

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

APPEAL SUIT No.910 OF 1998

JUDGMENT:

The unsuccessful plaintiff in O.S.No.13 of 1994 on the file of the Subordinate Judge, Pithapuram, preferred this appeal challenging the decree and judgment, dated 11.12.1997, whereunder the suit filed for partition of schedule property was dismissed.

For convenience of reference, the parties hereinafter will be referred to as arrayed before the trial Court in O.S.No.13 of 1994 throughout the judgment.

The plaintiff filed the said suit against defendants 1 to 11 for partition of schedule property into 12 shares and to allot 12/11th share to him alleging that himself and defendants 1 to 7 are the sons of Sri Darsipudi Subbarayudu and one Bheemeswara Rao was the son of Subbarayudu. Defendants 10 and 11 are the daughters of late Subbarayudu and defendants 8 and 9 are the wife and son of late Bheemeswara Rao. During the lifetime of Subbarayudu, he acted as Kartha of the joint family and died intestate on 16.08.1992. Plaintiff - A schedule property is the house, Plaintiff - B schedule property is the landed property and Plaintiff - C schedule property is the movable property. The property is being enjoyed as Hindu Undivided Coparcenary and they are in joint possession of the same. The property was never partitioned among the legal heirs of Subbarayudu. Defendant No.5 filed O.S.No.187 of 1990 against the plaintiff before the District Munsiff Court, Pithapuram, claiming that there was already a partition and the plaintiff was contesting the same. Just prior to the filing of the said suit, defendants 1 to 7 started alienating the joint family property and, therefore, the plaintiff was constrained to file the suit for partition and separate possession of his 12/11th share.

Defendant No.7 filed written statement and defendants

1 to 6 adopted the same by filing a memo. The case of the contesting defendants is that during the lifetime of Subbarayudu, the joint family property was partitioned on 30.06.1985 and thereafter a partition list was prepared on 01.07.1985, which was signed by all the members of the joint family. Since then Subbarayudu and his sons started enjoying their shares with absolute rights. Subsequently, when the plaintiff, who is in occupation of the house allotted to the share of defendants 5 and 7, did not vacate the same and, therefore, defendant No. 5 filed O.S.No.187 of 1990 and defendant No.7 filed O.S.No.196 of 1990 before the District Munsiff Court, Pithapuram, for ejectment of the plaintiff and the said suits are pending.

Late Subbarayudu during his lifetime obtained a decree in O.S.No.169 of 1976 on the file of II Additional Sub Court, Kakinada, against one Ramiseti Sri Rama Krishna Murthy and others and subsequently filed E.P.No.136 of 1989 for realization of the decretal amount. In the said E.P., the plaintiff filed E.A.No.1064 of 1993 to come on record, contending that Subbarayudu executed a Will on 09.08.1992 and as per the said Will, his father bequeathed the property allotted to his father's share including movable property and the plaintiff herein as a petitioner in E.A., admitted about the prior partition and claimed right as legatee under the Will. Subsequently, E.A.No.1064 of 1993 was dismissed on 30.01.1996. Thus, the plaintiff admitted prior partition and filed the present suit for partition again and thereby he is disentitled to claim the relief of partition.

The plaintiff's son, by name, Subhash also filed O.S.No.37 of 1994 on the file of the Sub Court, Pithapuram, contending that there was already a partition of joint family property and the share of Subbarayudu was allotted to him under the Will and the said suit is pending. Thus, the admissions about the prior partition disentitled the plaintiff to claim a decree for partition again and finally prayed to dismiss the suit.

The other defendants 8, 9 and 11 remained *ex parte*.

Based on the pleadings, the trial Court framed the following issues for consideration:

- 1) Whether the plaintiff is entitled for partition?
- 2) Whether the Will dated 09.08.1992 is true, valid and binding on the defendants?
- 3) Whether the plaintiff is estopped from claiming partition?
- 4) Whether the suit is barred by limitation?
- 5) Whether the Court fee paid is correct?
- 6) Whether the suit is bad for non-joinder of proper and necessary parties?
- 7) To what relief?

During the course of trial, the plaintiff himself was examined as PW.1 and Exs.A1 and A2 were marked. Defendant No.7 was examined as DW.1 besides examining DW.2 and marked Exs.B1 to B14.

The plaintiff, being unsuccessful before the trial Court, preferred the present appeal mainly contending that when the defendants contended that there was prior partition, initially the onus of proof is on them to prove the prior partition pleaded by them. In the absence of proof, the plaintiff is entitled to a decree. The plaintiff contended that the trial Court did not consider the evidence on record in proper perspective, but while rejecting the admission of the partition list, Ex.B1, erroneously concluded that the plaintiff is disentitled to claim any share in the property on the strength of the alleged admissions made in the execution application. It is further contended that the admission is not a conclusive proof and it was never the case of the defendants that there was oral partition. But, the trial Court, on erroneous appreciation of the specific pleadings of the defendants, dismissed the suit, finally prayed to set aside the decree and judgment and pass a preliminary decree in his favour for partition of schedule property into 12 shares and to allot one

such share to the plaintiff.

During argument, Sri V.L.N.G.K. Murthy, learned counsel for the appellant/plaintiff, has drawn the attention of this Court to the alleged admissions made in Exs.B6 and B9 while contending that they are not conclusive proof. However, when the defendants pleaded that there was an oral partition on 30.06.1985, which was later reduced into writing as a partition deed, dated 01.07.1985, it is for the defendants to prove their positive case of partition by producing cogent and satisfactory evidence. But the trial Court, instead of upholding the plea of the plaintiff while disbelieving his plea that there was no partition, as contended by the defendants on 30.06.1985, dismissed the suit based on the admissions which were marked as Exs.B6 and B9 and it is totally an erroneous approach of the trial Court, hence, prayed to dismiss the suit.

None appeared for the respondents and no argument is advanced on their behalf.

After perusing the judgment and decree, which is under challenge including the oral and documentary evidence, the points that arise for consideration are:

- 1) Whether the plaintiff is a divided son of Subbarayudu and if not whether the plaintiff is entitled for partition of suit schedule property and for allotment of 12/11th share to him?
- 2) To what relief?

POINT No.(1):- The relationship between the parties is not in dispute and they are constituted as members of Hindu Undivided Coparcenery initially. The contention of the plaintiff is that they are still concluded as members of Hindu Undivided Coparcenery, but whereas the defendants contended that the property of Subbarayudu was partitioned on 30.06.1985 and the same was also reduced into writing on 01.07.1985 as partition list. He also contended that he made several judicial admissions in O.S.No.187 and in O.S.No.196 of 1990 and also in E.A.No.1064 of 1993 about the partition. Exs.B1 and B2 are the partition

list, dated 01.07.1985, and the account book showing the details of division of cash between the plaintiff and the defendants, dated 30.06.1985. The trial Court did not accept Exs.B1 and B2 to prove partition, as Ex.B1 is inadmissible in evidence. The trial Court, basing on Ex.B6 – certified copy of the written statement filed in O.S.No.187 of 1990 on the file of the District Munsiff Court, Pithapuram, and Ex.B9 - certified copy of petition in E.A.No.1064 of 1993 in E.P.No.136 of 1989 in O.S.No.169 of 1976 along with the certified copy of Will on the file of the II Additional Sub Court, Kakinada, concluded that the plaintiff is the divided son of Subbarayudu.

Now the contention of the defendants is that when they set up a plea of oral partition, which was reduced into writing on 01.07.1985, they must succeed on the strength of their plea, but not on the weakness of the plaintiff's case. Undoubtedly, the burden is upon the defendants to prove the oral partition pleaded by them. The trial Court only because of inadmissibility of Ex.B1 - copy of partition list, disbelieved the partition, dated 30.06.1985, pleaded by the defendants. At best, the initial onus of proof is on the defendants to establish the specific plea of oral partition, but when the plaintiff himself admitted about the partition of the property under oral partition, the responsibility of the defendants became lighter and they need not be called upon to prove that the property was partitioned under Ex.B1 alone.

Before the trial Court, the defendants produced Ex.B6, wherein the plaintiff made a categorical and unequivocal admission about the partition of the schedule property during the lifetime of Subbarayudu. Similarly, under Ex.B9, the plaintiff set up a claim that the suit claim and other divided shares of the property allotted to Subbarayudu were bequeathed to him under a Will. Thus, the plaintiff categorically admitted about the division of property under oral partition. Similarly, in O.S.No.37 of 1994 filed by the plaintiff's son, by name, Subhash for partition of schedule property, the plaintiff herein filed written statement admitting about the oral partition. Therefore, the judicial admissions brought on

record by the defendants marked as Exs.B6, 9 and 12 clingingly established that there is an oral partition of property among the plaintiff and the defendants.

The only contention of the plaintiff before this Court is that the admission only estops the person to contend otherwise and it is not a conclusive proof. No doubt, under Section 31 of the Indian Evidence Act (for short, 'the Act'), admission is not a conclusive proof, but it estops the person who made such admission to contend otherwise. In the instant case, the plaintiff resiling from the admissions made under Exs.B6, 9 and 12, filed the present suit as if there was no partition, which cannot be accepted.

The qualified judicial admission in Exs.B6, 9 and 12 is the best piece of evidence. Admissions are of two types, one is judicial admission and the other is evidentiary admission. In the instance case, the qualified judicial admission in the written statement and petition in E.A.No.1064 of 1993 in E.P.No.136 of 1989 in O.S.No.169 of 1976 marked as Ex.B9, the plaintiff admitted about the partition.

Admissions are not conclusive proof, but they estop the person who made such admissions under Sections 18 and 31 of the Indian Evidence Act. Moreover, the judicial admission is on different footing than the evidentiary admission. When the judicial admission is made in the pleadings or in any document regarding a particular fact in issue, such fact need not be proved by adducing any amount of evidence in view of Section 58 of the Act. It is settled law that admission is the best piece of evidence in view of the principle laid down in a judgment reported in **Sita Rama Bhau Patil v. Ramachandra Nago Patil**^[1], wherein the Supreme Court held as under:

“Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is

what weigh is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to tender his explanation and clear the point on the question of admission”

In view of the above, the law on the admissions can be summarized to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to be person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.”

In another decision reported in **Nagubai Ammal v. Shama Rao**^[2], the Apex Court held as under:

“Admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in *Slatterie v. Pooley*, wherein it had been observed “What a party himself admits to be true, may reasonably be presumed to be so.”

In view of the law declared by the Apex Court in the above judgments, the admissions made in Exs.B6, 9 and 12 are suffice to conclude that the plaintiff is a divided son of Subbarayudu and the earlier partition pleaded by the defendants is to be accepted. The oral partition is accepted though not Ex.B1, partition list is inadmissible in evidence. Hence, the plaintiff, being a divided son is disentitled to claim the relief of partition.

The trial Court dismissed the suit only on the ground that the plaintiff failed to prove his continuation as a member of the joint family. Taking into consideration of the admissions made in Exs.B6, 9 and 12, and even after reappraisal of entire evidence on record, I find no reason to differ with the findings recorded by the trial Court. Hence, I have no

hesitation to hold that the plaintiff is a divided son of Subbarayudu and thereby he is not entitled to claim any share in the schedule property by filing a suit for partition. Hence, the finding of the trial Court is hereby confirmed and the point is answered in favour of the defendants and against the plaintiff.

POINT No.2:- In view of the findings on Point No.1, the plaintiff and the defendants are Hindu Divided Coparceners and the plaintiff being a divided son is not entitled to claim any relief. Hence, the point is answered in favour of the defendants and against the plaintiff.

In view of my foregoing discussion, I find no grounds warranting interfere of this Court in the judgment passed by the trial Court.

In the result, the Appeal Suit is dismissed. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in the Appeal Suit shall stand closed.

M.SATYANARAYANA MURTHY, J

27.08.2015

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[\[1\]](#) AIR 1977 SC 1712

[\[2\]](#) AIR 1956 SC 593