The first defendant himself was examined as D.W.1 and supported his contention in all respects, more particularly, purchase of 'A' schedule property from Appayamma and her son Babu Rao under Exs.B.9 and B.10 – payment of property tax. In the entire cross-examination of D.W.1, nothing was elicited to disprove and passing of consideration under original of Exs.B.9 and B.10, that apart, voluminous documentary evidence produced before the trial court Ex.B.1 to B.82 clinchingly established payment of land revenue by the first defendant and cultivation of the

property by himself. Exs.B.4 to 6 are the receipts evidencing payment made by Appayamma established that Appayamma alone discharged the mortgage debt due to agricultural cooperative bank. Discharge of the debt by Appayamma is another strong circumstance to believe that it was her separate property. The defendants also examined three other witnesses, who totally supported the contention of the defendant in all respects regarding the purchase of 'A' schedule property.

31. The trial court discussed about joint source of income to acquire the property, but it is quite irrelevant for the reason that it was not the case of plaintiff that the schedule property was acquired with the joint family exertions. In fact the plaintiff and first defendant did not acquire any property from their father. Therefore, the discussion of the trial court regarding source of income and regarding the joint family exertions and presumption is wholly unnecessary.

32. On overall consideration of evidence available on record, the plaintiff miserably failed to prove his contribution for purchase of 'A' schedule property along with the first defendant in the name of their sister nominally. On the other hand, voluminous evidence on record established that the property was purchased by Appayamma and paid consideration thereunder, treated the property as her separate property. Therefore, the contention of the plaintiff that 'A' schedule property was purchased nominally is not accepted by the trial court. On reappraisal of entire evidence, discerning the entire material on record, I find no error warranting interference of this court.

33. Therefore, I find that the 'B' schedule property is the separate property of first defendant, concurring with the finding of the trial court. Accordingly, the point is held in favour of the first defendant and against the defendant.

Point No.2:

34. Undisputedly, Pothuraju purchased 0.20 cents of land, out of it western part of Ac.0.10 cents of land was sold to Javvaji Ramu under original of Ex.B.2 31.05.1956 and executed settlement deed in favour of the first defendant under the original of Ex.B.6 and other document produced by the plaintiff like tax receipts etc. clinchingly established that the Eastern part of Ac.0.20 cents which is described in 'B' schedule property was settled by Pothu raju, father of the plaintiff and first defendant in favour

of first defendant constructed the house therein. Therefore, 'B' schedule property is the separate property of the first defendant and the plaintiff has nothing to do with the same. Though the plaintiff contended that the house was constructed with joint exertions, no iota of evidence is brought on record to establish his contention that he contributed equally. Except the bald allegation, no other material is available to substantiate his contention. Therefore, the trial court without any hesitation held that 'B' schedule property is the separate property of first defendant and this finding is free from any legal infirmity, warranting interference of this court. Hence, the finding of the trial court is hereby confirmed holding the point in favour of the first defendant and against the plaintiff.

35. In view of my foregoing discussion I find no ground to set aside the decree and judgment of the trial court, dated 29.09.1997 in O.S. No.10 of 1988 and to pass a preliminary decree in favour of the plaintiff and the appeal is devoid of merits, is liable to be dismissed.

36. In the result, the appeal is dismissed, but in the circumstances of the case without costs confirming the decree and judgment of the trial court, dated 29.09.1997 in O.S. No.10 of 1988.

37. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

Dt.08.09.2015

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