

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA AND THE STATE
OF ANDHRA PRADESH

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S.A No. 971 OF 2009

Between:

Late Kumari Mallamma and others

... Appellants/Plaintiffs

And

Kumari Narshimulu and others

...

Respondents

DATE OF JUDGEMENT PRONOUNCED: 04-08-2015

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SUBMITTED FOR APPROVAL:

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HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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

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HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

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S.A NO. 971 OF 2009

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J U D G M E N T :

This Second Appeal under Section 100 of Code of Civil Procedure by the un-successful plaintiffs is directed against the judgment dated 14.7.2009 of the learned V Additional District Judge at Sangareddy of Medak District passed in A.S. No. 54 of 2008. The learned Additional District Judge while dismissing the said appeal had confirmed the decree and judgment dated 31.5.2008 of the learned Senior Civil Judge, Sanga Reddy in O.S. No. 27 of 2005 wherein the plaintiffs 1 to 3 sought for partition of the plaint schedule land in an extent of Ac.11.06 guntas of land into two equal shares and allotment of one such separated share to the plaintiffs. The said land covered by four different survey numbers is situated at Osmannagar Village of Ramachandrapuram Mandal of Medak District and is more fully described in the schedule annexed to the plaint.

2. I have heard the submissions of learned counsel appearing for appellants/plaintiffs (for brevity 'plaintiffs') and the learned counsel appearing for respondents/defendants (for brevity 'defendants'). I have perused the material on record.

3. At the time of admission of this appeal, this Court

formulated the following substantial questions of law:

1. Whether the plaintiffs can be non-suited on the ground of non-joinder of necessary parties in the absence of any such pleading or proof or issue to that effect?
2. To what relief?

3.1 To adjudicate the lis and answer the substantial questions of law, it is necessary to refer the pleadings of the parties.

3.2 The case of plaintiffs, in brief, is thus:

The first plaintiff, who is the wife of late Buchaiah, is the mother of the plaintiffs nos. 2 and 3. One Venkaiah is the father of the first plaintiff and Anjaiah. The said Anjaiah is the father of the defendants. The said Venkaiah had died 14 years prior to the filing of the suit. The said Venkaiah owned landed properties i.e., the plaint schedule property. He was the pattedar of the said land. The parties to the suit are Hindus and as such they are governed by Hindu Law. The said Anjaiah had died long time back. After the death of the father of the defendants, the first plaintiff and her husband continued to cultivate the lands with the assistance of the plaintiffs 2 and 3. Since the plaintiffs 2 and 3 are Government employees, they having found it difficult to manage the agriculture operations had allowed the defendants to cultivate the lands. They are thus cultivating the lands at the behest of the first plaintiff. Therefore, by all means the defendants and the plaintiffs are the joint owners and co-owners of the suit property; and, as such the suit land is in joint possession of the parties. Late Venkaiah during his lifetime had performed the marriage of the first plaintiff with Butchaiah. At that time late Anjaiah, the father of the defendants was a small boy and, therefore, the situation compelled the father of the first plaintiff to secure an illatom son-in-law; and, an indenture was executed on 12.5.1950 by Venkaiah stating that the husband of the first plaintiff was brought as illatom son-in-law.

The first plaintiff is entitled to a share in the property as a daughter of Venkaiah not only by virtue of succession but also on the basis of the commitment of Venkaiah by virtue of the indenture dated 12.5.1950. After May 2002, the defendants had deliberately stopped giving the produce of the harvest and had started enjoying all the land by themselves. The defendants had stealthily got the land mutated in their names in the revenue records. When the plaintiffs wanted to have the division of the properties, the defendants had declined to cooperate. Therefore the suit is filed for partition.

3.3 The case of defendants, in brief, is thus:

There is no custom or practice of taking a person as illatom son-in-law in the caste to which the parties to the suit belong. The plea of the plaintiff in that regard is therefore false. No indenture dated 12.5.1950 was executed by Venkaiah stating that the husband of the first plaintiff was brought as illatom son-in-law. The land in s.no. 30 is the Government land; therefore, the suit for partition is not maintainable. Neither the first plaintiff nor the plaintiffs 2 and 3 are the coparceners of the family of the defendants. It is incorrect to say that the plaintiffs and the defendants are joint owners and co-owners of the property. There is no truth in the allegation that a half share of the produce was given to the plaintiff till May 2002 and that stealthily the names of the defendants were got entered in the revenue records and the property was mutated in their names. The suit is barred by time. Since the plaintiffs are not coparceners and as they are not in joint possession, they are not entitled to any relief. The suit may be dismissed.

3.4 Having regard to the above pleadings, the trial Court had

framed the following issues:

1. Whether the plaintiffs are entitled for relief of partition as prayed for?
2. To what relief?"

3.5 During the course of trial, PWs 1 and 2 were examined and exhibits A1 to A12 were marked on the side of the plaintiffs. The first defendant and a supporting witness were examined as DWs 1 and 2. No documents were marked on the side of the defendants.

3.6 On merits, the trial Court, while *inter alia* observing that the first plaintiff is the co-sharer along with father of the defendants had recorded a finding that the suit is liable for dismissal for non-joinder of necessary party viz., K. Lingamma, who is said to be the sister of the first plaintiff. The trial Court had thus dismissed the suit of the plaintiffs. The first appeal preferred by the plaintiffs, as already noted, was also dismissed by the court below confirming the judgment and decree of the trial Court in all respects. Therefore, the plaintiffs are before this Court.

4. The learned counsel for the plaintiffs would contend as follows:

In the suit for partition filed by the plaintiffs there is absolutely no pleading in the written statement of the defendants that the plaintiffs have to implead any necessary and proper party to the suit. There was no issue framed by the trial Court in regard to non-joinder of a necessary party. However, during the course of cross-examination of PW1, it was got elicited that the 1st plaintiff was having a sister by name K.Lingamma. Based on the said admission alone, the trial Court during the course of

its judgment and without any issue on this aspect had held against the plaintiffs and had recorded a finding that the suit is liable for dismissal for non-joinder of K.Limgamma, who is necessary party. The trial Court had failed to see that the said contentions based on the evidence in the cross examination of PW1 is not supported by any pleading in the written statement. The said approach of the trial Court is contrary to the provisions of law under Order 1 Rule 9 and Order 1 Rule 13 of the Code and also the settled legal proposition that any amount of evidence without a foundation in the pleading cannot be looked into. Even the first appellate court had erroneously confirmed the judgment of the trial court without considering the said factual and legal aspects. The said finding is contrary to Rule 13 of Order 1 of the Code. Therefore, the judgments of the Courts below are vitiated being grossly erroneous. In view of the substantial question of law raised and involved, the appeal is liable to be allowed. The Judgments of the Courts below be set aside and the suit may be decreed as prayed for.

5. On the other hand, the learned counsel appearing for the respondents/defendants would contend as follows:

The courts below had concurrently recorded a finding that the plaintiffs had failed to prove exhibit A1. When it was concurrently held by both the courts below

that exhibit A1 is not proved and when the said document is the basis for partition, it follows that the courts below had rightly dismissed the suit; hence, there is no need to go into the question as to whether or not K.Lingamma is a necessary party and whether the suit is liable to be dismissed for her non-joinder as a party to the suit for partition. Therefore, there is no substantial question of law involved in the Second Appeal and the Second Appeal is devoid of merit and is liable to be dismissed.

6. I have heard the learned counsel for both the sides. I have perused the material record.

7. I have carefully gone through the material record. And, I have given earnest consideration to the submissions of the learned counsel for both the sides.

8. The courts below had dismissed the suit for partition solely on the ground that K.Lingamma, the sister of the 1st plaintiff is a necessary party to the suit for partition and that the non-joinder of the said Lingamma as a party to the suit is fatal. The relationship of the parties with the said K.Lingamma is not in dispute. However, there is no pleading in the written statement of the defendants that the said Lingamma is a necessary and proper party to the suit. Hence, no issue was found in the suit on the said aspect as to whether the suit is bad for non-joinder of any necessary party. Hence, the learned counsel for the plaintiffs would contend that the statement elicited during

the cross-examination of PW1 that the 1st plaintiff is having a sister by name Lingamma cannot be a basis for the dismissal of the suit for partition as the said piece of evidence has no foundation in the defence of the defendants and there was no issue framed on the said aspect. In this backdrop, the learned counsel for the defendants would first contend that the suit is based on exhibit A1 and that exhibit A1 is the sheet anchor for the plaintiffs' case and that the same was not proved as per the concurrent findings of the Courts below and hence, on that ground alone the suit is liable to be dismissed without going into the aspect of non-joinder of Lingamma as a necessary party and that therefore, the courts below were justified in dismissing the suit for partition. What is to be noted is that the courts below had recorded a concurrent finding of fact that exhibit A1 is not proved. However, it is only a document filed in proof of the contention that when the father of the defendants was young, Kummari Venkaiah had brought the husband of the 1st plaintiff- Buchaiah as an illatom son-in-law under compelling circumstances and that there was a commitment that a right in respect of the property would be conferred on the 1st plaintiff. Both the courts had concurrently held that by virtue of exhibit A1 and merely because 1st plaintiff's husband was brought into the family house as an illatom son-in-law, no rights in respect of the property would

accrue to the 1st plaintiff. What is relevant to note is that the courts below had further found that the first plaintiff and the father of defendants by name Anjaiah being brother and sister and children of Venkaiah are coparceners and co-sharers. In fact, the trial Court in paragraph 14 of the judgment had held that there is absolutely no opposition to hold that the first plaintiff is also a co-sharer along with father of the defendants. Having recorded such a finding, as already noted, the trial Court had dismissed the suit of the plaintiffs for non-joinder of K.Lingamma, the sister of the 1st plaintiff and the father of defendants, though admittedly, there was no issue and that there is no plea in the written statement of defendants to the effect that the said K. Lingamma is necessary and proper party to the suit. Further, no evidence was brought on record during the trial as to whether K.Lingamma was alive or not as on the date of the evidence of PW1 and as to whether she had left behind her any legal heirs, in case she is not alive. However, solely relying upon an admission of PW1 that the 1st plaintiff is having sister by name K. Lingamma and that she is also to be considered as another coparcener, the trial Court had dismissed the suit of the plaintiffs for non-joinder of Lingamma as a party to the suit. The trial Court had applied, to the facts of the case, the ratios in decisions reported in **M.Shanmugha Udayar Vs.**

Sivananda and others^[1] and Kanakaradhammal Vs. L.

Madhukar and another^[2]. The Court below had confirmed the said finding of the trial court *inter alia* holding that though the plaintiffs had lot of time to take steps to bring the said Lingamma on record as a party to the suit, they did not do so and that therefore, there is no necessity of calling for interference with the decree and judgment of the trial Court.

9. Be that as it may. A reading of the plaint would show that the first plaintiff is claiming a share in the property in her own right as a daughter of Venkaiah i.e., by inheritance and in accordance with the law of Succession. Therefore, the contention of the learned counsel for the defendants that since the plaintiffs could not establish exhibit A1 the suit is liable for dismissal cannot be countenanced as the 1st plaintiff's right to seek partition of the plaint schedule property is not solely based on exhibit A1 but also is based on her right to claim a share by virtue of inheritance/succession.

10. The learned counsel for the plaintiffs had placed reliance on the decisions of the Supreme Court reported in **Mohammad Mustafa v. Sri Aubu Bakar and others^[3]** and **Rajgopal (Dead) by L.Rs., V. Kishan Gopal and another^[4]** in support of the contention that any amount of

evidence without a foundation in the pleadings is of no avail and cannot be looked into. There is no dispute with the said proposition. When a finding is reached by the Court without a pleading and necessary issue purely based on an admission in the evidence, the said finding, in the well considered view of this Court, is unsustainable. Now it is necessary to refer to the following relevant provisions of law dealing with misjoinder and non-joinder of parties.

11. Order 1 Rule 9 and 13 of the Code read as under:

“9. Misjoinder and non-joinder:- No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it: (provided that nothing in this rule shall apply to non-joinder of a necessary party).

13. Objections as to non-joinder or misjoinder:- All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.”

In the case on hand, it is undisputed that the defendants have not taken a plea in their written statement that K. Lingamma is a necessary party. Hence, an issue was also framed on the said aspect. The decision in **Rajgopal (Dead) by L.Rs., V. Kishan Gopal and another** (supra-4) clearly mandates that in the absence of a plea, no amount of evidence in relation thereto, can be looked into. A

pleading, it is well known, is intended to make an issue definite. Unless a specific plea is taken, court has to refrain from considering such a plea more particularly when such a plea is a mixed question of fact and law. The court should not decide on facts not stated in pleadings. No party shall be taken by surprise at trial as the object of pleadings is to ensure parties to place relevant evidence before the Court and to enable the Court to consider the case specifically pleaded. Therefore, the findings of the Courts below that K. Lingamma is a necessary party and for her non-joinder, the suit is liable to be dismissed are improper in the absence of plea in the written statement and an issue on the said aspect and are vitiated. Viewed thus, this Court finds that substantial question of law raised has got substance and the case of the plaintiffs merits consideration.

12. Coming to the next aspect, the question now is as to what is the relief to be granted in the second appeal as Lingamma who is the sister of the 1st plaintiff and who is said to be a necessary party is not impleaded as a party to the suit for partition.

13. The 1st plaintiff, the said Lingamma and the father of the defendants are the children of Venkaiah. All the three children of Venkaiah are entitled to an equal share in the properties of late Venkaiah as per the law of succession.

On the death of the 1st plaintiff, the other plaintiffs 2 and 3, who are her legal heirs are now claiming her share in the property of Venkaiah. In the suit the plaintiffs had claimed an equal share in the property and the right of plaintiffs 2 and 3 to a share in the property is now based on the right of the deceased 1st plaintiff to a share by way of succession being the daughter of late Venkaiah. If that is so, she along with father of defendants by name Anjaiah is entitled to share is not in dispute. The evidence of PW1 shows that the 1st plaintiff is having a sister by name K. Lingamma. If that is so, she would also be entitled to a share along with the 1st plaintiff and the father of the defendants. Therefore, one more aspect has to be explored before the shares of the sharers are determined and before a decision is arrived at finally in this matter. Though it is borne out by evidence that K. Lingamma is the sister of the 1st plaintiff, there is no material on record to know as to whether she is alive or not. The evidence brought on record also does not disclose as to whether she had left behind any legal heirs, in case she is not alive. Therefore, to give a quietus to the lis, in the well considered view of this Court the matter requires to be remitted to the trial Court to give an opportunity to both the parties, if necessary to add the necessary parties viz., K.Lingamma, if she is alive or her legal heirs, if any, in case she is not alive and to amend the pleadings and

adduce further oral and documentary evidence and for disposal of the suit afresh in accordance with the procedure established by law.

14. The second substantial question of law is accordingly answered.

15. In the result, the Second Appeal is allowed and the decree and judgment of the trial Court as confirmed by the appellate Court are set aside. The suit is remitted to trial Court with directions to give an opportunity to both sides, to implead, if necessary, the necessary party or parties viz., K.Lingamma, if she is alive or her legal heirs, if any, in case she is not alive and to amend the pleadings and to adduce further oral and documentary evidence and then decide the suit afresh in accordance with the procedure established by law. Considering the fact that the suit is sufficiently old, the trial Court shall make an endeavour to decide the suit accordingly within three months from the date of the receipt of a copy of this judgment and preferably not later than six months. There shall be no order as to costs.

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

M. SEETHARAMA

MURTI

DATE: 04.08.2015

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[\[1\]](#) AIR 1994 MADRAS 123

[\[2\]](#) AIR 1965 SC 271

[\[3\]](#) AIR 1971 SC 361

[\[4\]](#) AIR 2003 SC 4319