

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SMT JUSTICE ANIS

ASMP No.814 of 2011 in APPEAL SUIT No. 376 of 2006

and

APPEAL SUIT Nos. 376 of 2006 and 586 of 2007

COMMON JUDGMENT: *(Per VRS,J)*

Aggrieved by the dismissal of a suit for partition, the unsuccessful plaintiff has come up with A.S.No.376 of 2006 and the defendants 5 to 7 have come up with A.S.No.586 of 2007.

2. Heard Mr. V.L.N.G.K.Murthy, learned counsel for the appellant in one appeal, Mr. S.Rajan, learned counsel for the appellants in the other appeal, and Mr. K.V. Subrahmanya Narusu, learned counsel appearing for the respondents 2 to 4 in A.S.No.376 of 2006 and the respondents 3 to 5 in A.S.No.586 of 2007.

3. One Dasari Appala Swamy died intestate in 1978 leaving behind him surviving, his wife Kanakamma, three sons, by name, Sree Rama Reddy, Sydapa Reddy, and Lakshmana Rao, and a daughter, by name, Appala Narasamma. The mother, Kanakamma, also died in 1984. The eldest son, Sydapa Reddy, died in 1992.

4. In the year 2000, one of the three sons of Dasari Appala Swamy filed a suit for partition in O.S.No.1 of 2000 on the file of the VII

Additional District Court, Visakhapatnam, seeking a decree for partition and separate possession of his 1/3rd share in the suit schedule properties. In the suit, one of the brothers, namely, Dasari Lakshmana Rao, was impleaded as 1st defendant, despite the fact that at least two years before the institution of the suit, Lakshamana Rao had died in 1998 itself. The legal heirs of the eldest son, Sydapa Reddy, who died in 1992, were impleaded as defendants 2 to 4.

5. Quite strangely, the plaintiff did not even disclose in the plaint that he had a sister, by name, Appala Narasamma. On the contrary, his claim was that his father, Dasari Appala Swamy, retired from service in 1956; that thereafter, the eldest son, Sydapa Reddy, became the kartha of the undivided family; that after the death of Dasari Appala Swamy and Kanakamma, their three sons, namely, Sree Rama Reddy, Sydapa Reddy, and Lakshmana Rao, became entitled to 1/3rd share each in the suit schedule properties.

6. After the defendants 2 to 4 representing one branch entered appearance and filed a written statement pointing out that the 1st defendant had died at least two years before the institution of the suit, the plaintiff chose to implead the three legal heirs of the 1st defendant as defendants 5 to 7. But, he did not choose to take any steps either to mend his ways or to amend the pleadings, by impleading his sister as a party to the suit.

7. The 2nd defendant filed a written statement contending *inter alia* that the suit was bad for non-joinder of necessary parties; that the plaintiff had not come to Court with clean hands, inasmuch as he had impleaded his deceased brother as 1st defendant; that the properties described in paragraph-5 of the written statement were not the joint family properties, but were the self acquired properties of the eldest son, Sydapa Reddy; that there was a partnership firm started under the name and style of D.S. Reddy and Co., which undertook civil works, and on account of which, certain properties were purchased; that one of the properties was also sold, treating it as a self acquired property; that Sydapa Reddy had already executed a registered Will on 15.07.1992 bequeathing the properties acquired by him to the defendants 2 to 4; and that, therefore, there was no case for partition.

8. The 6th defendant filed a written statement on behalf of the defendants 5 to 7, virtually supporting the case of the plaintiff, except to the extent that their father, Lakshmana Rao impleaded as 1st defendant, had died two years before the institution of the suit.

9. On the basis of the pleadings so made by the parties, the trial Court framed the following issues for consideration:

- 1) *Whether the suit schedule properties are the joint family properties as contended by the plaintiff?*

- 2) *Whether the suit schedule properties are the self acquisitions of Dasari Sydapa Reddy as alleged by the defendants?*
- 3) *Whether Dasari Sydapa Reddy executed a Will dated 20.06.1973?*
- 4) *Whether the plaintiff is entitled to partition of the suit schedule properties, and if so, to what share?*
- 5) *Whether the plaintiff is entitled to a separate possession of the suit schedule properties as claimed?*
- 6) *To what profits is the plaintiff entitled?*
- 7) *To what relief?*

10. The plaintiff examined himself as P.W.1 and filed 15 documents as Exs.A.1 to A.15. He also examined a person, who allegedly mediated between the parties as P.W.2. In order to prove the issue of reply notice under Ex.A.15, he also examined an advocate as P.W.3. The defendants 2 to 4 examined the 3rd defendant as D.W.1. The 5th and 6th defendants examined themselves as D.Ws.2 and 3 respectively. No documents were filed on behalf of the defendants.

11. The trial Court held on issue No.1 that the suit schedule properties were the joint family properties, as contended by the plaintiff. On the third question as to whether Sydapa Reddy executed a Will, dated 20.06.1973 or not, the trial Court held that there was a Will executed by Dasari Appala Swamy. On issue Nos.4 to 6, the trial

Court held that Appala Narasamma was a necessary party to the suit, and that one of the daughters of Sydapa Reddy had also not been impleaded as a party to the suit, and that, therefore, the suit was bad for non-joinder of necessary parties. On the basis of Ex.A.15, the trial Court also came to the conclusion that there was ouster. As a consequence, the trial Court dismissed the suit. Hence, the present appeals.

12. After five years of filing of the appeal, A.S.No.376 of 2006, the plaintiff appears to have woken up to the reality and came up with an application in A.S.M.P.No.814 of 2011 for impleading the legal heirs of Appala Narasamma as respondents 8 to 10 in the appeal. Therefore, the said miscellaneous petition was also taken up along with the main appeal.

13. In the light of the foregoing, the points arising out of determination in these appeals are:

- 1) Whether the dismissal of the suit for partition by the trial Court was proper and justified, especially in the light of the finding that the properties were the joint family properties?
- 2) Whether the Court below was right in holding ouster against the plaintiff, especially when the defendants 2 to 4 set up a plea that the properties were the self acquired properties and not the joint family properties? and

- 3) Whether the defect of non-joinder of necessary parties could continue to be held against the plaintiff, when he has now taken steps to implead?

POINTS 1 TO 3:

14. At the outset, the plaintiff/appellant in A.S.No.376 of 2006, who died during the pendency of the appeal and whose legal representatives have been brought on record as appellants 2 to 6, did not come up with clean hands. First, the plaintiff did not even plead the existence of a sister, by name, Appala Narasamma. The plaintiff's averments proceed on the basis that Dasari Appala Swamy left behind only his wife and three sons. It may be a different issue, if the existence of a sister is mentioned, but a stand is taken that she is not entitled to a share. But, when a person chooses to completely suppress the existence of one of the legal representatives, such a person cannot be taken to have come to Court with true and full disclosure of all material facts.

15. The second mistake committed by the plaintiff was that despite being a twin brother of the 1st defendant and despite claiming to be living in the very same house, he chose to implead his twin brother, who died in 1998, as a party to the suit filed in the year 2000. If the other averments contained in the plaintiff's plea to the effect that the plaintiff was residing in the very same house along with the others, are true,

then the impleadment of a dead brother could be taken only to be a deliberate intention to snatch away a decree from Court by suppressing the relevant information.

16. The third mistake committed by the plaintiff was that despite the defendants 2 to 4 pointing out the existence of a sister, by name, Appala Narasamma, he did not choose to implead her as a party to the suit. He has chosen to do so only in the first appeal, A.S.No.376 of 2006, that too, after a period of five years of filing of the first appeal. Therefore, the plaintiff is a person, who was not entitled to any relief at the hands of the Court.

17. Even if we keep aside the conduct of the plaintiff, we do not think that the judgment and decree of the Court below call for any interference. It is true that the plea raised by the defendants 2 to 4 that the properties were the self acquired properties of Sydapa Reddy, was rejected by the trial Court. But, the plaintiff himself filed Ex.A.15-reply notice and examined the advocate, who issued the reply notice, as P.W.3. Under Ex.A.15, it was mentioned very clearly that the properties were always treated by Sydapa Reddy as his own, and that he had also transferred some of the properties. A plea that Dasari Appala Swamy had executed a registered Will, was also taken in the reply notice. In other words, the right of the plaintiff to seek partition was categorically denied under Ex.A.15.

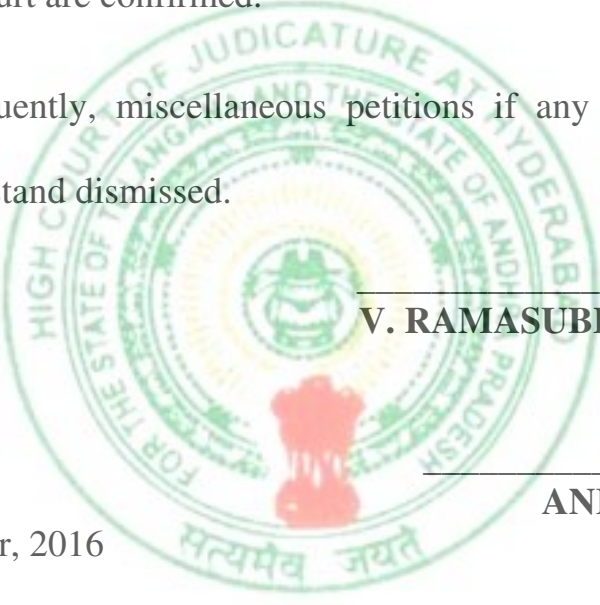
18. The reply notice, Ex.A.15, was dated 06.06.1986. After having received the notice, the plaintiff chose to keep quiet for 14 years and came up with a suit for partition only in the year 2000. Therefore, even if the plea of the defendants 2 to 4 that the properties are the self acquired properties, is rejected, the plaintiff, by his own pleadings and by his own evidence, appears to have been ousted. Hence, we hold all the points arising for consideration against the plaintiff/appellant in A.S.No.376 of 2006 and the judgment and decree of the Court below do not call for any interference.

19. Insofar as the defendants 5 to 7/appellants in A.S.No.586 of 2007 are concerned, they chose only to ride on the back of the plaintiff by filing a written statement seeking a decree for the plaintiff. They did not seek a decree for partition for themselves. In a suit for partition, every plaintiff is a defendant and every defendant is a plaintiff. But, if a defendant chooses to remain only as a defendant and does not seek a decree, then he cannot be considered as a plaintiff. Since the defendants 5 to 7 did not seek a decree for themselves, but merely chose to ride on the back of the plaintiff, the Court below could not pass a decree in their favour on the basis of the finding that the properties were the joint family properties. However, under issue No.7, the Court below made it clear that the appellants in A.S.No.586 of 2007 were at liberty to work out their rights by separate

proceedings, subject to the law of limitation. It is relevant to note that the decree of the Court below is dated 30.09.2005. Instead of choosing to take up their rights independently, the appellants in A.S.No.586 of 2007 have unnecessarily spent about 11 years in prosecuting the appeal. Therefore, their appeal also deserves to be dismissed.

20. Accordingly, A.S.M.P.No.814 of 2011 in A.S.No.376 of 2006 and both the Appeal Suits are dismissed and the judgment and decree of the trial Court are confirmed.

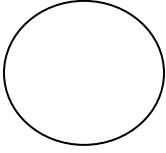
Consequently, miscellaneous petitions if any pending in the appeals shall stand dismissed.



V. RAMASUBRAMANIAN, J

ANIS, J.

15th September, 2016
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