

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Second Appeal No.707 of 2016

JUDGMENT:

This appeal under Section 100 of the Code of Civil Procedure ('the Code', for short) by the unsuccessful defendants 1 and 2 is preferred against the decree and judgment dated 24.05.2016 of the learned Judge, Family Court-cum-VIII Additional Sessions Judge, Mahabubnagar, passed in A.S.No.14 of 2013 whereby, the learned Judge while dismissing the said appeal confirmed the judgment and preliminary decree dated 22.03.2012 passed by the learned Junior Civil Judge, Kalwakurthy, Mahabubnagar District, in O.S.No.135 of 2006.

2. I have heard the submissions of the learned counsel for the appellants/defendants at the stage of admission.

3. The parties in this second appeal shall hereinafter be referred to as plaintiffs and defendants as arrayed in the original suit.

4. The plaintiffs brought the suit for grant of a preliminary decree by declaring the entitlement of the plaintiffs to a 1/5th share each in the lands in an extent of Ac.2.28 guntas in Sy.No.13 of Salarpur village, Thalkondapalli Mandal, Mahabubnagar District, more fully described in the schedule annexed to the plaint and to allot 1/5th share each to the plaintiffs 1 to 3 by metes and bounds in the final decree proceedings and for costs.

4.1 The 3rd defendant filed a written statement supporting the case of the plaintiffs.

4.2 The defendants 1 and 2 filed a written statement resisting the suit.

4.3 Having regard to the pleadings of the parties, the trial Court framed the following issues and additional issues.

Issues:

- 1) Whether the plaintiffs are entitled for partition and separate possession of the suit schedule land as prayed for?
- 2) Whether the suit is not maintainable as claimed by the defendants?
- 3) To what relief?

Additional Issues:

- 1) Whether the defendant No.3 is entitled for partition and separate possession as prayed for in counter claim?
- 2) To what relief?

5. At trial, the plaintiffs 1 to 3 and their supporting witness were examined as PWs 1 to 3 and PW4 and Exhibits A1 to A7 were marked on their side. The 1st defendant was examined as DW1 and two more witnesses were examined as DWs 2 and 3. The 3rd defendant was examined as DW4. Exhibits B1 to B7 were marked. As already noted, the trial Court decreed the suit of the plaintiffs and the Court below dismissed the appeal of the defendants 1 and 2.

6. The relationship between the parties and the undisputed facts, necessary for consideration, in brief, are as follows:

The suit land is an Inam land. The suit land was originally acquired by late Lal Mohammed, who died about 20 years prior to the institution of the suit. He had two sons, (i) Mohammed Akbar Ali, and (ii) Hymad Ali. The 1st plaintiff is the wife of the late Mohammed Ali, who is one of the sons of the said Mohammed Akbar Ali. The 2nd plaintiff and the 3rd plaintiff are the other two sons of the said late Mohammed Akbar Ali. Hymad Ali, the second son of late Lal Mohammed, is having two sons, viz., late Attar Ali and Mazar Ali, the 1st defendant. Ahmed Begum, 2nd defendant, is the daughter of the 1st defendant. Jarina Begum, 3rd defendant is the only daughter of late Attar Ali. Thus, the plaintiffs 2 and 3 and the 1st defendant are the grandchildren of late Lal Mohammed while the 1st plaintiff is the wife of one of the grandsons of late Lal Mohammed.

6.1 The case of the plaintiffs, in brief, is this:

During the life time of late Lal Mohammed, the suit lands were not partitioned between him and his said two sons. Mohammed Akbar Ali worked in Police Department. He lived and died at Hyderabad. Hymad Ali, second son of Lal Mohammed, looked after the plaint schedule lands and did business for his livelihood. The said Hymad Ali used to give lease amounts to late Akbar Ali during his life time. Hymad Ali died at Padkal village. Thereafter, the suit lands were looked after and cultivated by the 1st defendant on behalf of the plaintiffs and other sharers. The 1st defendant who used to cultivate the land with the permission of the plaintiffs and others used to give the lease amounts to the plaintiffs and other sharers. The plaintiffs believed the 1st defendant. The 1st defendant taking advantage of the confidence reposed upon him deceived them by getting the property mutated in his name in the occupancy register and got his name entered as occupant and suppressed the fact that the plaintiffs are having shares in the land that was originally acquired by late Lal Mohammed. The 1st defendant got Occupancy Right Certificate (hereinafter, 'ORC') in the year 1998 behind the back of the plaintiffs and did not pay their share of lease amounts to the plaintiffs in respect of the last crop realized prior to the suit. The plaintiffs having entertained a doubt made enquiries and came to know that the 1st defendant obtained the ORC in his name by cheating them and got the suit land mutated in his name without any entitlement and that he further tried for mutation of the property in the name of the 2nd defendant, who is his daughter and sell away the land to defeat the rights of the plaintiffs. The plaintiffs came to know about the said facts on 25.04.2006. The 1st defendant threatened that he would alienate the lands in the name of his married daughter, the 2nd defendant, or in the names of third parties and stated that the land does not belong to the plaintiffs even though the plaintiffs are entitled to a share each in the plaint schedule land. When the plaintiffs demanded for partition, the 1st defendant did not accept their request and

threatened to alienate the suit land in favour of his daughter or third parties. Hence, the suit is filed for partition.

6.2 The defence of the 1st defendant, which is in the nature of denial, in brief, is this:

In view of the facts that the suit land is an inam land and that the exclusive patta is in the name of the 1st defendant and his exclusive ownership, the legal heirs of late Lal Mohammed, who are Muslims, will not have any right of inheritance in the suit lands. The 1st defendant is the exclusive owner. During his life time, son, brothers or any other legal heirs will not have any right in the suit land and they cannot demand for partition. The 1st defendant is the absolute owner, pattedar and exclusive possessor of the suit land. During his life time, the plaintiffs cannot claim any right of partition. The suit land is recorded in the name of the 1st defendant and Pattadar passbook and title deed book were also issued to him. The plaintiffs did not challenge the ORC granted in favour of the 1st defendant and also did not file any appeal against the orders in regard to issuance of Pattadar passbook and title deed book in favour of the 1st defendant. The plaintiffs cannot contend that the ORC is wrongly issued in the name of the 1st defendant. The 1st defendant alone is the absolute owner of the suit land by virtue of the ORC granted in his favour in respect of the suit land and the suit land is his self acquired property. The plaintiffs were and are not in possession of the suit land. The 1st defendant alone is in possession of the suit land. The suit land is not an ancestral land and is not in joint possession. The suit is liable to be dismissed.

7. The learned counsel for the appellants/ defendants 1 and 2 would seek to contend that the following substantial questions of law are involved in this Second Appeal.

A. Whether the Courts below are correct in decreeing the suit for partition, when the appellants/ defendants got the Occupancy

Right Certificate under Section 10 of the A.P (T.A) Abolition of Inams Act, 1955.

B. The Judgment and Decree of the Courts below in view of Abolition of Inams, the pre-existing rights of Inamdar ceased and the grant of occupancy right certificate is a new grant and not liable for partition.

C. Whether the Courts below are correct in decreeing the suit in the absence of continuation of occupancy right and when it vests in the Government, and grant of occupancy rights certificate is a new grant confers the absolute right on the grantee alone.

D. Whether the person can claim partition who never pools any energy in acquiring the property as per Section 57 of the Mohammedan Law (Principles of Mohammedan Law by Mulla)
(Reproduced verbatim)

7.1 Now, it is to be examined as to whether such questions being sought to be raised are substantial questions of law and if so, whether any such questions are involved in this second appeal and if so, whether or not the second appeal deserves admission.

8. The learned counsel for the defendants 1 and 2/appellants would contend as follows:

The Courts below erroneously decreed the suit for partition ignoring the fact that the 1st defendant has got the ORC in his exclusive name and that the land is mutated in his name in the records and that he was given Pattadar passbook and title deed book. The ORC in favour of the 1st defendant is a new grant and it was granted exclusively in favour of the 1st defendant in recognition of his right and possession. The pre-existing rights of others, if any, ceased. The suit land is no more an ancestral land or joint family land. The question of plaintiffs seeking partition does not arise as long as the ORC continues and subsists. Moreover, under the Muslim Law, the right of inheritance comes into existence for the first time after the death of a person. During the life time of the 1st defendant, son, brothers or any other legal heirs will not have a right to seek partition of the plaint schedule land. The Court below placed erroneous reliance on a decision which is inapplicable to the facts

of the case and erroneously decreed the suit of the plaintiffs ignoring the valid defence of the 1st defendant.

8.1 Having so contended, the learned counsel placed reliance on the decision in N.Padmamma v. S.Ramakrishna Reddy¹ and contended that as the property is not ancestral or joint family property any longer and as there is no joint family and as the parties are living separately and as the possession of the 1st defendant is exclusive, his possession cannot be treated as possession of all the co-heirs and that the ORC exclusively granted in his favour is a new grant and hence, the suit for partition is not maintainable and is liable to be dismissed. The learned counsel also placed reliance on a passage viz., Section 57 at page 54 of Mulla's Principles of Mahomedan Law, Seventeenth Edition by Shri M.Hidayatullah.

9. I have given earnest consideration to the facts and submissions. I have carefully perused the material record.

10. Late Lal Mohammed was the original owner of the suit schedule land and that late Lal Mohammed acquired the suit land is an admitted fact. The said land is an Inam land is also an admitted fact. The relationship between the parties is also admitted and not in dispute. The parties are all the legal heirs of late Lal Mohammed.

10.1 The plaintiffs 2 and 3, who are admittedly the grandchildren of late Lal Mohammed and the 1st plaintiff, who is admittedly the wife of one of the grandsons of late Lal Mohammed are seeking partition of the plaint schedule inam land being the legal heirs of late Lal Mohammed *inter alia* contending that after the death of late Lal Mohammed, the property was looked after by Hymad Ali, one of the sons of late Lal Mohammed, on behalf of himself and his brother, Mohammed Akbar Ali. It is their further case that after the death of

¹ (2015) 1 Supreme Court Cases 417

Hymad Ali, his son, Mazar Ali, the 1st defendant looked after the property on behalf of all the legal heirs of late Lal Mohammed and that the plaintiffs believed the 1st defendant and that taking advantage of the confidence reposed upon him, he had cheated the plaintiffs and got the property mutated in his name in the occupancy register and got his name entered as occupant by suppressing the fact that the plaintiffs are having shares in the land that was originally acquired by late Lal Mohammed and that when the plaintiffs demanded for partition, he refused to cooperate. *Per contra*, the case of the 1st defendant is that the 1st defendant has got the ORC in his exclusive name and that the land is mutated in his name in the records and that he was given Pattadar passbook and title deed book and that the ORC in his favour is a new grant and it was granted exclusively in his favour in recognition of his right and possession and that the pre-existing rights of others, if any, ceased to exist and that the suit land is no more an ancestral land or joint family land and that therefore, the question of plaintiffs seeking partition does not arise as long as the ORC continues and subsists.

10.2 Though it is admitted that the land originally belonged to late Lal Mohammed and that it is an inam land and that the plaintiffs are also the legal heirs of late Lal Mohammed, the 1st defendant contends that the plaintiffs are not entitled to seek partition as the rights, if any, of the other sharers/ heirs including those of the plaintiffs ceased to exist by virtue of the ORC granted exclusively in the name of the 1st defendant and the mutation of the property in his name. The further contention of the 1st defendant is that unless the ORC is questioned by following the procedure established by law and the ORC is cancelled, the instant suit of the plaintiffs for partition is not maintainable. Rejecting the contentions and claim of the 1st defendant, the Courts below concurrently held that the plaintiffs, who are the co-heirs of the 1st defendant, need not challenge the ORC and that the plaintiffs are entitled to sue for partition and granted accordingly a preliminary decree in favour of the

plaintiffs, as prayed for. Be it noted that on the death of Lal Mohammed and his sons, his grand children, who are his heirs, have become entitled to a share each in the plaint schedule land and that the status of the 1st defendant as a legal heir of the deceased Lal Mohammed was no better than the other legal heirs of late Lal Mohammed and that the grant of ORC in the name of the 1st defendant, who is one of the legal heirs of late Lal Mohammed, inures for the benefit of all the legal heirs of late Lal Mohammed and that the grant of ORC exclusively in the name of the 1st defendant would not result in extinction of the rights of the other co-heirs who had an equal right and claim along with the 1st defendant in whose favour the ORC is granted. It is well settled that mutation entries in revenue record do not either extinguish or confer title. What is also to be next noted is that as per settled law, possession of one co-heir is to be treated as possession of other co-heirs and therefore the 1st defendant's possession is not to the exclusion of the other co-heirs and his possession cannot be termed as adverse and the cultivation of land by him would be treated as cultivation by the entire family, more particularly in the absence of any pleading and evidence regarding the ouster of the other co-heirs. The afore-stated findings of this Court find support from the ratio in the decision in N.Padmamma (1st supra). Perusal of the decision reflects that one Ramachandra Reddy continued to be in possession of the land in his individual capacity even after the vesting of the inam land under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955, and till his death and that on his death occupancy rights were granted in respect of the said inam land in favour of one son in his individual capacity and that son acquired occupancy rights and that thereafter, when the rights of the other heirs were denied, they filed a suit for partition claiming *inter alia* that after the death of Ramachandra Reddy, rights and privileges in respect of inam land including the occupancy rights would devolve on all the heirs in equal shares and that the son who was in exclusive possession and cultivating the lands cannot claim exclusive rights

and that grant of occupancy rights in respect of inam land in favour of son cannot be treated to be in his individual capacity to the exclusion of other members of the family so as to deny them their share in the property. When it was contended in the said suit that the suit for partition is not maintainable, the Supreme Court while allowing the appeal held that the suit for partition filed after the grant of occupancy rights is maintainable and that the grant of such rights in favour of son is for the benefit of all the heirs left behind by Ramachandra Reddy and that in the absence of a plea of ouster, a co-heir could merely on the basis of grant of occupancy rights in his name exclude the other co-heirs from partition of the property so granted. By virtue of Section 3 of 1955 Act, the subject inam land stood vested in the State with effect from 20.07.1955, the date of coming into force of the Act. Yet, the Inam land continued in possession of late Lal Mohammad even as on the date of vesting and he cultivated the land till his demise. On his death and the deaths of his sons, the rights and privileges in regard to the said land devolved upon his legal heirs and entitled them to claim ORC under the Act. Thus, his rights and privileges in regard to the said land are inherited by his legal heirs, who are the parties to this appeal. Since the 1st defendant herein was looking after the lands on behalf of all the co-heirs, the ORC was granted in his name and therefore, it inures for the benefit of all the legal heirs left behind by late Lal Mohammad and the ORC granted in the name of the 1st defendant does not exclude the plaintiffs and consequently the plaintiffs' suit for partition of the plaint schedule inam lands is maintainable and resultantly the plaintiffs are entitled to seek partition as rightly and concurrently held by the Courts below.

10.3 It is now necessary to advert to the contention of the learned counsel based on a passage viz., Section 57 at page 54 of Mulla's Principles of Mahomedan Law, Seventeenth Edition by Shri M.Hidayatullah, which reads thus:

57. Joint family and joint family business. --- (i) When the members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu law. Further, in the Mahomedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family. But if during the continuance of the family properties are acquired in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand.

(2) If after the death of a Mahommedan his adult sons continue their father's business, and retain his assets in the business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased, and liable to account as such for the profit made by them in the business. If after the death of the sons the business is continued by their sons or by other heirs, they also will be liable to account on the same footing.

(3) Members of a Mahomedan family carrying on business jointly do not constitute a joint family firm in the sense in which that expression is used in the Hindu law so as to attract the legal incidents of such a firm. Sons assisting a father in business are presumably his agents and are not his partners unless an agreement of partnership is proved. A minor may be entitled to a benefit in the business, but this will not make him liable on a mortgage executed by him along with his adult brothers in the course of the business carried on by the latter. The managers of such a business in a Mohmedan family have no right to impose any liability on the minor members of the family.

There is no provision of Mahommedan Law recognizing a joint family. In Andhra Pradesh muslim families live together and do business together. Such business may be carried on for the benefit of the family including minors and females. Such arrangements have been upheld by Courts. In such a case the adult member or members stand in a fiduciary capacity and the Trust Act is applicable. When the co-owner dies his heirs take his place."

10.4 In the case on hand, the land is not originally a joint family land and it was not acquired either from the income of the family business or by the joint efforts of the members of the family. The land is admittedly an inam land. The same was originally acquired by late Lal Mohammed is also an admitted fact. Having regard to the facts established and the precedential guidance in the afore-stated decision of the Supreme Court, this Court finds itself in agreement with the concurrent findings of the Courts below and resultantly

holds that the ORC granted in favour of the 1st defendant subsequent to the death of late Lal Mohammed and his sons inures for the benefit of all the legal heirs left behind by late Lal Mohammed and that on the death of late Lal Mohammed, the rights and privileges devolved upon all his legal heirs in respect of the inam land and that the occupancy rights would also devolve on all the legal heirs and that the ORC granted in the name of the 1st defendant and his possession in respect of the plaint schedule inam land are for the benefit of all the legal heirs and that merely because ORC is granted in his name, the 1st defendant would not become the exclusive owner and that he cannot exclude the other co-heirs from partition of the suit land. Hence, the contents of the above stated passage do not advance the case of the appellants/ defendants 1 and 2 any further.

11. On the afore-stated analysis of the facts and the law, this Court finds that the substantial questions of law being sought to be raised are not substantial questions and that no substantial questions of law are involved in this second appeal and that therefore, the second appeal is liable to be dismissed at the stage of admission.

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

As a sequel, pending miscellaneous petitions, if any, in this second appeal shall stand closed.

17th September, 2016
RAR

M. SEETHARAMA MURTI, J