

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

SECOND APPEAL No.616 of 2013

Between:

Aravapalli Subbarao

and others.

.... Appellants

And

Anne Seetha Ratnam

and another.

Respondents

....

DATE OF JUDGMENT PRONOUNCED: **27.04.2016**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers

may be allowed to see the judgments?

Yes /

No

2. Whether the copies of judgment may be

marked to Law Reporters / Journals?

Yes /

No

3. Whether Their Lordship wish to

see the fair copy of the Judgment?

Yes / No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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**! Counsel for Appellants : Sri V.L.N.Gopala Krishna
Murthy**

**^ Counsel for Respondent No.1 : Sri Yallabandi
Ramatirtha**

< Gist:

> Head Note:

? Cases referred:

- 1) (2006) 8 SCC 581
- 2) (2009) 15 SCC 184
- 3) AIR 2013 SC 3525

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

SECOND APPEAL No.616 of 2013

JUDGMENT:

This Second Appeal is filed by the unsuccessful defendants questioning the judgment and decree dated 15.04.2013 in A.S.No.55 of 2012 passed by the VII Additional

District and Sessions Judge (Fast Track Court), Vijayawada, wherein the learned Judge dismissed the appeal filed by them and confirmed the judgment and decree dated 12.12.2011 passed in O.S.No.173 of 2002 by the II Additional Senior Civil Judge, FAC: V Additional Senior Civil Judge (FTC), Vijayawada.

2) The brief facts of the case are thus:

a) The suit is for partition of the plaint schedule property into five equal shares and for allotment of one such share to plaintiff and also mesne profits. The case of the plaintiff is that the plaintiff and defendants are the children of Aravapalli Venkata Ratnam and Venkayamma. The plaint schedule property was the self acquired property of Late Aravapalli Venkata Ratnam and besides that the said Ratnam was also having properties at Gudavalli and Penamaluru villages. About 25 years ago, there was oral partition between said Ratnam and his sons i.e, D.1 to D.3 and in the said partition, the properties at Gudavalli and Penamaluru villages fell to the share of D.1 to D.3 and whereas the plaint schedule property fell to the share of said Ratnam and he enjoyed the same during his lifetime. He died intestate on 23.04.1993 leaving behind him the plaint schedule property and defendants and his wife as his LRs. After death of Ratnam, his wife—Venkayamma enjoyed usufructs and the plaintiff used to send money for her maintenance. While-so, Venkayamma also died intestate on 12.12.2001 and since then the plaint schedule property has been in joint possession and

enjoyment of the plaintiff and the defendants. The plaintiff contended that though she requested the defendants to cooperate with her for partition, they did not respond. Finally, the plaintiff got issued a legal notice to defendants but they avoided taking notices. Hence, the suit.

b) The Defendants 1 to 3 filed common written statement admitting the relationship of the parties but they denied the material allegation in the plaint. They contended that the late Ratnam has no self acquired properties and the properties at Gudavalli, Penamaluru and Poraniki are the ancestral properties. The plaintiff has no cause of action and the plaintiff was not in joint possession of the property at any time, hence the court fee paid on the plaint was not correct. The suit property and some other properties situated in Gudavalli and Penamaluru were the ancestral properties of Venkata Ratnam and defendant Nos. 1 to 3 and the said Venkata Ratnam got those properties in a partition along with his brothers in the year 1941. In the said partition, the plaint schedule property and other properties, referred above, fell to the share of Venkata Ratnam. Since then, Venkata Ratnam and his three sons have been enjoying those properties jointly till the year 1971. In 1971, an oral partition was effected between Venkata Ratnam and Defendant Nos.1 to 3 and later on 2.06.1980, a Memorandum of Past Partition List was executed by them confirming the earlier partition. In the partition, the plaint schedule property fell to the share of Venkata Ratnam with limited rights and it was agreed that Venkata Ratnam and his wife shall enjoy the plaint schedule

property with life interest and after their demise, the property should devolve on defendant Nos. 1 to 3 equally with absolute rights. Venkata Ratnam performed the marriages of plaintiff and 4th defendant prior to 1986 by spending huge amounts and at the time of their marriages, D.1 to D.3 and their father gave some properties to them towards Pasupukunkuma and therefore, the plaintiff and 4th defendant are not coparceners and they are not entitled to any share.

c) D.1 to D.3 filed amended Written Statement and took the plea that the plaint schedule property and other immovable properties were the ancestral properties of Venkata Ratnam and D.1 to D.3 and they are coparcenary members having equal share and there was no partition of the joint family properties in the year 1971, as contended by the plaintiff. Their father—Venkata Ratnam died intestate in the year 1993 and subsequently, the plaintiff, D.1 to D.4 and their mother were entitled to 1/6th share in the undivided 1/4th share of their father and consequent to the death of their mother, the plaintiff and defendants are entitled to 1/5th share in 1/4th share of their father and since the plaintiff has not claimed share in the remaining property situated in Gudavalli and Penamaluru villages and she did not include all the joint family properties, the suit is bad for non-joinder of all the properties.

d) Defendant No.4 remained *ex parte*.

e) Basing on the above pleadings, the trial Court framed

the following issues:

1. *Whether the plaintiff is entitled for partition and for separate possession of 1/5th share in the plaint schedule property?*
2. *To what relief?*

f) The following additional issues were framed:

1. *Whether the suit is bad for not showing all the joint family properties in particular lands at Gudavalli and Penamaluru as pleaded in the Additional Written Statement?*
2. *Whether the plaintiff is entitled 1/20th undivided share?*
3. *To what relief?*

g) During trial, PW.1 was examined and Exs.A1 to A7 were marked. DWs.1 to 3 were examined and Exs.B1 to B3 were marked on behalf of defendants.

h) On appreciation of facts and evidence the trial Court granted preliminary decree by dividing the plaint schedule property into five equal shares and to allot one such share to the plaintiff and with regard to the mesne profits, it observed that the plaintiff was at liberty to file a separate application.

i) Aggrieved, the defendants 1 to 3 filed A.S.No.55 of 2012 before VII Additional District and Sessions Judge (Fast Track Court) , Vijayawada, against plaintiff and defendant No.4 challenging the judgment of the trial Court.

j) After hearing both sides, the first appellate Court

dismissed the appeal by confirming the judgment and decree dated 12.12.2011 in O.S.No.173 of 2002 passed by the II Additional Senior Civil Judge, FAC: V Additional Senior Civil Judge (FTC), Vijayawada.

Hence, the Second Appeal at the instance of the aggrieved defendants.

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

4) Following Substantial questions of law are pleaded in the grounds of appeal:

a) *When the plaintiff failed to prove the case set up by her regarding the partition said to have taken place whereas the suit property is said to have fallen to the share of the father of the parties, whether the suit can be decreed on the basis that the partition as alleged by the defendants is not proved ?*

b) *Whether the judgments of the Courts below are vitiated in placing the burden wrongly on the appellants in the light of pleading of plaintiff, in suit for partition, about the oral partition among the appellants and his father ?*

c) *When the partition as pleaded by both the parties is not proved, whether a decree can be passed on the basis that there was no partition and in terms of the amendment to the Written Statement ?*

5) Heard arguments of Sri V.L.N.Gopala Krishna Murthy, learned counsel for appellants/defendants and Sri Yallabandi Ramatirtha, learned Counsel for 1st respondent/plaintiff.

6 a) Challenging the judgments of the Courts below, the learned counsel for appellants/defendant Nos.1 to 3 argued that the plaintiff has approached the court with a definite pleading that the plaint schedule property is the self acquisition of her father—Venkata Ratnam and sought for 1/5th share therein as he died intestate, but, she miserably failed to establish that the suit property was the self acquired property of her father, despite denial by the appellants about the nature of the property. In that view, the Courts below ought to have dismissed the plaintiff's suit as the burden of proof is squarely rested on her.

b) He further argued that the first contention of D.1 to D.3 was that all the properties are the ancestral properties and Venkata Ratnam and D.1 to D.3 constituted into a coparcenary and there was an oral partition in the year 1971, in which, the plaint schedule property though allotted to the father, it was agreed that the father and mother of D.1 to D.3 would have only life interest and thereafter the plaint schedule property should devolve on D.1 to D.3 and this was evident from the Memorandum of Past Partition List prepared by the parties on 2.06.1980. He further argued that, in proof of the terms of the partition, particularly, conferring life interest on the parents of the plaintiff and defendants over plaint schedule property, defendants examined DW.3 and therefore, the Courts below ought to have dismissed the plaintiff's suit on this ground.

c) Learned counsel further argued that the

defendants took an alternative plea stating that all the properties were ancestral properties and after the death of their father intestate, the plaintiff, defendants and their mother succeeded his un-divided $\frac{1}{4}$ th share and subsequently, their mother also died intestate and in that view, the plaintiff while claiming partition in respect of her share, ought to have included all the joint family properties, but she claimed share in the plaint schedule property only and therefore, the suit is bad for partial partition. The Courts below ought to have dismissed the suit on this ground also, but they decreed the suit on erroneous observations. He, thus, prayed to allow the appeal.

7) In oppugnation, learned counsel for respondent/plaintiff argued that in a partition between Venkata Ratnam and D.1 to D.3, the suit property fell to the share of Venkata Ratnam and therefore, it is assumed the character of his self acquired property and he died intestate in the year 1993 and subsequently his wife also died interstate and therefore, the plaintiff and D.1 to D.4, who are the Class-I heirs of their father are entitled to $\frac{1}{5}$ th share each. The defendants though took the plea that in the oral partition their father was given only life interest in respect of plaint schedule property, but failed to establish the said fact and therefore, the courts below rightly negated the said contention and their alternative plea was also discarded by the courts below as the same was inconsistent and destructive with reference to their first contention. The Courts below rightly decreed the plaintiff's

suit and hence, the appeal may be dismissed.

8) Since all the substantial questions of law raised in ground No.4 (a, b and c) are inter-connected, they are answered together as below:

9) The relationship between the parties and the existence of plaint schedule property and other properties are not in dispute. The basis for plaintiff's claim is that the plaint schedule property is the self acquired property of her later father, inasmuch as the said property fell to his share during an oral partition between him and his three sons i.e., D.1 to D.3 in the year 1971 and after the death of her parents intestate, the plaintiff and defendants are entitled to $1/5^{\text{th}}$ share each being Class-I heirs. This is precisely the case of the plaintiff. It should be noted that from the plaint pleadings, it is not very much clear whether the plaintiff claims that the plaint schedule property and other properties situated in Gudavalli and Penamaluru villages were all self acquisitions of her late father since inception and still he partitioned them with his sons and got the plaint schedule property to his share and thereby the plaint schedule property became his self acquired property or whether all the properties at the inception were ancestral properties and during partition since her father got the plaint schedule property to his share and thereby the same acquired the character of self acquired property. However, in the cross examination, she admitted that during her childhood, there was a partition between her father and his brothers and her father developed the

properties with the income from his share. From this admission, her case can be inferred as the plaint schedule property and other properties situated in other villages were all the ancestral properties in the hands of her father and during oral partition her father got to his share the plaint schedule property and hence, the said property is his self acquired property.

10) Now the question is what is the character of a property derived by a coparcener to his share in a partition with other coparceners. The law is no-more *res integra* on this aspect. When a coparcenar in a coparcenary governed by Hindu Mithaskhara Law derives a share in the ancestral properties in a partition with the other coparceners, though the said share which fell in his hands is generally ancestral in nature, still he can treat the said property as separate one or self acquisition so long as a male (or a female after advent of Hindu Succession Amendment Act, 2005) issue was not born to him. Treating the said property as his separate property, he can deal with it and alienate the same. However, once a male or female child is born to him, they get a right by birth in the said property along with their father and then he cannot treat the property as his separate or self acquired property.

11) In ***Sheela Devi and others vs. Lal Chand and Another***^[1], the Hon'ble Apex Court held in Para No.8 as thus:

“We have noticed hereinbefore that a finding of fact has been arrived at that the properties in the hands of Babu Lal and his brothers were joint family property. The

*principle of law applicable in his case is that so long a property remains in the hands of a single person, the same was to be treated as a separate property and thus, would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten (See **C. Krishna Prasad v. CIT., Bangalore 1974(97 ITR 493 (SC))**. But once a son is born, it becomes a coparcenary property and he would acquire an interest therein".*

12) In **M. Yogendra and others vs. Leelamma N. and others**^[2], the Apex Court reiterated the same point and held in para No.19 as follows:

*"Mr. Bhat, however, would contend that the properties at the hands of K. Doddananjundaiah which were allotted to him in partition which took place between him and his brother in the year 1948 would constitute coparcenary properties at his hands, with respect we cannot persuade ourselves to agree with the said view which has been accepted by the courts below. It is now well-settled in view of several decisions of this Court that the property in the hands of sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid. This aspect of the matter has been considered by this Court in **Commissioner of Wealth Tax, Kanpur and others v. Chander Sen and others (1986) 3 SCC 567**".*

13) In another decision reported in ***Rohit Chauhan v. Surinder Singh and others***^[3], the Apex Court held identically in para No.13 as follows:

“A person, who for the time being is the sole surviving coparcener as in the present case Gulab singh was, before the birth of the plaintiff, was entitled to dispose of the coparcenary property as if it were his separate property. Gulab Singh, till the birth of Plaintiff Rohit Chauhan, was competent to sell, mortgage and deal with the property as his property in the manner he liked. Had he done so before the birth of plaintiff, Rohit Chauhan, he was not competent to object to the alienation made by his father before he was born or begotten. But, in the present case, it is an admitted position that the property which defendant No.2 got on partition was an ancestral property and till the birth of the plaintiff he was sole surviving coparcener but the moment plaintiff was born, he got a share in the father’s property and became a coparcener. As observed earlier, in view of the settled legal position, the property in the hands of defendant No.2 allotted to him in partition was a separate property till the birth of the plaintiff and, therefore, after his birth Defendant No.2 could have alienated the property only as Karta for legal necessity”.

14) Applying the above presidential jurisprudence to the case on hand, it can be said that the plaint schedule property which fell to the share of Venkata Ratnam i.e., the father of the plaintiff, though an ancestral, still it acquired the character of his separate or self acquired property because subsequent to partition, he did not beget any son or daughter to claim a share by birth. Since the parents of the plaintiff admittedly died intestate, the plaintiff and defendants being Class-I heirs are entitled to equal shares in the suit property.

15) Now coming to defendants, their first contention is that the suit property and other properties are ancestral properties, which their father got in a partition with his brother in the year 1941 and subsequently, during oral partition in 1971 between their father and themselves, the suit property fell to the share of their father, but, as per their agreement, their parents were given life interest alone in the suit property with an understanding that later it should devolve on D.1 to D.3 with absolute rights. The oral partition was subsequently reduced in the form of Memorandum of Past Partition List dt. 2.6.1980, wherein all the above said facts were noted. This being their contention, the burden is heavy on the defendants to establish the factum of the alleged agreement covered by Memorandum of Past Partition, dt. 2.6.1980.

16) To establish this fact, the defendants seem to have relied upon the document dt. 2.6.1980 and DW.3, who is one of the attestors of the said document. It has to be said that some doubt and controversy shrouded around the exhibition of Memorandum of Past Partition List, dt.2.6.1980. In the appendix of evidence of trial court's Judgment, this document is referred as Ex.B.1- Partition List. The document dt.2.6.1980 in Telugu version is also available in that record and no doubt it is stamped as Ex.B.1. However, neither in the evidence of DW.1 (D.1) nor DW.2 (D3), the document dt.2.6.1980 was referred and offered to the Court to mark as exhibit. On the other hand, in the evidence of DW.1, what were exhibited were Exs. B.1 and B.2, which are pattadar passbook and title

deed only and, as stated, there is no reference about the agreement dt. 2.6.1980. Curiously, in the evidence of DW.3 also, the said document was not confronted to him and he has not identified his signature on physical verification of Memorandum dt. 2.6.1980. What all he stated was "I put my signature as second attestor on the said Memorandum". Further, most importantly, the trial Court while evaluating the evidence of DW.3 and also the document dt.2.6.1980 observed in Para Nos. 16, 19, 20 and 21 of its judgment as follows:

" DW.3 is another witness who was examined for the purpose of proving the alleged family agreement. But as point out by me the very document is not filed in the Court. However, the plaintiff counsel has given clear suggestions to DWs.1 to 3 that they are speaking false to avoid the share of Pw.1. Thus, on behalf of contesting defendant Nos. 1 to 3, the oral evidence is only as mentioned above, which primarily consists of self-serving testimony of DW.1".

19) It is also the contention of the defendant Nos. 1 to 3 that there was an agreement among the family members that the plaint schedule property should fell to the share of their father Ratnam with life interest and after his death, their mother Venkayamma has to enjoy with life interest and after her demise the property should devolve upon himself and his brother D.2 and D.3, equally with absolute rights. It is also further contention of the defendants that the said agreement was reduced into writing on 2.6.1980. But except the oral evidence of DWs. 1 to 3 there is no supporting evidence. In the first instance, the alleged agreement dt. 2.6.1980 did not see the light of the day. No explanation is forthcoming from D.1 to D.3 for non-filing of the said agreement. In the absence of that an adverse inference must be drawn against the case of defendants".

20) *Of course, the defendants examined DW.3 to speak that he was the witness to the alleged agreement. But his evidence is a cryptic. He tried to say that there was a partition list prepared between D.1 to D.3 and their father on 2.6.1980 and he put signature on it. As pointed out by me, the very document is not filed in the court. However, DW.3 spoke only about the allotment of shares among the parties which is not in dispute. He never stated that there was an agreement among the parties with regard to the enjoyment of the plaint schedule property by Ratnam and Venkayamma with limited rights and after their demise the property should devolve upon D.1 to D.3. Hence, the evidence of DW.3 does not inspire any confidence. Therefore, the theory of family agreement is not believable”.*

21) *There is no evidence to show that there was an agreement among the family members that the plaint schedule property shall be enjoyed by Ratnam and his wife Venkayamma with life interest and after their demise it will devolve upon D.1 to D.3. There is also no evidence to show that any properties were given to the plaintiff and D.4 towards their Pasupu Kumkuma. The evidence on record in the present case does not establish either of the two”.*

So, from the above, it is crystal clear that the document dt.2.6.1980 was not offered by the defendants as an exhibit on their behalf, but some how dubiously the said document was given number as Ex.B.1. It appears that the defendants on the apprehension that the said document if exhibited, required stamp duty and penalty shunned from offering the same as an exhibit. But some how the said document was marked inadvertently.

17) In the appeal also, the learned District Judge, dealt with this aspect in para Nos. 19 and 20 of his judgment and held that the defendants specifically pleaded that the agreement

was reduced into writing on 2.6.1986 (sic 2.6.1980), but they did not produce the said agreement before the Court and the trial Court rightly held that in the absence of such agreement, the oral testimony of DWs.1 to 3 cannot be taken into consideration. However, in para No.21 of his judgment, curiously, he dealt with Ex.B.1—Partition List dt.2.6.1980 and discussed the evidence of DWs.1 to 3 and held that their evidence relating to the document dt. 2.6.1980 does not infuse confidence. In my view, the discussion made by the learned Additional District Judge in para No.21 regarding Ex.B.1 is quite unwarranted in the light of his observation in the earlier paras that the agreement dt. 2.6.1980 was not produced into the Court.

18) In the light of the above, it can be concluded that the alleged Memorandum of Past Partition List dt. 2.6.1980 was not produced into the Court by the defendants for the reasons best known to them. Consequently, the oral evidence adduced by them touching the alleged family arrangement, whereunder life interest alone was granted to their parents cannot be believed. The facts and evidence would show that the plaint schedule property was allotted to the share of Venkata Ratnam in the oral partition between him and D.1 to D.3 and after the death of himself and his wife intestate, the plaintiffs and defendants succeeded the plaint schedule property as their Class-I heirs and therefore, they are entitled to 1/5th share each.

19) Then coming to the alternative plea taken by the

defendants, the Courts below rightly observed that the said plea was inconsistent and destructive of the earlier pleas. Therefore, the said plea cannot be taken into consideration at this stage. At the out set, none of the grounds raised by the appellants is worth consideration.

20) In the result, this Second Appeal is dismissed with costs throughout by confirming the decree and judgment in O.S.No.173 of 2002 on the file of V Addl. Senior Civil Judge (FTC) at Vijayawada, which was confirmed by the appellate Court in A.S.No.55 of 2012 on the file of VII Additional District Judge (FTC), Vijayawada.

Consequently, the miscellaneous petitions, if any, pending, in this case, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 27.04.2016

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[\[1\]](#) (2006) 8 SCC 581

[\[2\]](#) (2009) 15 SCC 184

[\[3\]](#) AIR 2013 SC 3525