

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

APPEAL SUIT NO.121 OF 1997

JUDGMENT:

The unsuccessful plaintiff in O.S.No.19 of 1988 on the file of the Subordinate Judge, Chirala (hereinafter referred as "trial Court") preferred this appeal against the impugned judgment and decree, dated 28.03.1995, whereunder, the suit filed for partition of the plaint schedule property was dismissed.

2. The appellant was the plaintiff and the respondents were the defendants before the trial Court. For the sake of convenience, the parties herein after will be referred to as arrayed before the trial Court.

3. The plaintiff filed suit for partition of the suit schedule property into three equal shares and allot $1/3^{\text{rd}}$ share in the plaint schedule property to the plaintiff alleging that 1st defendant is the brother of the plaintiff. The plaint schedule property is situated in Vetapalem originally own by three brothers i.e, Lal Mohammad Saheb, Khaja Mohiddin and Abdul Waheb Saheb. The plaintiff as well as the

1st defendant are the sons of Khaja Mohiddin. Each of the above three brothers possessed $1/3^{\text{rd}}$ share in the said property. The plaintiff's father conveyed his $1/3^{\text{rd}}$ interest in favour of his wife Azimunnisa Begum under a registered sale deed dated 09.11.1933. The paternal uncle of the plaintiff by name Abdul Waheb Saheb also sold his $1/3^{\text{rd}}$ share to Azimunnisa Begum on 09.08.1939. Thus, the plaintiff's mother became entitled to $2/3^{\text{rd}}$ share in the suit property.

4. The other sharer Lal Mohammed, who possessed 1/3rd interest, died about 40 years ago and his share devolved on his son Khuddu Saheb. Khuddu Saheb also passed away about 9 years ago, leaving behind him, the 2nd defendant, who is alleged to be the son of Khuddu Saheb and successor in title.

5. The plaintiff's mother died about 11 years ago, and on her death, her interests in the suit property devolved on the plaintiff and the 1st defendant in equal shares. Thus, the plaintiff and the 1st and 2nd defendants are entitled to 1/3rd share each in the plaint schedule property.

6. The plaintiff and the 1st defendant are the employees in Railways, stayed at different places. The 2nd defendant's father and after him, the 2nd defendant used to look after the management of the suit schedule house and used to pay their share of rent after deducting property tax every year.

7. The 3rd and 4th defendants are the tenants in occupation of the property, who are liable to pay the rent to the plaintiff and the 1st defendant.

8. A small portion of site was sold by Khuddu Saheb about 13 years ago with the consent of the plaintiff and his mother, paid their due shares of consideration in the sale proceeds and the remaining site and house are joint. Thereby, the 1st and 2nd defendants and the plaintiff are in joint possession of the suit schedule property. The plaintiff made a request for amicable partition of the schedule property but the 2nd defendant did not accede to his request. Hence, the plaintiff filed this suit for partition of the schedule property into three equal shares and allot

1/3rd share in the property to him.

9. The 1st defendant filed written statement supporting the plaintiff's case while praying to allot 1/3rd share to him and for delivery of separate possession of his 1/3rd share.

10. The 2nd defendant filed written statement denying material allegations of the plaint *inter alia* contending that the total extent of the property in possession of the 2nd defendant is only 500 Sq.yds and it is the absolute property of the 2nd defendant. There is any amount of discrepancy in the extent of property and the extent of property was only 10.31 cents but 1500 Sq.yds is equivalent to 32 cents. The schedule, itself indicates that the plaintiff and the 1st defendant do not know anything about the schedule property and that they are un-concerned with the property, which is in exclusive possession of the 2nd defendant.

11. The trial Court is not competent to try this suit, as the value of the suit is Rs.14,503/- by the date of filing of this suit. On this ground alone, the plaint is to be returned.

12. It is specifically contended by the 2nd defendant that the father of the defendant Khuddu Saheb and his father Lal Mohammad Saheb have exercised right over the schedule property as absolute owners for the last more than 70 years. The paternal grand father of the defendant by name Lal Ahammad Saheb was the absolute owner of the property and he submitted an application on 14.07.1933 to the Deputy Collector, Ongole seeking appointment as Bench Magistrate of Vetapalem. Lal Ahammad Saheb died on 04.03.1938 and Abdul Khuddu Saheb succeeded the

estate of Lal Ahmmad Saheb and enjoyed the same openly, peacefully, uninterruptedly with absolute rights till 23.12.1974 when he executed the gift deed in favour of the 2nd defendant with absolute rights. Since the date of execution of registered gift deed, the 2nd defendant has been in possession and enjoyment of the property in his own right. The plaintiff, the 1st defendant and their predecessors were never in the possession and enjoyment of the property and are not entitled to claim any right in 10.31 cents of the land.

13. The plaintiff, the 1st defendant and their predecessors were living at Nellore with separate residents and business, they are no way connected with the property at Vetapalem, Ongole District. Therefore, the plaintiff is not entitled to claim any relief in this suit.

14. Khuddu Saheb being the absolute owner of the property sold 61 Sq.yds of site to Byna Rudramurthy and another under a registered sale deed dated 12.04.1973, delivered possession of the same after receiving the sale consideration and the allegation that the share of plaintiff and the 1st defendant was paid to their mother is false.

15. The 3rd and 4th defendants are in occupation of a small extent of the property paying meager amount of Rs.25/- per month and the 2nd defendant alone receiving the rent from the defendant and in occupation of the property. The 1st defendant or the plaintiff was never paid any share in the income of the property and the allegation made in the plaint to the contra is denied.

16. Abdul Khuddu Saheb had no issues, he brought up defendant, who is his wife's elder sister's son from 1944 onwards treating him as his son, fostered him with love and affection, therefore, he executed a registered gift deed dated 23.12.1974 in favour of the 2nd defendant donating the entire property of 500 Sq.yds with absolute rights. Therefore, the 2nd defendant alone is the absolute owner of the property neither plaintiff nor the 1st defendant had any right in the property and prayed to dismiss the suit.

17. The 4th defendant filed a memo adopting the written statement filed by 1st defendant and whereas 3rd defendant remained ex parte.

18. Basing on the above pleadings, the following issues were framed by the trial Court:

- 1). ***Whether the plaintiff is entitled for partition as prayed for?***
- 2). ***Whether the suit is barred by limitation?***
- 3). ***To what relief?***

19. During the course of trial, on behalf of the plaintiff, PWs.1 and 2 were examined and Exs.A1 to A8 were marked. On behalf of the defendants, DWs.1 to 3 were examined and Exs.B1 to B20 and Ex.X1 were marked.

20. Upon hearing argument of both the counsel, the trial Court held that the plaintiff and the 1st defendant are not entitled to claim partition of the schedule property since it is exclusive property of the 2nd defendant by virtue of the gift deed executed by his fostered father Khuddus Saheb, who succeeded the same from

his father Lal Ahmmad Saheb, and dismissed the suit.

21. Dissatisfied with the decree and judgment passed by the trial Court, the unsuccessful plaintiff preferred this appeal on various grounds. The main contentions raised in the grounds of appeal and during the course of argument are that:

a). The trial Court did not consider Exs.A1 and A2 sale deeds dated 09.11.1933 and 09.08.1939, which are more than 30 years old as on the date of producing before the trial Court and no further proof is required. If the contents of Exs.A1 and A2 are taken into consideration, the property could be identified but committed an error in dismissing the suit.

b). The 2nd defendant claimed the property by virtue of gift deed Ex.B1 the fostered son of Khuddu Saheb and at best he is entitled to 1/3rd share but not the entire property. But the trial Court on wrong appreciation dismissed the suit negating the relief of partition.

c). The plaintiff, 1st and 2nd defendants are at best entitled to 1/3rd share being the co-owners of the property as sharers but ignoring the title traced from Silar Saheb, father of Lal Mohammed Saheb. Khaja Mohiddin and Abdul Waheb Saheb erroneously concluded that the 2nd defendant is the absolute owner of the property and committed an error in dismissing the suit and prayed to allow the appeal setting aside the impugned decree and judgment of the trial Court.

22. During the course of argument, M.Ravinder Reddy, learned counsel for the appellant/plaintiff would contend that the father of the plaintiff and the 1st defendant executed a sale deed in

lieu of Mehar, agreed to be paid to his mother at the time of marriage for his 1/3rd interest in the entire property possessed by the family under Ex.A1. Later, their mother Azimunnisa Begum purchased 1/3rd share of Abdul Waheb Saheb, brother of the plaintiff's father under Ex.A2. Thereby, she became the owner of the 2/3rd share in the entire property and the plaintiff and 1st defendant being the sharers inherited the same but the trial Court comparing the boundaries of the schedule property under Exs.A1, A2 and Ex.B1, erroneously concluded that the property covered by Exs.A1 and A2 is totally distinct from the property covered by Ex.B1 and denied partition on the ground that the plaintiff has failed to establish inheriting the schedule property. If Exs.A1 and A2 are accepted, the plaintiff is entitled to a decree for partition since no further proof is required to establish their right to the schedule property, but the trial Court without adverting to the contents of documents and original owner over the property, dismissed the suit. Finally, it is contended that the plaintiff and the 1st defendant are entitled to 1/3rd share each which they inherited being the sharers of his mother Azimunnisa Begum, prayed to pass a preliminary decree for partition and for separate possession of 1/3rd share to the plaintiff setting aside the decree and judgment under challenge passed in O.S.No.19 of 1988 passed by the Sub Ordinate Judge, Chirala.

23. Sri P.R.Prasad, learned counsel for the 2nd defendant would contend that the property covered by Ex.B1 which is in possession of the 2nd defendant is no way related to the property purchased under Exs.A1 and A2. If the plaintiff's mother obtained Exs.A1 and A2 for 1/3rd share under each document in an extent of 1500 sq yds., the property may be

different from the property in possession of the plaintiff and when the plaintiff failed to establish very existence of the plaint schedule property he is not entitled to claim decree for partition and thereby denial of partition decree by the trial Court is supported by legal reasoning and finding of the trial Court does not call for interference of this Court. In any view of the matter it is evident from the facts, the plaintiff miserably failed to establish the identity of the property and inheritance of the property from his mother being the sharers. Therefore, in the absence of establishing the very existence of this plaint schedule property, the plaintiff is disentitled to claim relief of partition and prayed to dismiss the appeal confirming the decree and judgment of the trial Court.

24. Considering rival contentions, perusing the material available on record including the decree and judgment, oral and documentary evidence, the points that arise for consideration are:

- 1). ***Whether the schedule property is the joint property of plaintiff, 1st and 2nd defendants having inherited the same by the plaintiff and 1st defendant from his mother (2/3rd share) covered by Exs.A1 and A2, if so, is the plaintiff entitled to claim partition of schedule property and for allotment of 1/3rd share with separate possession?***

Point:

25. The basis for claim of the plaintiff is Ex.A1—registered sale deed executed by Khaja Mohiuddin in favour of Azimunnisa Begum, mother of the plaintiff and Ex.A2—registered sale deed executed by Abdul Waheb in favour of Azimunnisa Begum, mother of the plaintiff. By virtue of Exs.A1 and A2, mother of the plaintiff and 1st defendant became absolute owner and after her death the plaintiff and 1st defendant succeeded the estate of

their mother as sharers or residuaries under Hanafi Law. Whereas it is the contention of the 2nd defendant before the trial Court that the property covered by Exs.A1 and A2 is totally different from the property in possession of 2nd defendant and by virtue of Ex.B1—gift deed dated 23.12.1974, executed by Khuddu Saheb, the 2nd defendant became absolute owner of the property, since then, the 2nd defendant is in possession and enjoyment of the property as exclusive owner. The trial Court disbelieved the case of the plaintiff, while accepting the contention of the 2nd defendant and dismissed the suit.

26. In view of the contentions urged before the trial Court and this Court, it is necessary for the plaintiff to establish that the property in possession of the 2nd defendant covered by Ex.B1 is the same property which was alienated under Exs.A1 and A2 so as to claim share in it. To substantiate the contention of the plaintiff, the plaintiff himself was examined as PW.1 and as usual he testified about the facts reiterating the contentions raised in the plaint. However, in the cross examination, he admitted that the schedule property is not 1500 Sq.yds as per the Commissioner's report with whom he accompanied but expressed his inability to state what was the land actually Khuddu Saheb sold and the balance of land available. Therefore, the extent as on today available on ground is only 500 Sq.yds. According to PW.1, his mother told him that the suit site is 1500 Sq.yds but no proof is available to establish the same, several admissions made in the cross examination show that PW.1 is ignorant about the details of the property and identity of the property also. He made categorical and unequivocal admission that he does not know personally, if her mother was delivered the possession of her

share in the property through Exs.A1 and A2 and no property tax was paid to the concerned Department. He further admitted that Khuddu Saheb sold 61 Sq.yds of site to one B.Rudramurthy. Therefore, even according to the admissions of PW.1, out of the entire extent, 500 Sq.yds gifted to defendant No.2 under Ex.B1 by Khuddu Saheb, if 61 Sq.yds sold to B.Rudramurthy, the available extent of land is only 500 Sq.yds. In further examination-in-chief of PW.1, it is asserted that the house originally belongs to three brothers i.e., Lal Mohammad Saheb, Khaja Mohiddin and Abdul Waheb Saheb. Plaintiff and 1st defendant are sons of Khaja Mohiddin. Since Khaja Mohiddin conveyed his 1/3rd interest to his wife in 1933 towards Mehar and in 1939 she purchased 1/3rd share of Abdul Waheb Saheb. Thus, she became owner of 2/3rd share in the house belonging to three brothers referred supra.

27. PW.1 made crucial admissions, which goes to the root of the case and those evidentiary admissions are extracted hereunder for better appreciation:

“I went to Bitragunta in 1972. Even now I am living there. I sold my house at Vetapalem to one Rudramurthy. We are not related to the three brothers stated above. Our claim is different. I have necessity to acquire into the properties possessed by their family. My grand father is related to them. I am 61 years old now. There is no exchange of visits between our families after I went to Bitragunta. The suit property was originally purchased by Silar Saheb who is the father of the three brothers. I have not seen his title deed. I do not know the year of purchase and the extent purchased and the name of the vendor. I do not know the sale price for which it was purchased and the boundaries of the suit house. I have not seen the 1934 Mohar deed executed by Khaza Mohiddin in favour of his wife. I do not know the extent of land that was given by him to her.....”

28. This specific evidence of PW.1 clearly establishes that PW.1 is not related to the three brothers referred supra i.e., Lal Mohammad Saheb, Khaja Mohiddin and Abdul Waheb Saheb and it further discloses that this property was purchased by father of above three persons but no piece of paper is produced to establish that the property is acquired by father of Lal Mohammad Saheb and two others, and PW.1 is totally ignorant about the acquisition of the property by father of Lal Mohammad Saheb and others.

29. The 2nd defendant himself examined as DW.1 to substantiate his case and he produced the documents in support of his contentions. From a close perusal of evidence available on record, it is clear that Lal Mohammad Saheb, Khaja Mohiddin and Abdul Waheb are brothers. Abdul Waheb Saheb died issueless. Khaja Mohiddin is the father of the plaintiff. He pleaded ignorance whether the schedule property gifted to him under Ex.B1 is ancestral property or not. When a specific question was put about the relationship, he pleaded ignorance about the relationship etc., However, the plaintiff approached this Court with a specific claim that the schedule property belongs to his family and the family of 1st defendant, it is for him to establish that it belongs to the plaintiff and 1st defendant. Therefore, the initial onus of proof is on the plaintiff to establish the extent, source of acquisition and identity of the property on ground.

30. At this stage, it is relevant to advert to the documentary evidence produced by PW.1 to decide the identity of the property. Ex.A1 is the sale deed executed by Khaja Mohiddin Saheb in favour of his wife i.e., Azimunnisa Begum for Rs.500/-

and the schedule of property and its boundaries are relevant for deciding the real controversy.

31. The tiled house is situated within limits of Vetapalem Village, Sub-registry of Chirala, erstwhile Guntur District. The schedule of property is $\frac{1}{3}$ rd share in house bearing door No.12-314 in an extent of 1500 Sq.yds and the specific boundaries are not clear in Ex.A1. Ex.A2 is the registered sale deed executed by Abdul Waheb Saheb in favour of Azimunnisa Begum. The schedule is $\frac{1}{3}$ rd share in the house bearing No.12-314 in an extent of 1500 Sq.yds within the boundaries mentioned therein. Thus, the property purchased under Exs.A1 and A2 is $\frac{1}{3}$ rd share in the house bearing No.12-314 of Vetapalem Village, within the limits of Chirala in an extent of 1500 Sq.yds but the land available on ground as on today is only 500 Sq.yds. A commissioner was appointed during the course of trial before the trial Court and the Commissioner filed his report but the same was marked as Ex.B5 before the trial Court. However, the property gifted to defendant No.2 by Khuddu Saheb under Ex.B1 is only an extent of 500 Sq.yds. The schedule of property in Ex.B1 is relevant for deciding the real controversy. The details of schedule are mentioned hereunder for better appreciation.

32. The property situated in 12th ward of Vetapalem is within the following boundaries:

East: Compound wall of Pasumarthi Nagamma to some extent and house wall and compound wall of Rudramurthy to some extent

North: Compound wall of Pasumarthi Nagamma to some extent and house wall and compound wall of

Rudramurthy to some extent

South: Sarkar Road

West : land boundary of Bandaru Jathamma etc.,

33. The total extent gifted under the document is 10 cents of land equivalent to 405 Sq.mtrs, the house bearing door No.24-141. Thus, the total extent gifted under Ex.B1 is only an extent of 480 Sq.yds equivalent to 405 Sq.mtrs. Whereas the partition claimed by plaintiff is an extent of 1500 Sq.yds with different boundaries. If for any reason, the property belonging to three brothers is same as that of the property, at least one of the boundary would have been tallying and it is not the case of the plaintiff at any time that the boundaries were changed subsequent to Exs.A1 and A2. Even assuming for a moment that the boundary ownership of the adjacent land is changed, there must be some evidence on record to establish the change of ownership or boundary's owners and at least the plaintiff would have examined the present boundary owners to establish that they acquired title subsequent to execution of Exs.A1 and A2. Obviously, for different reasons the plaintiff did not examine any one of the adjacent owners of the property to establish the identity of the property.

34. If really, the plaintiff's mother acquired the property i.e., share in the present schedule property, she would have been paid property tax to the panchayat from the date when she became the owner of 2/3rd share of the property by virtue of Exs.A1 and A2. No such piece of paper is brought on record to substantiate that she became the owner of property and paying the property tax to the panchayat. The plaintiff produced the proceedings issued by President, panchayat board demanding payment of property tax

for the year 1935-36, 1936-37 and Ex.A4 is the demand notice, for which a notice under Ex.A5 was issued informing that the property was purchased by Azimunnisa Begum on 09.09.1993 but her name was not mutated in the panchayat register and requested to mutate her name in the register, but the letter was not signed by Azimunnisa Begum, the alleged owner of the property. Therefore, this document is of no use to prove that she became the owner of the suit schedule property. The schedule property as per plaint is house bearing No.24/141 in an extent of 1500 Sq.yds within the following boundaries:

East: House of Binaru Mallikarjuna Rao and others, South:
Road,
North: Galli
West: Bandaru Subbarao and others property.

35. As seen from the schedule property annexed to the decree copy, the north and south boundaries are galli and road, they are permanent boundaries, but whereas in Ex.B1 the northern boundary of the property is compound wall of Pasumarthi Nagamma and others, southern boundary is described as Sarkar Road. Thus, the boundaries on the northern side and southern side of the property are not tallied with the schedule of property covered by Ex.B1. Similarly, the east and west boundaries are also not tallying specifically. Therefore, the property covered by Ex.B1 is totally different from the property own and possessed by three brothers including the husband of Azimunnisa Begum and father of the plaintiff and 1st defendant. Therefore, it is evident from the record that the plaintiff miserably failed to establish the identity of the property on ground with reference to boundaries by examining any independent witness, more particularly, when he pleaded ignorance about the details of property in his cross examination. In the absence of any material on record, it is

difficult for the Court to hold that the mother of the plaintiff Azimunnisa Begum acquired $2/3^{\text{rd}}$ share in the property by virtue of Exs.A1 and A2. Therefore, the trial Court concluded that the property covered by Ex.B1 is totally different from the property covered by Exs.A1 and A2 and disbelieved the claim of the plaintiff only on the ground that he failed to establish that the mother of the plaintiff acquired $2/3^{\text{rd}}$ share in the property covered by Exs.A1 and A2 as per the Commissioner's report. Thus, it goes to establish that the property on ground is only 10 cents equivalent to 405 Sq.mtrs, but not 1500 Sq.yds. The plaintiff's mother allegedly acquired $1/3^{\text{rd}}$ share in 1500 Sq.yds of site from her husband under Ex.A1 in the year 1933 and purchased $1/3^{\text{rd}}$ share from brother of her husband under Ex.A2 in the year 1939. If really the total extent was 1500 Sq.yds, it will not be reduced to 480 Sq.yds under any circumstances, unless remaining property was sold to any third parties. It is not the case of the plaintiff that the remaining extent was sold to the third parties. Strangely, the plaintiff failed to establish about the alienations, if any, so as to reduce the total extent of 480 Sq.yds by furnishing all details. In those circumstances, it is difficult for me to conclude that the property covered under Exs.A1 and A2 is same as that of Ex.B1.

36. On careful discerning the material available on record, I have no other alternative except to arrive at a conclusion that the plaintiff miserably failed to establish the identity of the property on ground by adducing satisfactory and cogent evidence. Therefore, the trial court rightly concluded that the plaintiff failed to establish the identity of the property on ground and declined to grant a decree for partition of the property into three equal shares and one such share to plaintiff.

37. Hence, I find no legal infirmity in the finding recorded by trial Court. In view of my finding on point, the appeal deserves to be dismissed, holding in favour of the defendant No.2 and against the plaintiff and 1st defendant.

38. In the result, the appeal is dismissed. No costs.

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

JUSTICE M. SATYANARAYANA MURTHY.

Date :13.02.2015
Gvl/knl

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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