

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

A.S.No.163 of 1997

JUDGMENT:

The unsuccessful plaintiff in O.S.No.53 of 1991 on the file of the Subordinate Judge, Peddapuram preferred this appeal challenging the decree and judgment dated 22.06.1995 by which the plaintiff's suit for partition was dismissed.

For the convenience of reference, the ranks given to the parties in O.S.No.53 of 1991 by the Subordinate Judge, Peddapuram will be adopted through out the judgment.

The plaintiff filed the suit for partition of schedule property into three equal shares and for allotment of one such share to him and for separate possession, alleging that he is the father of defendants 1 and 2 and used to reside in Kirlampudi Village and plaint schedule property is also situated in Kirlampudi Village, which devolved upon them from their ancestors. Thus, the schedule property is coparcenary property. In the partition among the brothers of the plaintiff, the schedule property was allotted to his share in the year 1977 through partition deed, dated 14.04.1977. Therefore, the schedule property is the coparcenary property of plaintiff and defendants 1 and 2.

The plaintiff demanded defendants 1 and 2 for partition of the schedule property and they entered into family arrangement in the year 1989. Accordingly, the schedule property and debts were agreed to be partitioned among the plaintiff and defendants 1 and 2 but they failed to obtain a registered Partition Deed, equally allotting the property and debts, so as to allow the plaintiff to sell the property to discharge the debts. Therefore, he got issued a legal notice dated 11.09.1991 demanding defendants 1 and 2 to cooperate for partition of schedule property and debts, but no purpose was served. Hence, the plaintiff filed the suit for partition of both property and debts.

Defendants 1 and 2 filed written statement denying the material allegations of the plaint *inter alia* contending that the suit is not maintainable as their sister Tavvala Tulasi, W/o. Dilip Kumar whose marriage was performed in the year 1988 was not impleaded, though she is a coparcener in view of A.P. amendment to Section 29 of the Hindu Succession Act. The mother of defendants 1 and 2 by name Tummu Prabhavathi is entitled to maintenance from the family properties, because, the plaintiff abandoned her, while living with his concubine. Hence, the said Prabhavathi is also a proper and necessary party to the suit. On this short ground alone, the suit is liable to be dismissed.

Out of the schedule property, an extent of Ac.4.92 cents in Survey No.431/3 does not belong to the family, since it belongs to Tummu Somaraju, plaintiff's brother and the boundaries and extents mentioned in the plaint schedule and plan are not correct.

The defendants admitted that part of the schedule property is the ancestral property of the plaintiff and defendants but pleaded ignorance about the partition deed dated 14.04.1977 executed among the brothers of the plaintiff and called upon the plaintiff to put the same to strict proof. The defendants admitted the oral gift of Ac.4.00 cents in Survey No.417/2 to Tavvala Tulasi towards Pasupu Kunkuma at the time of marriage as per caste customs, while denying the debt quantifying to Rs.2,45,000/- contracted by the plaintiff in connection with performance of marriage of Tavaala Tulasi and liability to discharge the debts while contending that the debts are created for the purpose of this suit.

The defendants denied the family arrangement that was allegedly effected in the year 1989 for division of both assets and liabilities i.e. property and debts.

The specific contention of the defendants is that the plaintiff contracted debts for immoral purpose i.e., maintenance of his concubine and her family and did not incur any debt either for the family benefit or for the marriage expenses of the plaintiff's daughter. Debtors are not parties to the suit and in their absence, the liabilities cannot be partitioned among the plaintiff and defendants 1 and 2.

Finally, it is contended that the suit schedule did not embrace the entire joint family property and that the suit for partial partition is not maintainable, since the land belonging to the joint family situated in Kattumilli Village was acquired by the Government for Yeluru Reservoir Project and the plaintiff received entire compensation originally awarded and enhanced compensation but secreted the same without showing in the schedule, though defendants are also entitled to claim share in it and prayed to dismiss the suit.

On the basis of the above pleadings, the trial Court framed the following issues:

- i. *Whether the suit schedule is correct?*
- ii. *Whether the partition list dated 14.4.77 is true?*
- iii. *Whether the family arrangement dt.18.5.69 pleaded by the plaintiff is true, valid and binding on the defendants?*
- iv. *Whether the debt of the family alleged in the plaint is true, valid and binding on the defendants?*
- v. *Whether one Tavvala Tulasi and Tummu Prabhavathi are*

necessary parties to the suit and if so whether the suit is bad for non-joinder of necessary parties?

- vi. *Whether the suit is bad for partial partition?*
- vii. *Whether the suit is not maintainable in view of the provisions of A.P.Act 10 of 1973?*
- viii. *Whether the plaintiff is entitled for partition of the plaint schedule partition and if so, to what share?*
- ix. *To what relief?*

(extracted)

During course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.7 and Exs.X.3 to X.8 were marked. On behalf of the defendants, D.Ws.1 to 4 were examined and Exs.B.1 to B.5 and Exs.X.1 & X.2 were marked.

Upon considering the oral and documentary evidence, the trial Court disbelieved the debts of the joint family and negated the relief on the ground that proper and necessary parties were not impleaded to the suit and that the entire property of the joint family was not included in the schedule in the suit for partition.

Aggrieved by the decree and judgment under challenge, the plaintiff being unsuccessful before the trial Court, preferred this appeal on various grounds, mainly contending that the finding of the trial Court that the land in Survey No.431/3 does not belong to the joint family is incorrect and in the absence of any evidence, acceptance of the contention of the defendants is erroneous. It is further contended that Tavvala Tulasi is married and is no more a coparcener and that the amended provisions of Hindu Succession Act by way of A.P.Amendment would not apply, thereby Tavvala Tulasi is not proper and necessary party and similarly, Prabhavathi is not a proper and necessary party to the suit, but the trial Court erroneously recorded a finding that they are proper and necessary parties, though they are not more interested in the family property. Hence, the finding of the trial Court is erroneous.

Finally it is contended that the compensation awarded in the land acquisition proceedings by the Government, initially, and enhanced compensation in the reference under Section 18 of the Land Acquisition Act was spent for the family expenses and no amount is available to be partitioned among the plaintiff and defendants 1 and 2, thereby non-inclusion of compensation amount awarded in land acquisition proceedings for the land acquired in Kattumilli Village cannot be said to be partial partition and thereby finding of trial Court is erroneous and prayed to allow the appeal setting aside the judgment and decree of the trial Court and to pass a decree in favour

of the plaintiff for partition of schedule property into three equal shares and allot one such share to him and for separate possession.

Learned counsel for the plaintiff while reiterating the contentions, pointed out certain inconsistencies in the evidence and prayed to allow the appeal setting aside the judgment and decree and pass decree in favour of the plaintiff.

Whereas learned counsel for the defendants did not advance any argument supporting the decree and judgment under challenge.

On considering the contentions of the learned counsel for the plaintiff and perusing the oral and documentary evidence, including the decree and judgment under challenge, the points that arise for consideration are as follows:

- i. Whether Tavvala Tulasi, daughter of the plaintiff and Tummu Prabhavathi, wife of the plaintiff are proper and necessary parties to the suit and if so, non-joinder of the said persons disentitles the plaintiff to claim partition of the schedule property?
- ii. Whether the compensation amount received by the plaintiff in the land acquisition proceedings for the land situated in Kattumilli Village is available for partition and if not, whether the suit is liable for dismissal on the sole ground of partial partition?
- iii. Whether the debts/liabilities shown in the schedule are real and if so, the defendants are liable to equally share the responsibility to discharge the debts/liabilities shown in the schedule? and
- iv. Whether plaintiff is entitled for partition of the schedule property?

POINT No:1

The trial Court held that Tavvala Tulasi, daughter of the plaintiff and sister of defendants 1 and 2 is proper and necessary party and similarly, Tummu Prabhavathi, wife of the plaintiff who was neglected by the plaintiff while living with his concubine is entitled to claim maintenance and she is a proper and necessary party. The finding is now challenged before this Court on the ground that the said Tummu Prabhavathi is not entitled to claim charge over the share of the plaintiff and whereas Tavvala Tulasi was given Ac.4.00 cents of land

as gift towards pasupu kunkuma at the time of her marriage in lieu of her share. Hence, Tavvala Tulasi is no more interested in the joint family property and she is not entitled to claim any share therein. Admittedly, the marriage of Tavvala Tualsi was performed in the year 1988 and the Hindu Succession Act as amended by incorporating Section 29-A of the Hindu Succession Act came into force on 05.09.1985. As the marriage of Tavvala Tulasi was performed subsequent to A.P. Amendment to Hindu Succession Act, by virtue of amendment to Section 29-A, Tavvala Tulasi became coparcener and is entitled to claim equal share in the property. Admittedly, the schedule property is the ancestral property devolved upon the plaintiff, thereby defendants 1 and 2 and their sister Tavvala Tulasi became coparceners as her marriage was performed subsequent to A.P. Amendment to Hindu Succession Act. The land possessed by joint family is Ac.22.5 cents, which is inclusive of the land gifted to Tavvala Tulasi at the time of her marriage towards Pasupu Kunkuma. Thus, she is entitled to Ac.5.62½ cents in total. Even assuming that gift of Ac.4.00 cents of land was given in lieu of her share, still she is entitled to Ac.1.62 ½ cents in the joint family property. Therefore, the failure to implead Tavvala Tulasi, who is a comparcener by virtue of A.P. Amendment to Hindu Succession Act incorporating Section 29-A, the suit is not maintainable.

The trial Court also held that Tummu Prabhavathi, wife of the plaintiff is entitled to claim maintenance out of the joint family property on the strength of several judgments more particularly the judgment in ***Biswanath vs. Prafulla Kumar***. The trial Court concluded that Tummu Prabhavathi is also proper and necessary party, since she is entitled to claim charge over immovable property belonging to the joint family. In fact, by the date of filing of the suit, no charge was created on the joint family property either by act of the parties or by decree of the court for payment of maintenance to Tummu Prabhavathi. Therefore, the proposition of law relied on by the trial Court is not directly applicable. Hence, failure to implead Tummu Prabhavathi, wife of the plaintiff and mother of defendants 1 and 2 is not a ground to dismiss the suit, since she is neither proper nor necessary party to the suit for partition.

Viewed from any angle, Tavvala Tulasi, who is coparcener and whose marriage was performed in 1988 was not impleaded, though she is entitled to claim share in the property. The defendants raised a specific plea for jon-joinder of proper and necessary parties under Order I Rule 9 C.P.C. at the earliest point of time and the trial Court accepted the said contention.

According to Section 99 of C.P.C., no decree shall be reversed or

substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or jurisdiction of the Court. At the same time, the proviso says that nothing in this section shall apply to non-joinder of a necessary party. The power under Section 99 of C.P.C. is subject to the proviso thereto. Hence, the Court can reverse a decree on the ground of non-joinder of necessary party and the trial Court relying on the judgments of the Supreme Court and other High Courts rightly concluded that non-joinder of necessary parties disentitles the plaintiff to claim a decree for partition more particularly by applying law laid down by the A.P.High Court in **Balwant Rao vs.Kerba**, so also the law laid down in **Prafulla Cheren vs. Satya Cheren**. In one of the judgments of this Court in **Sanjay Kumar Patengay vs. Satyanarayana Rao Patangay**, a Division Bench of this Court held that in a suit for partition, all the coparceners are necessary parties and failure to implead them disentitles the plaintiffs to claim partition. In **Biswanath's** case (1 supra), the Calcutta High Court held that in a suit for recovery of land against a company, which was thika tenant, the tenancy vests in the State by escheat and the suit could not be proceeded without the State being made a party. The same view was expressed by the Karnataka High Court and this Court in **Vishwaraj vs. B.M.Byrappa** and **N.Jangi Reddy vs. Yellaram Narsimha Reddy** respectively. In view of the law laid down by Apex Court, this Court, Calcutta High Court and Karnataka High Court, the suit for partition without impleading the coparceners, who are entitled to claim share in the property, is not maintainable. On this ground alone, the suit can be dismissed. Hence, the point is held against the plaintiff and in favour of the defendants.

POINT No.2

The second ground, on which the suit was dismissed by the trial Court is that non-inclusion of all the properties belonging to coparcenery, more particularly the compensation awarded by the land acquisition authorities on acquisition of property situated in Kattumilli Village. Admittedly, the plaintiff received compensation under the award so also enhanced compensation in reference under Section 18 of the Land Acquisition Act but the plaintiff's contention is that the compensation received by him was spent for the benefit of the family and therefore, the defendants are not entitled to claim any share. By the date of receipt of compensation, the daughter of the plaintiff Tavvala Tulasi is living with her husband after her marriage. Even assuming for a moment that the plaintiff spent the amount for the benefit of the family, still Tavvala Tulasi being a coparcener is entitled to claim her share of compensation. The plaintiff did not produce any iota of evidence to establish that the compensation

received by him was spent for the benefit of the family. Therefore, failure to include the compensation received by him on acquisition of the joint family property at Kattumilli Village is fatal to the plaintiff's case as the general principle is that a suit for partition must embrace all the properties of the joint family. When the compensation received by him was not made as a part of the property to be divided, the suit is only for partial partition and it is not maintainable in view of the settled law laid down by this Court in **N.Jangi Reddy's** case (6 supra).

As discussed in the earlier paragraphs, the suit is not maintainable for the reason that the other coparcener i.e., Tummy Prabhavathi was not impleaded as a party, though she is entitled to share in the joint family property and that all the properties belonging to the joint family were not included in the schedule in a suit for partition, thereby, the suit is for partial partition and is not maintainable according to law. On these two grounds also, the plaintiff is to be non-suited to claim the relief of partition.

The trial Court after appreciation of both facts and law rightly concluded that Tavvala Tulasi is a proper and necessary party being a coparcener in view of the A.P. Amendment to Hindu Succession Act incorporating Section 29-A of the Hindu Succession Act and that the suit did not embrace the entire property belonging to the Hindu coparcenery and the suit is only for partial partition, thereby, the suit is not maintainable. Even after reappraisal of entire oral and documentary evidence with reference to law, I find no legal infirmity in the finding recorded by the trial Court, warranting interference of this Court. Hence, the finding recorded by the trial Court is hereby confirmed holding these two points against the plaintiff and in favour of the defendants.

POINT Nos.3,4 and 5

In view of my finding on point Nos.1 and 2, it is wholly unnecessary to record any finding about the plaintiff's entitlement to claim share in the property by way of partition and genuineness of the debts shown in the plaint. According to Order XX Rule 5 of C.P.C., in suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for decision of the suit. Though the Court is under obligation to record finding on each issue separately, when finding on two issues is sufficient for decision of the suit, the Court is not required to record finding on the other issues. Here, in view of finding on point Nos.1 and 2, which is sufficient for decision of the suit, the other points i.e., points 3 to 5 need not be answered in view of the exception contained under order XX Rule 5 C.P.C. Hence, no finding is recorded on point Nos.3 to 5.

In the result, the appeal suit is dismissed confirming the decree and judgment of the Subordinate Judge, Peddapuram in O.S.No.53 of 1991. In the circumstances, the parties shall bear their own costs. Miscellaneous petitions pending, if any, shall also stand disposed of.

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Date: 06.02.2015

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