THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT

APPEAL SUIT No.1087 of 2003

JUDGMENT:

This appeal is directed against the order dated 04.03.2002 in O.S.No.5 of 1995 on the file of the Court of the Senior Civil Judge, Miryalaguda (for short, trial Court).

2. For the sake of convenience, the parties are referred to as they are arrayed before the trial Court.

3. The brief facts of the case are as follows:

The plaintiffs filed O.S.No.5 of 1995 before the trial Court as against the defendants seeking partition of the plaint A and B schedule properties and allotment of $1/15^{th}$ share each to plaintiffs 1 to 4 in the plaint A schedule property and $1/30^{th}$ share in the plaint B schedule property. The case of the plaintiffs was that plaintiffs 1 to 3 are the sons and plaintiff No.4 is the daughter of defendants 3 and 4. Defendants 1 to 3 are the sons of late Veeraiah. Plaint A schedule properties are the joint family properties of defendants 1 to 3 and the plaint B schedule property is a partnership concern belonged to defendants 3 to 5. Defendant No.5 owns 50 paise share while defendants 3 and 4 own 25 paise share each. The share of defendants 3 and 4 in the plaint 'B' schedule property is the joint family property of defendants 1 to 3. Defendants 1 to 3 are in the joint possession and enjoyment of plaint A schedule property and 50 paise share in the plaint B schedule property. Defendants 1, 2 and 5 deceived defendants 3 and 4 and hence defendant No.3 left the place a year prior to filing of the suit and in search of him, defendant No.4 also left Miryalaguda. Hence, the plaintiffs, who are the minor children of defendants 3 and 4, were under the care and custody of one Shivakoti Bhaskara Chary, the husband of defendant No.4's sister. After defendant Nos.3 and 4 left Miryalaguda leaving the minor plaintiffs to their fate, defendants 1 and 2 refused to adjust any amount for their education and maintenance. They also refused to partition the properties and to allot their share. Hence, they filed the suit. The suit against defendants 3 and 4 was dismissed for default and the subsequent petitions filed by them seeking to set aside the dismissal order were also dismissed and they have become final as the revisions preferred by them before this Court was also dismissed. After the death of defendant No.1, defendants 6 to 11 were brought on record as his legal representatives, but all of them remained ex parte along with defendant No.2. Only defendant No.5 has contested the suit.

3. Defendant No.5 filed written statement stating that there is no ancestral property to the plaintiffs and defendants 1 to 3. One Krishna Murthy, the eldest son of late Veeraiah and his 5 daughters viz., Annapurna, Kamalamma, Dhanamma, Nagalaxmi and Govindamma are to be tenants in common but they are not added as parties to the suit and in their absence the suit for partition is not maintainable. He further stated that in the firm, he is having 50 paise share and defendants 3 and 5 were having 25 paise share each prior to 08.07.1997. One month prior to that, defendant No.3 offered to sell his 25 paise share for the discharge of his antecedent debts and accordingly he purchased the same for Rs.50,000/- after having confirmed about the antecedent debts of defendant No.3 to Sarikonda Rama Krishna, Itepamula Pullaiah, Kommi Ramanaiah and Kotilingam from whom defendant No.3 borrowed amounts under the pronotes and also due of amounts as per the settlement of accounts by the firm. He also obtained the copy of promotes executed by defendant No.3 in their favour.

4. Later defendant No.4 also offered to sell her 25 paise share which is her Sthreedhana Property stating that since her husband incurred several debts for the maintenance of the family, as a true wife, she wanted to give the sale proceeds to her husband for the discharge of the debts. Then he made enquiry and came to know that defendant No.3 indebted to Vishnu Agencies a sum of Rs.22,794.40 ps. He obtained the true copy of account to that effect and then purchased the share of

defendant No.4 for a consideration of Rs.50,000/-. Both defendants 3 and 4 were paid the consideration by way of banker's cheque drawn on Indian Bank, Nalgonda. Defendants 3 and 4 executed a release deed on 28.10.1992 of their interest in the property which is a movable property. By virtue of it, he became the sole proprietor of the firm and later his two daughters Aruna and Nagarani joined as partners under the name and style of 'M/s.Cheedella Murali timber Merchants' and in the new firm he is having 60 paise share and his two daughters 20 paise each. Defendants 3 and 4 ceased to be the partners after 28.10.1992. Hence, the claim of the plaintiffs that 50 paise share in the plaint 'B' schedule property is joint family property of defendants 1 to 3 is not correct.

5. He further stated that defendants 3 and 4 are residing in the house bearing Door No.5-7-8/F, Manyam Chelka in Nalgonda along with the plaintiffs and the suit was got filed by them through the plaintiffs showing one Shivakoti Bhaskara Chary as guardian. By any stretch of imagination, said Bhaskara Chary cannot be considered as guardian to the plaintiffs. He also denied the case of the plaintiffs that they are entitled to $1/15^{th}$ share each in the plaint A schedule properties. Plaintiffs 1 to 4 and defendants 1 and 2 never had any share in the plaint B schedule property. He also denied the claim of the plaintiffs that defendant No.4 was only Binamidar in respect of her 25 paise share in the plaint B schedule property for defendants 1 to 3. He also stated that since plaint B schedule property is a partnership firm, the suit is not maintainable and sought for dismissal of the suit.

6. On behalf of the plaintiffs, PWs.1 to 4 were examined and Exs.A.1 to A.7 were marked. On behalf of the defendants, DWs.1 to 9 and CW.1 were examined and Exs.B.1 to B.11 were marked.

7. The trial Court, basing on the above pleadings, framed the following issues.

> "1. Whether the interest of D-3 and D-4 in the plaint B schedule properties was the joint family property of late Veeraiah and D-1 to D-3?

2. Whether D-3 and D-4 released their interest in the B schedule property in favour of D-5, if so, does it binds on the plaintiffs?

3. Whether the suit for partition of the schedule mentioned property is maintainable even after its dismissal against D-3 and D-4?

4. Whether there was a prior partition of the properties of late Veeraiah?

5. To what relief?

8. With regard to Issue No.1, the trial Court discussed in its judgment that admittedly the plaintiffs had no personal knowledge of existence of any ancestral property to late Veeraiah and they did not file even a single document to that effect. It is the specific case of the defendant No.5 that the property acquired by Veeraiah himself was partitioned during his life time among himself and defendants 1 to 3. The case set out by defendant No.5 has been proved by the evidence through the plaintiff witness itself because PW.2 in his cross-examination at para 13 of page 6 and in the chief examination at para 5 of page 2, has categorically stated that Veeraiah had no ancestral property and that the properties are his self-acquired properties. Apart from that, P.W.3, who is none other than the brother-in-law of defendants 1 to 3, also has categorically stated that Veeraiah had no ancestral property. Therefore, whatever the property that was available in the family of late Veeraiah and his son, is self-acquired property to say that 25 paise share each held by defendants 3 and 4 in the plaint 'B' schedule property forms part of the joint family property or the nucleus of it is from ancestral property. Ex.A.1 filed by the plaintiff shows that the land for construction of the saw mill was purchased in 1979 by defendant No.5, late Veeraiah and defendant No.3 and the share of defendant No.5 is 50 paise and that of defendant No.3 and his father Veeraiah was 25 paise share each. Defendant Nos.3 and 4 joined as partners along with defendant No.5 in the partnership firm and the shares of defendants 3 and 4 are 25 paise each. It was the specific case of defendant No.5 that after the

retirement of late Veeraiah, defendant No.5 was taken as the new partner with 25 paise share and it is fortified by the evidence of plaintiffs' witness as PW.2, who is an independent person, has categorically stated that Veeraiah, before his demise, gave away his 25 paise share in the schedule B property to defendant No.4. Apart from that, PW.3 has also stated in his evidence that late Veeraiah gifted away his 25 paise share in the schedule B property in favour of defendant No.4 for the services rendered by her to him in his last stage of life. Examining the said evidences, the trial Court held that 25 paise interest each held by defendants 3 and 4 in schedule 'B' property is their own property and plaintiffs cannot claim that it is a joint family property and decided issue No.1 against the plaintiffs.

9. With regard to issue No.2, defendant No.5, to support his case with regard to purchase of 25 paise share each of defendants 3 and 4 in plaint B schedule property, has examined DWs.3 and 4 who are the attestors of Ex.B.8 release deed. Both these witnesses have categorically deposed that Ex.B.8 release deed was executed by defendants 3 and 4 in their presence and informed that they received the consideration of Rs.50,000/- each by way of a banker's cheque. DW.3 has further stated that both defendants 3 and 4 have shown him the drafts that they received from defendant No.5 towards the consideration for the 25 paise share each sold by them. They have categorically denied the suggestion that as defendant No.4 underwent a spinal card operation in a hospital at Hyderabad, she could not physically present on the date of Ex.B.8. Except giving the suggestion to this effect, nothing was elicited in the cross-examination of these witnesses to discredit them. By virtue of Ex.B.8 release deed, defendant No.5 became the sole proprietor of the firm as the share held by defendants 3 and 4 become the firm property and later the firm was reconstituted by defendant No.5 by inducting his two daughters as the partners with a new firm which got registered as evidenced by Ex.B.10. Hence, the plaintiff's claim that still 25 paise share each held by defendants 3 and 4 is deemed to be in

possession and enjoyment by themselves and defendants 1 to 3, has no force to sustain.

10. The case of defendant No.5 is that defendants 3 and 4 have sold their interest of 25 paise share each in the plaint B schedule property to discharge the antecedent debts incurred by defendant No.3 and he verified personally with the creditors of defendant No.3 and in fact obtained the promotes executed by defendant No.3 in their favour under the originals of Ex.B.3 to B.5 and B.7. He also examined DW.5 whose evidence is that defendant No.3 borrowed Rs.10,000/- from him on 09.05.1992 and executed the pronote in Ex.X.1 which is the original of Ex.B.4 given by him to defendant No.5. DW.6 is another witness from whom defendant No.3 borrowed Rs.27,300/- and executed the pronote under the original of Ex.B.3. The evidence of these two witnesses shows that defendant No.3 incurred the debts and executed pronotes. DW.7 is one Mohan whose evidence shows that there was Sri Vishnu T.V.S. Showroom in which defendant Nos.2 and 3 and one Shobha Rani were partners and defendant No.3 continued as a partner in it till 1992-93 and later retired from the partnership business and when the accounts were settled, he was found due of Rs.22,000/-. DW.7 worked in the partnership firm and maintained the accounts. His evidence further shows that he has given the accounts extract in Exs.B.6 to D.5. In his cross-examination, the only suggestion given was that he is giving false evidence to cause harm to plaintiffs. Accordingly defendant No.3 was not found due of any amount to other partners as deposed by him. At the same time, it is not explained what is the motive for him to depose false against the plaintiffs. No suggestion was given to him that defendant No.3 was not the partner along with defendant No.2 and Shobha Rani in the said showroom in 1984. Thus, the trial Court observed that the evidence of DWs.5 to 7 has amply proved the antecedent debts of defendant No.3.

11. The trial Court also observed that if really the plaintiffs pleaded in the plaint that the debts of defendant No.3 are ‘Avyavaharika’ which

means immemorial, then the burden would have been on defendant No.5 to prove the borrowing of amount and the sale of interest in the plaint B schedule property by defendants 3 and 4 was for the benefit of the minors. Thus, even assuming for a moment that the interest of defendants 3 and 4 in the plaint B schedule property is belonged to joint family, the alienation made by them cannot be challenged by the plaintiffs unless they establish that the debts incurred by defendant No.3 were 'Avyavaharika'. Accordingly, the trial Court answered issue No.2 against the plaintiffs.

12. With regard to issue No.3, the trial Court observed that defendant No.3, who is one of the coparcener of the so-called joint family, was not a party to the suit as the suit was dismissed against him long back and no steps were taken to restore the same.

13. Accordingly the suit was ended in futile and answered against the plaintiffs.

14. With regard to issue No.4, the trial Court, by taking into consideration of evidence of DW.7 coupled with Ex.B.11, answered against the plaintiffs. Accordingly, the trail Court dismissed the suit.

15. I have gone through the judgment and decree in question and perused the record, however, found no discrepancy, therefore I am not inclined to interfere with the same.

16. Accordingly, the appeal suit is dismissed with no order as to costs.

17. The miscellaneous petitions pending, if any, shall stand closed.

SURESH KUMAR KAIT, J

Date: 28.06.2016
TJMR