

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.470 of 2005

JUDGMENT:-

This Second Appeal, under Section 100 of Coide of Civil Procedure by the appellants/unsuccessful plaintiffs, is directed against the decree and judgment dated 03.12.2004 of the learned Senior Civil Judge, Ramachandrapuram of East Godavari District, passed in A.S.No.27 of 2000, whereby the learned Senior Civil Judge, while dismissing the said appeal had confirmed the decree and judgment dated 07.02.2000 of the learned Principal Junior Civil Judge, Ramachandrapuram passed in O.S.No.143 of 1994 filed by the plaintiffs for a declaration that plaint 'A' and 'B' schedule properties are joint family properties of the plaintiffs and the defendants and to pass a preliminary decree for partition of the said properties into three equal shares and to allot 1/3rd separated share each to the plaintiffs after ejecting the defendant/respondent there from and for profits and costs.

2. I have heard the submissions of the learned counsel for the appellants/plaintiffs and the submissions of the learned counsel for the respondent/defendant. I have perused the material record.

3. The case of the plaintiffs is this: 'The plaintiffs and the defendant are brothers and are sons of late B. Venkataraju and Seethamma. She had died long time back. All the plaint schedule properties are joint family/ancestral properties. The father acted as the manager of the joint family. A vacant site was purchased on 13.05.1977 in the name of the father under exhibit A2. An extent of Ac.0.97 1/3 cents which is a part of R.S.No.352/2 of Chodavaram village was also purchased under exhibit A1-registered sale deed dated 19.06.1978 in the name of the father. On consultations and advise the father had partitioned all the properties amongst the four male members of the family in the presence of the elders namely Bikkani Ammiraju @ Tata Rao, Bikkani Veera raju, Bikkini Veera Venkata Satyanarayana and others. At that

time it was agreed that properties covered under exhibits A1 and A2 documents shall be enjoyed by Venkatraju, the father, without any rights of alienation and that after his life time the said properties shall be partitioned amongst the parties to the suit i.e., the three brothers. Rest of the properties were divided and each sharer is enjoying his share of property with absolute rights. Since oral partition had taken place earlier, it was reduced in writing on 19.04.1980. In that document the respective shares of the father and the parties to the suit are mentioned. The father, during his life time, used to live with the defendant while enjoying his share of properties and also the properties which he is entitled to enjoy for life time. He had alienated some properties and had purchased some more properties. He had no right to alienate the properties which were agreed to be enjoyed during his life time. He died on 13.10.1993. The plaintiffs demanded the defendant to co-operate for partition of the properties under exhibits A1 and A2 in the presence of the persons who were present at the time of oral partition. But, the defendant did not co-operate. Hence, a notice under the original of exhibit A3 was issued. The defendant gave a reply under exhibit A4. A further notice under the original of exhibit A5 was issued. A further reply under exhibit A6 was issued. Hence, the suit is filed for partition.'

4. Per contra, the case of the defendant is this: 'The plaint averments are false. The father of the parties has got several ancestral properties. He had managed the properties during his life time and had purchased some more properties. He had accordingly purchased the properties under exhibits A1 and A2. On 19.04.1980 the parties to the suit and their father had partitioned their entire joint family properties into four shares in the presence of mediators and a partition list was also executed. On 25.04.1980 the plaintiffs and this defendant have together executed a registered partition deed under exhibit B1 in respect of ancestral vacant site and house. Since the date of the said partition, the sharers are enjoying their respective share with absolute rights. During the life time of the father, this defendant had looked after his welfare. The father died on 13.10.1993. In the said circumstances, the father out of love and affection towards this defendant had executed a registered

settlement deed dated 03.12.1984 under exhibit B3 and had conferred vested remainder rights in respect of plaint 'A' schedule property and other properties in favour of this defendant while keeping life interest for himself. Similarly he had also executed another gift deed dated 27.11.1984 under exhibit B2 conveying absolute rights in respect of plaint 'B' schedule vacant site to this defendant and delivered possession of the same. The father has got absolute rights to convey plaint 'A' & 'B' schedule properties which he had got to his share in the partition and the plaintiffs have no right to question the said documents. The father sold certain properties which had fallen to his share. As per the two registered documents under exhibits B2 and B3, this defendant has got absolute right, title and interest and also possession and enjoyment over the properties. The plaintiffs changed their version in the second notice and fabricated a Photostat copy by suppressing the original. Hence the suit may be dismissed.

5. Basing on the above pleadings, the trial Court had framed the following issues:-

1. Whether the alleged partition deed dated 19.04.1980 is true?
2. Whether the plaintiffs are entitled to the relief of partition of A & B schedule properties into three shares and to allot two such shares to them?
3. To what relief?
[reproduced verbatim]

6. At trial, the second plaintiff was examined as PW1 and one of the elders, whose name was mentioned in the plaint was examined as PW2 and exhibits A1 to A6 were marked. On behalf of the defendant, the sole defendant was examined as DW1 and another supporting witness was examined as DW2 and exhibits B1 to B3 were marked.

7. On merits, the trial Court had dismissed the suit of the plaintiffs. The first appeal preferred by the plaintiffs was also dismissed by the Court below confirming the decree and judgment of the trial Court. Aggrieved of the same, the plaintiffs are before this Court.

8. The learned counsel for the plaintiffs would contend that the Court below has not framed specific points for determination and did not follow the procedure under Order 41 Rule 31 of the Code and did not consider the oral evidence in the absence of documentary evidence and has wrongly cast the burden on the plaintiffs when the defendant had pleaded exclusive rights and when there is a presumption that all the properties acquired with joint family funds belong to the joint family and had wrongly placed reliance on the documents viz., exhibits B2 and B3, which are not proved and that the Courts below had misread and misinterpreted evidence and had further ignored material evidence brought on record and that, therefore, substantial questions of law on the above aspects are involved in the second appeal. He further advanced arguments in line with the pleaded case of the plaintiffs.

9. The learned counsel for the respondent/defendant would submit that though the plaintiffs had relied upon the partition list and that a specific issue was framed as to whether the alleged partition list dated 19.04.1980 is true and that the plaintiffs had failed to produce the said document and other material documents which were referred to by them in their case and that on the other hand, the defendant had produced the registered partition deed and that the second plaintiff (PW1), in his evidence, had admitted the execution of exhibits B1 to B3 and that, therefore, the Courts below were justified in recording concurrent findings of fact in favour of the defendant and in dismissing the suit and that the questions now raised are not substantial questions of law and thus, the appeal is liable to be dismissed at the admission stage being devoid of merit. He had thus supported the decrees and judgments of the Courts below.

10. Now this Court has to examine as to whether or not any substantial questions of law are involved in this second appeal and whether the appeal deserves admission for disposal on merits or is liable to be dismissed at the stage of admission.

11. I have bestowed my attention to the facts and the submissions. In a suit for partition, the initial onus of proof and the legal burden are on the plaintiffs

to show that the properties are joint family properties and are available for partition. The law is well settled that there can be a presumption that the family is joint and there can be no presumption that the properties held by the family members of a joint family are joint family properties. Even though it is pleaded that there is a partition list and that under it the father of the plaintiffs and the defendant i.e., Venkataraju is having only a life interest and that after his lifetime, the said properties in which the father had a life interest are to be divided amongst the three brothers as per the partition list, the said partition list was not filed and exhibited by the plaintiffs. Thus, the plaintiffs could not discharge the initial onus of proof which is upon them and also the legal burden. On the other hand, the defendant had pleaded in his defence that there is a registered partition deed dated 25.04.1990 under exhibit B1 evidencing partition between the plaintiffs and the defendant and that his father had executed exhibit B2 – registered gift deed dated 27.11.1994 in respect of plaint ‘B’ schedule vacant site and exhibit B3 – registered settlement deed dated 03.12.1994 in respect of plaint ‘A’ schedule landed property and that by virtue of exhibits B2 and B3, registered documents, the said properties were gifted to/settled on the defendant by his father. The second plaintiff (PW1), having not objected to the said documents at the time of marking the same had admitted that the defendant used to look after the welfare of the father during his last days and had further admitted in his evidence the execution of the said documents by the father in respect of the suit schedule properties in favour of the defendant. Therefore, looking at the facts and the evidence, this Court is satisfied that there is neither mis-reading nor mis-interpretation or non-appreciation of the evidence by the Courts below. Having examined the facts accurately and the evidence in the proper perspective, both the Courts below have recorded concurrent findings on facts supported by cogent and valid reasons. Therefore, none of the contentions now raised, which are stated to be substantial questions of law, are not involved in this appeal, in the well considered view of this Court, and there is no substance in the questions raised. Hence, this court finds that the appeal is devoid of merit and is liable to be dismissed at the admission stage. The law is well settled that a second appeal shall not be admitted if no

substantial question of law arises for consideration and when no substantial question of law is involved. A second appeal under Section 100 of the Code is now confined to cases where a question of law is involved and when such question is a substantial one. The view of this court is reinforced by the ratio in the decision in **Gurudev Kaur v. Kaki** (AIR 2006 SC 1975). In the case on hand, as this court found, after careful examination of the pleadings, the evidence and the contentions, that no substantial question of law is involved, this second appeal is liable for dismissal at the stage of admission in view of the narrow compass of Section 100 of the Code of Civil Procedure.

12. Accordingly, the second appeal is dismissed at the stage of admission. There shall be no order as to costs.

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

M. Seetharama Murthi, J

29th June, 2015
Bvv