

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.233 of 2000

JUDGMENT :

The unsuccessful plaintiff before the trial Court as well as the lower appellate Court is the appellant herein.

2. When instituted the suit in O.S.No.92 of 1990 on the file of the District Munsif, Hindupur, initially, the plaintiff sought the relief of partition of the plaint schedule houses and to allot middle portion towards 1/3rd share and delivery of possession thereof to him. Subsequently, he introduced an amendment, changing the relief from that of partitioning the plaint schedule houses into one of declaration of his title over the middle 1/3rd portion of the plaint schedule houses with a consequential perpetual injunction, restraining the defendants from interfering with his possession and enjoyment thereof.

3. The case of the plaintiff is that, one late Pattipalli Nagappa, who is his paternal grand-father, was the absolute owner of the plaint schedule houses, besides owning and possessing certain other landed properties. He was survived by 3 sons, viz., (1) Pedda Narasimhappa, (2) Chinnappaiah, and (3) Ramaiah (defendant No.1). All three of them have got a son each, by name N. Kristappa, B. Narayanappa, who is the plaintiff, and Aswthanarayana, who is defendant No.2. He sets up a specific plea that all of them have divided their properties long ago and living separately and that defendant Nos.1 and 2, who are father and son, respectively, are living jointly.

4. The grand-father of the plaintiff executed a registered Will dated 01.06.1961, bequeathing all his properties to his sons and grand-sons.

The suit schedule houses constitute D-schedule properties in the said Will, and were bequeathed to the plaintiff, N. Kristappa and Aswthanarayana. A year or two thereafter, the said Pattipalli Nagappa died. Thereafter, by virtue of the Will dated 01.06.1961, the plaintiff, N. Kristappa and Aswthanarayana have become jointly entitled for D-schedule properties of the Will.

5. While the things stood thus, one of them, N. Kristappa, who held 1/3rd share, sold it away to defendant No.1 and thus, defendant No.1 became entitled to that 1/3rd share. The plaintiff states that since the original Will is in the custody of defendant No.1, he was able to file only its Photostat copy.

6. Since the houses are situate in two different places, one at Hindupur Town and the other at Kotnur Village, according to the plaintiff, for convenience sake and by mutual consent, an oral partition was entered into between himself and the defendants. In the said partition, he claims, that he was allotted middle portion of the house, but, for accommodation sake, he alone has been residing in the house, located at Hindupur Town, while the defendants are residing in the house situate at Kotnur Village, by letting it out to a third party on rentals, by living in a separate house at Kotnur Village, but no partition walls were raised. He claims that he has been paying house tax for the house at Hindupur Town for the last 20 years, but the defendants, being highly influential, with an evil intention to grab major portion of the suit schedule property, were trying to dispossess him forcibly and make construction to his detriment and to deprive him of his legitimate right accrued under oral partition. Stating that the defendants refused for an amicable settlement to act upon the oral partition, he filed suit for the

aforesaid reliefs and the same was registered as O.S.No.92 of 1990 on the file of the District Munsif, Hindupur.

7. By making an application in I.A.No.630 of 1992, the plaintiff introduced the relevant paragraphs seeking the relief of declaration of title over the middle portion of each house said to have got by him under oral partition. By virtue of the same, the very nature and character of the suit was changed to one of a declaratory relief from that of the relief of partitioning the properties and for allotment of a share, which was originally sought.

8. A joint written statement was filed by defendant Nos.1 and 2, specifically denying the alleged oral partition set up by the plaintiff. According to them, the allegation of oral partition is conveniently kept vague by the plaintiff for possible twists and manipulation later, thus, self-contradictory versions are being placed by the plaintiff. Concerning the house at Hindupur Town, while controverting the allegation that they (defendant Nos.1 and 2) were enjoying the same by letting out to a third party on rents, they state that the said house has fallen down completely long back and thus, sought to dismiss the suit.

9. Consequent upon the amendment introduced by the plaintiff, a common additional written statement was filed by the defendants. While denying the allegation of allotment of middle portion to the plaintiff and the other portions to defendant Nos.1 and 2, they allege that the plaintiff has been in exclusive right, possession and enjoyment of northern 1/3rd portion of D-schedule in the Will, adjoining his own father Chinnappaiah's share as per the D-schedule of Will, who is also a signatory to the sale dated 28.08.1970.

10. The defendants specifically pleaded that the deletion of the original relief of partitioning the properties and substituting it with the relief of declaration of title will change the very nature of the suit and the cause of action and, therefore, the plaintiff has to file a separate suit seeking appropriate relief, and the relief of declaration sought, at that stage, long after the suit was filed, was barred by limitation.

11. Basing on the original pleadings, the trial Court settled as many as 8 issues. Subsequent to the amendment of plaint and additional written statement, the issues were re-cast as hereunder:

1. Whether the plaintiff is entitled to 1/3rd joint in the middle of the suit schedule properties?
2. Whether the oral partition set up by the plaintiff, if it is true and binding on the defendants?"

12. During trial, the plaintiff, besides examining himself as P.W.1, examined two (2) more witnesses as P.Ws.2 and 3, and marked Exs.A.1 to A.12. On behalf of the defendants, defendant No.1 was examined as D.W.1 and marked Exs.B.1 to B.3.

13. The trial Court, on appraisal of evidence, both, oral and documentary, let in by the rival parties, recorded a finding on issue No.1 that the plaintiff was not living in the middle portion of the house and that there were no partition walls erected, at all, for the house situated at Hindupur Town and thus, held issue No.1 against the plaintiff.

14. The trial Court, commenting on Exs.A.1 to A.10, that mere receipts or voters lists would not prove exclusive rights over the property and disbelieving oral partition set up by the plaintiff, held issue No.2 also against the plaintiff. Basing on the said findings recorded by it, the trial Court dismissed the suit with costs, by judgment and decree dated 23.07.1996.

15. Aggrieved over the said judgment and decree, the plaintiff preferred a regular appeal in A.S.No.9 of 1996 on the file of the Additional District Judge, Hindupur.

16. The lower appellate Court, in order to adjudicate upon the controversy, formulated the following two points for determination:

1. Whether the plaintiff is entitled to 1/3rd joint middle portion of the suit schedule properties.
2. Whether the oral partition set up by the plaintiff is true and binding on the defendants.

17. On re-appraisal of evidence on record, the lower appellate Court, mainly taking into consideration the probabilities, basing on proved facts, through documentary evidence, that the plaintiff's name was not mutated in the relevant records concerning middle portion of the suit schedule houses, that the measurements of the house situated at Hindupur Town would give rise to an inference that it would not be possible to accommodate three families to live, that the evidence let in by the plaintiff does not establish that he is in occupation of middle portion of the house at Hindupur Town, and the last probability being absence of partition walls, held both the points against the appellant – plaintiff and thus, confirmed the findings recorded and conclusion arrived at by the trial Court, while dismissing the appeal, by judgment and decree dated 21.02.2000.

18. Assailing the said judgment and decree of the appellate Court, the plaintiff preferred the present Second Appeal, raising the following substantial questions of law:

1. Whether the judgment and decree of the lower appellate Court in confirming the judgment and decree of the trial Court and in dismissing the suit for declaration of title and for injunction is legally sustainable and is supported by evidence on record?

2. Having regard to the documents filed on behalf of the plaintiff that the appellant is in possession of the property, whether the Courts below acted legally in dismissing the suit on the ground that the plaintiff is in possession of the property by consent of the parties?
 3. Whether the Courts below acted legally in disbelieving the evidence adduced on behalf of the petitioner only on the ground that there was no partition walls in the house?
 4. Having held that the appellant is in possession of the property, whether the Courts below are justified in refusing to grant injunction?
 5. Whether the Courts below acted legally in not considering the evidence of D.W.1 with regard to the oral partition between the parties?
 6. Whether the reasoning of the Courts below that there was no partition between the parties is legally sustainable and is supported by evidence on record?
19. Initially, by order dated 31.03.2000, in CMP.No.5376 of 2000, *status quo* was granted. But, the same was vacated, by order dated 15.02.2002, in CMP.No.11526 of 2001 in CMP.No.5376 of 2000, by referring to the relevant facts and circumstances.
20. Heard Sri Addepalli Suryanarayana, learned counsel for the appellant – plaintiff, and Sri N. Ranga Reddy, learned counsel for the respondents – defendant Nos.1 and 2.
21. Perused the judgment and decree under challenge and evidence on record.
22. At the very outset, I would like to observe that the present Second Appeal shall meet with the fate of dismissal, not just because that concurrent judgments have been rendered by the Court of first instance and also the first appellate Court, but because the very amendment introduced by the plaintiff, seeking the relief of declaratory title from the original relief of partitioning of plaintiff schedule houses and allotment of middle portion towards his 1/3rd share therein, was unsustainable, as

the rights of the parties will have to be determined as on the date of the suit and if any amendment is sought to be introduced, it is only permissible, if it does not change or alter the nature and character of the suit, which was originally sought. Somehow, the trial Court overlooked the basic legal principle and allowed the amendment application, which led to a laborious task of trial being conducted and disposal of the suit, not only by the trial Court, but also by the lower appellate Court, and the matter being carried to this Court.

23. Though, the above substantial questions of law have been formulated by the plaintiff in the present Second Appeal, in fact, except question of law No.1, the remaining would touch the factual aspects or relate to the findings arrived at, based on the factual aspects.

24. Even turning to the merits of the case, though, not required to deal with, still, there is no case for the plaintiff to succeed. The documentary evidence placed for consideration is, nothing but Municipal Tax payment receipts, voters list, voters identity card, photographs, negatives and sketch. These documents, even cumulatively, would not advance the case of the plaintiff to seek the relief of declaration of title, as articulated in the suit.

25. It is not as though, it was not within the control of the plaintiff to place before the trial Court, the documents of vital significance in establishing his exclusive right and in seeking the relief prayed by him, but the plaintiff has not chosen to make any effort in that direction.

First, the registered Sale Deed executed by N. Kristappa in favour of defendant No.1, under which 1/3rd share of the said Kristappa, being the son of Pedda Narasimhappa, was alienated in favour of defendant No.1. In case, what was alienated thereunder is described as distinct property,

but not either joint property or undivided share, certainly, the plaintiff would have invariably succeeded. The very circumstance that he did not file certified copy of the said document would give rise to an inescapable inference that had he tendered certified copy, the said document would have stood adverse to his case. This accounts for a circumstance, which, in other words, can be termed as a probability that stands adverse to his case.

26. *Second*, there is no legally acceptable evidence to prove oral partition set up by the plaintiff, apart from his failure to file certified copy of the sale deed referred to in the preceding paragraph. A pertinent answer given by him in his cross-examination would cut at the root of his case. He answers

“I am not having any record to show that I am allotted middle portion”.

The answer given by him to a previous question is thus:

“I have not having any application either to Municipality or Revenue and Electricity for mutation in my favour.”

27. Even the evidence of P.Ws.2 and 3 would not improve the case of the plaintiff. Further, nothing is brought out in the cross-examination of D.W.1 to prove the factum of oral partition set up by the plaintiff.

28. Therefore, the findings recorded by both the Courts below do not suffer from any legal infirmity, warranting interference, even on factual side.

29. Thus, there is no question of law, muchless substantial, in the present Second Appeal, warranting interference by this Court, under Section 100 of C.P.C.

30. Accordingly, this Second Appeal is dismissed. There shall be no order as to costs.

31. Though, it is urged that the findings tendered by both the Courts below would since indicate that the plaintiff has been in possession of the house at Hindupur Town and the defendants have been in possession of the house at Kotnur Village, to record the said finding, leaving it open to the parties to seek appropriate relief in a competent Court, including the right of passage, which is not the subject matter, it is difficult even to accede to such a request. It is needless to mention that if any remedy is available to the parties, a party would not give up his claim and would pursue for redressal of his grievance, in accordance with law.



JUSTICE A. SHANKAR NARAYANA

28.09.2016.
Msr

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

(P.D. JUDGMENT)

SECOND APPEAL No.233 of 2000



28.09.2016
Msr