

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

CCCA No.197 of 1998

JUDGMENT:

This appeal is preferred by the plaintiff aggrieved by the judgment dated 05.08.1998 in O.S.No.1217 of 1990 passed by IV Senior Civil Judge, City Civil Court, Hyderabad, whereby and whereunder learned Judge dismissed the plaintiff's suit filed for partition of suit property situated at Mallepally, Hyderabad into two equal shares by metes and bounds and allot one such share to her.

2) The factual matrix of the case is thus:

a) The case of the plaintiff is that she is the legally wedded wife of late Ghulam Mohiuddin. Earlier Mohiuddin married the defendant and as they have issueless, defendant permitted her husband to marry the plaintiff and to that effect she executed a document dated 27.10.1981. Accordingly, Ghulam Mohiuddin married the plaintiff as per Muslim customs. The plaintiff further stated that defendant with her free will and pleasure permitted her husband to marry the plaintiff. The defendant admitted in the said document that she would give half share in the suit property which was purchased by her husband to the plaintiff. Hence, the plaintiff is the owner of half partition of the suit property. While so, Ghulam Mohiuddin died on 28.04.1987 and after his death the plaintiff tried her level best to maintain good relations with the defendant but the

defendant who is of stubborn nature, used to quarrel with the plaintiff every day. The plaintiff maintained patience with the profound hope that the defendant would change one day, but the defendant never mends her attitude. Therefore, plaintiff asked the defendant for partition of suit property into two equal shares but defendant on some pretext or other delayed the partition. Therefore, the plaintiff issued legal notice dated 08.09.1990 asking the defendant to divide the suit property into two equal shares and deliver possession of one such share to the plaintiff. The defendant received the said legal notice and instead of complying the same gave a false reply dated 18.09.1990.

Hence the suit.

b) Defendant filed a written statement admitting that she is the first wife and the plaintiff is the second wife of Ghulam Mohiuddin and both of them have no children. Defendant contended that she never permitted her husband for marrying the plaintiff. She denied execution of document on 27.10.1981 or any other subsequent date in favour of plaintiff in respect of suit house. She further denied about her visit to Nizamabad, A.P. either for the purpose of marriage or for execution of alleged document dated 27.10.1981. She also denied the promise she made to give equal share to the plaintiff in the suit property. She thus contended that the plaintiff is not having any right, title or interest over the suit property. Defendant stated that

she is the absolute owner and possessor of suit property during and after the death of her husband. It is stated that her husband died on 30.04.1987 and she herself performed all the death ceremonies and spent huge amounts during his illness. She denied quarrelling with the plaintiff and pleaded that at no point of time either during the life time of Ghulam Mohiuddin or after his death the plaintiff asked for partition of suit property. Except legal notice dated 08.09.1990 no demand was made by the plaintiff for the alleged partition. It is submitted that defendant purchased the suit property by selling her own jewellery and the amounts provided by her sister and other relatives and after purchasing the suit house she was residing in it and got mutated in her name. She thus opposed the suit.

c) Basing on the above pleadings, the trial Court framed the following issues for trial:

i) Whether the document dated 27.10.1981 relied upon by the plaintiff is true valid and binding on the defendant?

(ii) Whether the document dated 27.10.1981 conveys any right to the plaintiff with regard to the suit property?

(iii) Whether the plaintiff is entitled to partition of suit property as prayed for?

iv) To what relief ?

d) The trial Court after full fledged trial and upon hearing both sides dismissed the suit of the plaintiff with the observations that suit property is the exclusive

property of defendant who purchased the same by selling her jewellery and by securing monetary help from her parents and sister and the plaintiff failed to prove that her husband purchased the property in the name of defendant. The trial Court further observed that Ex.A4—agreement dated 27.10.1981 is not a genuine document and plaintiff failed to establish its authenticity.

Hence the appeal.

3) The parties in the appeal are referred as they were arrayed in the trial Court.

4) Heard arguments of Sri Khaja Mohiuddin, learned counsel for appellant/plaintiff and Sri Mohd. Ghulam Hussain, learned counsel for respondent/defendant.

5) While so, after the matter was reserved for judgment on 14.07.2015, learned counsel for respondent/defendant filed a memo dated 03.09.2015 stating that as per the information, the respondent—Smt.Tahera Begum died on 21.05.2010 and she is surviving by her legal representative viz. Ghulam Ayyub. Hence, the matter was reopened on 08.10.2015 for taking steps against the deceased respondent and posted to 26.10.2015. On 26.10.2015, learned counsel for appellant filed a memo stating that since arguments were already heard in this matter, he has no objection for the Court to pronounce the judgment. He thus submitted that he is not bringing the LRs. of the respondent on record. Hence, the matter is

taken up for judgment.

6) Fulminating the judgment learned counsel for appellant firstly argued that trial Court erred in holding that suit property was purchased by the defendant but it was purchased by the husband of the plaintiff in favour of defendant who is his first wife.

a) Secondly, he argued that the trial Court committed a gross mistake in disbelieving Ex.A4—agreement executed by defendant in favour of plaintiff. He submitted that by virtue of Ex.A4, the defendant clearly and unequivocally declared that she was giving permission to her husband to marry the plaintiff and she further declared that henceforth the plaintiff and herself would live like sisters and most importantly, in the suit house which belonged to her husband both herself and plaintiff would have equal shares. In view of categorical declaration made by the defendant on free volition, the trial Court ought to have decreed the suit in favour of plaintiff. The plaintiff proved authenticity of Ex.A4 by examining PW2 who was one of the attestors of Ex.A4 and also by obtaining expert's opinion in respect of authenticity of thumb impression of defendant on Ex.A4. In view of expert's opinion the burden was heavy on the defendant which she failed to discharge, but the trial Court erroneously disbelieved Ex.A4. In this regard, he relied upon the following decisions.

1. ***Pusapati Krishna Murthy Raju v. The APSEB***^[1]

2. ***Secretary to Government of India v. Indira Devi*** ^[2]

He thus prayed to allow the appeal.

7) Per contra, while supporting the judgment, learned counsel for respondent/defendant argued that plaintiff utterly failed to prove that suit house was purchased by her husband benami in the name of defendant and therefore, the plaintiff had no right to claim a share in the suit schedule property. On the other hand, the defendant established that she purchased the property by selling her jewellery and with the funds given by her family members and trial Court rightly held so. So far as genuineness of Ex.A4 is concerned, he argued it was an unregistered document and though plaintiff claimed that on the date of her marriage defendant and her husband came to Nizamabad and defendant executed Ex.A4 at Nizamabad, she could not establish this fact and though plaintiff secured expert's evidence she has not examined the expert in the court and further, by virtue of Exs.X1 and X2 it was established the defendant has not purchased the stamp for Ex.A4. By virtue of all these facts the trial Court rightly rejected Ex.A4. He thus prayed to dismiss the appeal.

8) In the light of above rival arguments, the points for determination in this appeal are:

- 1) *Whether the plaint schedule property is the self-acquisition of defendant or purchased*

by her husband in her name as benami?

2) Whether the plaintiff could establish authenticity of Ex.A4 to claim share in the plaint schedule property?

3) Whether judgment of the trial Court is factually and legally sustainable?

4) To what relief?

9) **POINT No.1:** The claim of plaintiff is concerned, as per plaint averments and her evidence the suit property was purchased by her late husband—Ghulam Mohiuddin with his funds in the name of defendant and in Ex.A4 the defendant clearly admitted this fact and agreed to share the same with the plaintiff. Whereas the contention of defendant throughout is that she purchased the plaint schedule house under Ex.B1—sale deed dated 18.03.1974 from one Sughra Bibi for Rs.5,000/- and she secured the sale consideration by selling her jewellery and also through the amounts provided by her sister and other relatives and so she is the absolute owner and possessor of the suit property.

a) In this appeal, it is contended that though the burden is on the defendant to establish that she purchased the suit property with her own funds, she failed to establish the same. I am afraid this argument is incorrect for the reason that it is trite law that the burden of proving the fact lies on the party who substantially asserts such fact and claims a right thereunder but not upon the party who denies the said fact, for, a negative fact is usually incapable of proof. Even the judgment in ***Indira***

Devī's case (2 supra) relied upon by the appellant/plaintiff clarifies the same. It was observed that Section 102 of the Indian Evidence Act embodies a test for ascertaining on which side the burden of proof lies and Section 102 states that the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. It means that when the burden of proof lies on the party, that party must fail if he does not discharge the burden by giving evidence. In the instant case since the plaintiff asserts that though property stands in the name of defendant it was in fact purchased by her late husband through his own funds but in her name, if neither party adduced evidence certainly the plaintiff's case will be defeated and hence burden of proof can be said to be on her to prove the fact that her husband invested money and purchased the suit property. It must be said that except making an oral assertion the plaintiff has not produced any independent evidence to establish that it was her husband who invested money for purchasing the suit house. Of course, she relied upon recitals of Ex.A4 which are in the nature of declaration allegedly made by defendant that the suit house is the property of her husband and herself and plaintiff will have equal share in the said property. It must be noted that authenticity of Ex.A4 itself was challenged by the defendant which will be subject matter of discussion in the next point. Sans Ex.A4, the plaintiff has not produced any other

independent evidence to establish that her husband purchased the suit house. On the other hand, the defendant produced Ex.B1—sale deed from her custody which shows that she purchased the suit house from one Sughar Bibi on 18.03.1974 for sale consideration of Rs.5,000/-. Then Ex.B4 shows she applied for mutation of the house in her name and Assistant Commissioner, Municipal Corporation of Hyderabad issued mutation proceedings dated 17.06.1989. Ex.B3 was the receipt issued by Municipal Corporation of Hyderabad in favour of defendant. Thus, Exs.B1, B3 and B4 would show the ownership of defendant in respect of suit property. In her evidence she stated that she purchased the suit house with her own funds by selling her ornaments and with the help of her parents. In the cross-examination she stated that she paid the advance of Rs.500/- and paid the remaining amount of Rs.4,500/- at the time of execution of Ex.B1—sale deed. She denied suggestion that her husband paid the sale consideration under Ex.B1. On the repeated suggestions about her financial capacity, she denied that she has no financial source and help from her parents and the house was purchased by her husband. She clearly explained that at the time of Ex.B1 her husband paid the entire amount by taking amount from her. When the evidence of DW1 is keenly perused, nothing tangible could be extracted to show that she has not paid the sale consideration and her husband alone paid the same. In support of her case DW1 examined

DW2—a family friend who deposed that she purchased the property at Hyderabad from out of her own funds and further her paternal uncle—Hussain Khan who was a practicing advocate in Bidar District and who brought her up had given a sum of Rs.1,500/- and her elder sister—Kurshid Begum paid Rs.500/- about 22 to 23 years back at Bidar. Except eliciting in the cross-examination that Hussain Khan and Kurshid Begum did not write any letter to him asking him to witness the payment of amount by them to DW1, no useful material could be extracted in the cross-examination to impeach the credibility of this witness. Thus, when the evidence on either side is perused, except Ex.A4 there is no other evidence in support of plaintiff's case. Whereas the defendant could produce cogent evidence to prove that she purchased the house with her own funds and the funds secured from her sister and uncle and she has been in possession and enjoyment of the suit property. Now, the validity of Ex.A4 has to be seen in the point infra.

This point is answered accordingly.

10a) **POINT No.2**: It should be noted that plaintiff's case mainly pivots on Ex.A4 agreement dated 27.10.1981. Ex.A5 is the translated copy of Ex.A4. As per plaintiff, when the defendant and her husband did not have children even 20 years after their marriage, the defendant had given permission to her husband to marry plaintiff and in that context she executed Ex.A4—agreement dated

27.10.1981 at Nizamabad. In the said agreement the defendant further mentioned as if the plaint schedule property was the property of her husband and henceforth the plaintiff and defendant would have equal shares in that house and also in the properties which would be acquired in future and the defendant made a further declaration that she would abide by the agreement and if she fails to do so, the plaintiff was authorized to take legal action on the strength of Ex.A4. It is on the basis of this Ex.A4, the plaintiff claims a share in the suit property. Needless to emphasize that defendant has denied the very execution of the said document giving consent for marriage of her husband with plaintiff and also conferring a share to her in the suit property. Hence, in this instance also the burden is heavy on the plaintiff to prove the genuinity of the document. In proof whereof the plaintiff besides herself, examined PW2 who is her brother-in-law and an attestor to Ex.A4.

b) As can be seen, Ex.A4 was written in Urdu on Rs.5/- non-judicial stamp bearing Sl.No.22922 dated 24.10.1981. The stamp was obtained allegedly in the name of defendant. It was purchased from one G.Dasaratham—stamp vendor, Munsif Court, Nizamabad. As per the cross-examination of PW1, Ex.A4 was executed one hour prior to her marriage which took place at Nizamabad and her husband came along with defendant on 27.10.1981 in the morning. Then, PW2

deposed that PW1 is his sister-in-law and her marriage was performed with Ghulam Mohiuddin on 27.10.1981 at Nizamabad and this witness was present at the time of negotiations of marriage and at that time defendant came to Nizamabad and agreed that house property which was in her name at Hyderabad, was purchased by her husband in her name and that she would give half share in that property to plaintiff. He further deposed that Ex.A4 was executed about two hours before the marriage and the defendant herself brought the document after scribing the contents. She brought the scribe along with her and after execution of Ex.A4 only the marriage was performed. In the cross-examination he stated that Khazi has come to the marriage before 15 minutes and this witness read the contents of Ex.A4 before the marriage and defendant informed him that she has purchased the stamp paper of Ex.A4. Both PW1 and this witness admitted the husband of plaintiff did not subscribe his signatures on Ex.A4. PW2 denied the suggestion that defendant never came to Nizamabad and executed Ex.A4 and she has not purchased the stamp paper and not got scribed the document and PW2 admitted that Ex.A4 does not bear the signature of scribe of the document. In the cross-examination he asserted as if defendant came to Nizamabad four days before the marriage.

c) A perusal of Ex.A4 and the circumstances under which it was allegedly executed and the evidence of

PWs.1 and 2 throw any amount of doubt on the genuinity of Ex.A4. Firstly, it is an unregistered document. Though the plaintiff claims that by virtue of this document the defendant conferred half share in an immovable property, neither plaintiff nor her parents contemplated of obtaining a registered document. It is quite unusual. Secondly, who purchased the stamp for Ex.A4 is enigmatic. As per PW2, defendant came to Nizamabad about four days prior to the marriage and she informed him that she purchased the stamp paper for Ex.A4. Whereas as per the admission of PW1, except at the time of marriage the defendant did not come to Nizamabad at any time. This mutual contradictory statements of PWs.1 and 2 raises a doubt whether in fact defendant came to Nizamabad on 24.10.1981 i.e. on the date of purchase of non-judicial stamp for Ex.A4. At the instance of defendant CW1 produced Ex.X1—stamp vending register for the year 1981 from Sub-Registrar office, Nizamabad. Ex.X1 did not show any non-judicial stamps being sold on 24.10.1981. It is mentioned in Ex.X1 that non-judicial stamps were sold on 23.10.1981. On that day non-judicial stamp paper No.22922 was recordedly sold to Smt. Tahera Begum w/o Ghulam Mohiuddin, Hyderabad vide Ex.X2. No doubt, this description relates to defendant. However, admittedly defendant is a thumb impressionist and not a signatory. Against her particulars we do not find her thumb impression but we will find a signature. The trial Court opined that the said signature belongs to PW2. Be that it

may, there is no thumb impression of defendant to conclude that she in fact purchased the stamp for Ex.A4. It belies the claim of PWs.1 and 2 that defendant herself purchased the stamp paper. This is another suspicious circumstance against Ex.A4. In Ex.A4, PW2 and one Mohd. Abdul Hameed have attested. Curiously, the plaintiff's husband though present and property allegedly belonged to him, has not acted as witness to give strength to the document. The Khazi who performed the marriage also not attested. This also raises a suspicion about Ex.A4. Nextly, the plaintiff has sent Ex.A4 with the admitted thumb impressions of defendant to the opinion of expert. However, plaintiff did not examine the expert. In these circumstances and in the backdrop of facts, the evidence of PWs.1 and 2 being highly interested, cannot be believed to decide the authenticity of Ex.A4. As rightly held by the trial Court, the defendant is an illiterate and pardanashin lady. Hence, in the light of so many suspicious circumstances Ex.A4 cannot be believed to be a genuine document. Thus, the plaintiff failed to establish the authenticity of Ex.A4 to the satisfaction of the Court. The cited decision in ***Pusapati Krishna Murthy Raju's*** case (1 supra) will not improve her case. Hence, she cannot claim share in the pliant schedule property.

This point is answered accordingly.

11) **POINT No.3**: In view of findings on point Nos.1 and 2, the judgment of the trial Court is factually and legally

sustainable.

This point is accordingly answered.

12) In view of the above findings, the appeal is liable to be dismissed. The appeal is liable to be dismissed also for the reason that the LRs. of respondent are not brought on record. In the result, this C.C.C.A.No.197 of 1998 is dismissed by confirming the judgment of the trial Court in O.S.No.1217 of 1990. No order as to costs.

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

U. DURGA PRASAD RAO, J

Date: 30.10.2015
Murthy

[\[1\]](#) 1996 (4) ALT 822

[\[2\]](#) 1998 (5) ALT 32