

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.C.C.A.No.116 of 2014

JUDGMENT :

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The defendants 1 to 6 out of 9 of whom 5th defendant/5th appellant died even before trial Court and her legal representatives already on record, in O.S.No.475 of 2008 filed by the sole plaintiff Smt. Kishori Soni for partition of the plaint schedule property into seven shares and allotment of such (1/7th) share to the plaintiff and also to grant perpetual injunction restraining the defendants from changing the nature of the suit schedule property, preferred this appeal against the plaintiff as 1st respondent and defendants 7 to 9 as respondents 2 to 4 aggrieved by the judgment and decree dated 02.06.2014 passed by the III Additional Chief Judge, City Civil Court, Hyderabad, decreeing the suit with costs granting preliminary decree directing the defendant Nos. 1 to 4 and 6 to partition the schedule property into six equal shares and to allot 1/6th share to the plaintiff by name Smt. Kishori Soni. The contentions in the grounds of appeal are that the trial Court's decree and judgment besides contrary to evidence and provisions of law in ignorance of the facts that by virtue of Ex.B.1, appeal 1st respondent-plaintiff even became the owner of a small mulgi in H.No.3-3-61/6 (Part of plaint schedule) and therefrom all the other mulgies bearing Nos.3-3-62,3-3-64,3-3-64/1,3-3-64/2,3-3-54/10 belong to the appellants-defendants and so far as the 1st appellant-D.1 concerned, is entitled to all the upper floors of the mulgies including on the mulgi 3-3-61/6 (belongs to plaintiff) and thereby granting of 1/6th share to the appeal 1st respondent-plaintiff in the entire plaint schedule property is untenable, that the factum admitted by the plaintiff of she was not a party among the applicants in the application made to GHMC for construction of apartments but the trial Court erred in saying plaintiff's signature also appearing in the application made to GHMC though she was not signatory, that the

plaintiff failed to prove her right over the schedule property, thus granting 1/6th share to her is untenable, that the mulgi of the plaintiff was already demolished in the road widening and the trial Court erred in holding that the property was demolished in the road widening as per the undertaking given by the plaintiff along with others is contrary to the evidence on record, more specifically, contrary to the evidence of 1st respondent-plaintiff, that the finding of the trial Court that record shows the entire property is thrown into common stag for the development of property and subsequently, the plaintiff's share was denied, is contrary to the evidence on record, that admittedly, the right of the 1st respondent-plaintiff was limited to mulgi No.3-3-61/6 and she failed to depose and establish the extent of land of mulgi 3-3-61/6 and hence to set aside the judgment and decree of the trial Court by allowing the appeal.

2. The plaintiff, 1st respondent to the appeal put forth appearance in contesting the matter, leave about the defendants 7 to 9/respondents 2 to 4 of the appeal, the defendants 1 to 6/appellants reiterated the same in the course of hearing in support of their grounds of appeal.

3. Whereas, it is the contest of the 1st respondent-plaintiff in support of the trial Court's decree and judgment as correct and with the say that for this Court while sitting in appeal there is nothing to interfere and hence to dismiss the appeal.

4. Perused the material on record.

5. Now the points for consideration in deciding the appeal are :

1. Whether the plaintiff is not entitled to share by separate possession by taking mulgi 3-3-61/6 out of mulgis shown in the plaint schedule and same is acquired by Government in road widening and demolished and nothing left of the site therein in the other mulgies area developed by defendants according to them and if so, as contended by defendants 1 to 6-cum-

appellants, plaintiff is not entitled to any share much less 1/7th as claimed or 1/6th as granted by trial Court and if so the trial Court's preliminary decree for partition of 1/6th share pursuant to the judgment is unsustainable and requires interference by this Court, and if so to what extent?

and

2. With what result?

Point No.1:

6. In deciding the point 1 formulated for consideration supra of the appeal lis, the factual matrix of the case necessary to mention in nutshell is that, as per the plaintiff, herself and the defendants 1 to 6 in particular are the legal heirs of late S.Balram Sony, who died intestate on 15.11.2005 leaving behind him the immovable property bearing Municipal Nos. 3-3-61/6, 3-3-62, 3-3-64, 3-3-64/1, 3-3-64/2 and 3-3-54/10 total 637 sq.mtrs. situated at Chappal Bazar, Kachiguda, Hyderabad, that said S.Balram Soni acquired the properties out of the source of income from electrical business and he died intestate and he appointed his second wife Subhadra Devi to hold the property as Trustee for the welfare of all the children as his first wife, no other than the 5th defendant Shyamala Devi, was not keeping good health, that the plaintiff and the defendants thereby constitute joint family in enjoying the suit property and defendants 2 and 6 are brother and sister of plaintiff respectively and D.1,3 and 4 are step-brothers and sister of plaintiff respectively, that while all are allowed to enjoy the property, plaintiff herein is assigned to collect rents from Mulgi No. 3-3-61/6 and 3-3-61/7 and D.4 was assigned Mulgi No.3-3-64/2 and D.6 was assigned Mulgi No.3-3-64/1 and subsequently the Municipal assessment was assigned on their names respectively and Subhadra Devi-the 2nd wife of late S.Balaram Soni, was only a trustee and a nominal holder, that after the death of Subhadra Devi, the defendants 1 to 4 in collusion and in order to deprive share of the plaintiff and

defendant No.6 in the suit property, conspired to alienate to 3rd parties from which the D.6 herein filed O.S.No.618 of 2006 on the file of the learned I Senior Civil Judge, City Civil Court, Hyderabad for partition and separate possession of her 1/7th share mentioning true facts and the plaintiff herein as one of the defendants therein received suit notices and waited under bona fide impression of she would get allotment of her 1/7th share in the property, however while the things stood thus, on 05.01.2008 the defendants in collusion with one another demolished the Mulgi No.3-3-61/6 allotted to the plaintiff along with other structures without knowledge or consent of her and when plaintiff questioned, they did not respond which made her to lodge a report before Kachiguda P.S., where she was stated that as it is a civil dispute and advised to approach competent civil Court, that she came to know that the defendants conspired with D.7 Builder for construction of a residential complex and also obtained permission from GHMC vide Permit No.154/68 dated 14.02.2008 and on that the plaintiff immediately submitted an application dated 29.02.2008 to GHMC to furnish the copies of the permission and other documents submitted by the defendants to G.H.M.C. under Right to Information Act and obtained the same and to her shock and dismay, the defendants obtained permission by misrepresentation and fraud, as if she signed in the sanctioned plan though she never signed and as the plaintiff as one of the defendants in the suit O.S.No.618 of 2006 filed by the D.6 herein, set ex parte, filed petition to set aside the ex parte order and while the same is pending, the D.6 withdrew the suit on 20.06.2008 and thereafter started proceeding with the construction work which made the plaintiff to file the present suit for the reliefs herein.

7. The defendants 1 to 6 filed common written statement, leave about the separate written statement of D.8 and 9 as legal heirs of late D.7 vide order in I.A.No.844 of 09 dated 08.12.2009, needless to say the defendants 2 and 6 the other legal heirs along with plaintiff being

the children of late D.5 on record, that the D.5 late Shyamala Devi and Subhadra Devi acquired the suit schedule property under two sale deeds with their income and late Subhadra Devi never acted as a trustee much less looked after the family affairs, that the D.5 Shyamala Devi, the owner of Mulgi No.3-3-54/10 whereas, Subhadra Devi was owner of Mulgi Nos.3-3-61/6, 3-3-61/7, 3-3-62, 3-3-63, 3-3-64, 3-3-64/1 and 3-3-64/2, that late Subhadra Devi in her lifetime bequeathed her property covered by sale deed dated 01.02.81 to the plaintiff and the defendants 1,3 and 6; that D.1 to D.5 entrusted the suit property to M/s. Raghavendra Engineers and Developers for development and obtained Municipal permission through D.7, that the Mulgies covered by 3-3-61/6 and 3-3-64/1 facing road were demolished for road widening and D.6 who filed O.S.No.618 of 2006 for partition withdrew the suit, that the defendants 1 to 6 are not aware about the police complaint and submitted that ever since the death of Smt. Subhadra Devi, beneficiaries of Will were in possession and enjoyment over their respective portions in the suit schedule property and the proposed complex which is under the development is much away from the Mulgies of the plaintiff and D.6 and demolished for road widening, that the plaintiff has no sort of rights or claims in respect of suit schedule property except her Mulgi bearing No.3-3-61/6, that the plaintiff contrary to the same filed the present suit to harass and extract moneys under threat of litigation and submitted that D.5 and defendants 1 to 4 and 6 being exclusive owners of the suit schedule property are entitled to deal with the same excluding plaintiff Mulgi bearing No.3-3-61/6 and also submitted that in view of the same the suit property is not liable for partition and denied any share to the plaintiff saying the suit is liable to be dismissed.

8. The written statement of D.8 and D.9 supra is with contest that S.Balaram Soni died leaving the plaintiff and D.2 to 6 and he had two wives namely D.5 Shyamala Devi and Subhadra Devi, and they are the owners of the suit schedule property, that the D.1,3 and 4 are

children through his second wife Subhadra Devi while D.2 and 6 are through his first wife Shyamala Devi(D.5) and it is denied of late Balaram Soni acquired the suit schedule property with his business income or his 2nd wife late Subhadra Devi acted as Trustee for the same and she looked after family affairs. It is contended that Late Shyamala Devi(D.5) is the owner of the House No.3-3-54/10 and late Subhadra Devi is the owner of House No.3-3-61/6 and 3-3-61/7, H.No.3-3-61 to 64 and 3-3-64/1 and 3-3-64/2 and also Smt. Subhadra Devi through will dated 01.02.1981 bequeathed said house property to the plaintiff and defendants 1,3 and 4 and the plaintiff got the Mulgi No.3-3-61/6 in the said will, that with regard to the D.1 to 5 the schedule property was entrusted to D.7, through D.7 signed on municipal plan for obtaining permission for developing the same into building and as per the terms, the owners i.e. defendants 1 to 5 and the defendant No.8 are entitled each 50% share in the super structures, as such the plaintiff and defendant No.6 got Mulgies Nos. 3-3-61/6 and 3-3-64/1 in the will and the said Mulgies are facing to the road and subsequently they were demolished in the road widening and also away from the Mulgies given to the plaintiff and defendant No.6 in the will and in view of the same, the plaintiff has no right over the suit schedule property and hence to dismiss the suit.

9. The trial Court therefrom framed the issues as to Whether the plaintiff is entitled for partition of the plaint schedule property by allotting 1/7th share as prayed for, whether the plaintiff has no cause of action to file the suit and to what relief.

10. On the evidence of the plaintiff as P.W.1 with reference to Exs.A.1 to A.13 viz; certified copy of site plan, dt. 14.03.2008, letter dated 29.02.2008 addressed by the plaintiff to the Town Planning Officer, letter dated 16.10.2007 addressed by the deceased Subhadra Devi to the Municipal Commissioner of Hyderabad, copy of complaint dated 06.01.2008 addressed by the plaintiff to the Station House

Officer, Kachiguda Police Station, electricity bill, municipal tax receipt, lease deed dated 10.08.2006, bunch of rental receipts, memo filed in O.S.No.616 of 2006, photographs, copy of private complaint, development agreement and encumbrance certificate; and on behalf of the defendants, the D.2 Pradeep Kumar was examined as D.W.1 and placed reliance on Exs.B.1 to B.3 viz; Will deed dated 01.02.1981, sale deed bearing No.299 of 1958 and sale deed bearing No.2032 of 1956. It is from the said pleadings and evidence supra, the trial Court held that undisputedly the plaintiff and D.1 to 4 and 6 are children of late of S.Balram supra out of two wives of Balram Soni including D.5 Shyamala Devi and as the two wives also died, the plaintiff and defendants 1,4 and 6 are the legal heirs of them; though original documents filed were Exs.A.1 to A.13 shown misplaced in the Court records permitted to substitute with Photostat certified copies since marked shows all the defendants and plaintiff addressed a letter to the municipal authorities requesting to grant permission for construction since belonging to the portion of the plaintiff was also earlier demolished and to support the case of the defendants and plaintiff were separated and with no right to claim partition, there is nothing on record and Ex.A.7 rental deed executed by the plaintiff in the name of Wasim Ahmed Khan and Ex.A.8 is also receipts to that effect, till then there is no dispute in respect of the plaintiff's property and subsequently the same appears to have been demolished and thereafter the plaintiff and defendants together addressed a letter to the municipality for sanction of plan which was dated 16.10.2007 wherein the so called property of the plaintiff also shown as one of the items with other properties of the plaint schedule viz; 3-3-61/6 mentioned in the said Ex.A.3 letter to the Municipal Commissioner for approved plan for the proposed construction mentioning that the effected portion for road widening admeasuring 113.18 Sq.Mts and also contains some annexures, wherein the same property is mentioned by Shyamala Devi along with the boundaries, plan and also undertaking in respect

of the road widening wherein all the defendants along with the plaintiff stated to have given under taking to the Municipal authorities, the plaintiff no doubt denied the same signature, in the and also a plan attached to that Ex.A.3 also it is clearly shown that the plan proposed commercial building including the plaintiff's door number.

11. Even coming to the dispute of the claim of plaintiff as her father purchased the property in the name of his two wives, that is not of much in dispute as plaintiff also admitted execution of the Will and allotment of share to plaintiff by deceased Subhadra Devi with occupation of plaintiff and letting out however, that was subsequently demolished in the road widening process and therefrom the entire property thrown into common stock for development purpose pursuant to which applied to the municipality for permission with undertaking to leave the site for road widening and the defendants cannot thereby now contend of the plaintiff's property was demolished. It clearly speaks from the record itself after said demolition of the structures in whose property it is in doubt after said demolition entire property thrown to common stock and applied for development under Exs.A.2 and A.3 referred supra and as such, the plaintiff is entitled along with the defendants 1 to 4 and 6, $\frac{1}{6}$ th share, though initially asked for $\frac{1}{7}$ th share including of D.5 since D.5 died intestate and thereby the suit of the plaintiff is decreed.

12. It is impugning the same as referred supra, the present appeal is maintained and from the hearing as referred supra in deciding point for consideration formulated supra now it is clear of Balram Soni died intestate on 15.11.2005 leaving behind two wives, the first wife is no other than the 5th defendant Shyamala Devi only died pending the suit and the second wife is Subhadra Devi, shows executed Ex.B.1 registered will deed dated 01.02.1981 and died later testate in the year 2003, prior to the filing of the suit, and as per the bequeaths in the Will came into force after her death in 2003, the Mulgi No.3-3-61/6 shown

allotted to the plaintiff and the bequeath made to defendant No.6 who was plaintiff in O.S.No.618 of 2006 that was later withdrawn by her, who was allotted Mulgi 3-3-54/10. Importantly in the item of the property covered by Ex.B.3 sale deed of purchase by Subhadra Devi, Mulgi 3-3-61/6 not at all covered that could not even be disputed by any of the defendants including the appellants herein. Further what it shows undisputedly is that the Ex.B.3 sale deed of Subhadra Devi nowhere shows the door No.3-3-61/6. It is the Mulgi later constructed and door Number allotted it appears and consequently referred in the bequeaths of Ex.B.1 will registered on 01.02.1981 and the plaintiff's evidence also proves the same. The letter addressed under Ex.A.3 itself shows confusion regarding existence of D.No.3-3-61/6 to give any sanctity to the bequeaths apart from the demolition of the shops abutting road for road widening not in dispute. A perusal of the Exs.A.2 and A.3 to read with Ex.A.1 site plan pursuant to Exs.A.2 and 3 letters, leave about the plaintiff's disputed signature, as concluded by the trial Court in its recitals and evidence clearly show common application for approved plan of the entire site to make new constructions by throwing the site into the common hotchpot, there is entitlement to the plaintiff also share along with the D.1 to 4 and 6 for D.5-1st wife by name Shyamala Devi since died pending suit, for all others are entitled being the legal heirs of Balram Soni. Apart from it, the sales under Exs.B.2 and B.3 stand in the name of the two wives of Balram Soni-father of the plaintiff and D.1 to 4 and 6 were of the years 1956 and 58 respectively and there is nothing to show Shyamala Devi and Subhadra Devi were having any independent sums, but for the income in electrical goods business by late S.Balaram Soni, with which the properties were acquired and that supports the contention of plaintiff, leave about as concluded by the trial Court even Shyamaladevi and Subhadra Devi were shown particularly of Subhadra Devi executed registered deed (Ex.B.1) and mere enjoyment of property by payment of tax for any portion let out by the

plaintiff covered by Exs.A.5 to A.8 during the years 2006 and 2007 no way gives any conclusion much less to say the so called demolished road side portion is with cogent evidence covered by Mulgi No.3-3-61/6, leave about any separate enjoyment no way prevents under law the pooling of the site for all their common development and benefit of the property being the members of the joint family for convenient and common development of construction of apartments pursuant to the development agreement entered into with 3rd party through applications covered by Exs.A.2 and A.3 and obtained plan under Ex.A.1 for development through D.7 since died by L.Rs. D.8 and D.9 respectively, on record undisputedly. Thus what the trial Court concluded in granting share to the plaintiff, for this Court while sitting in appeal against it, it requires no interference, that too, it is not the case of the Exs.A.2 and A.3 contents are not correct, leave about one of the signatures thereon that of the plaintiff or not, from same is denied by the plaintiff. Once that is the case and when nothing shown of plaintiff received any compensation from the municipality and the correspondence covered by Exs. A.2 and A.3 including with common application of the development of the rest of the site for construction leaving that portion on the road side demolished for widening of road when otherwise not even entitles, the other defendants so to apply but for common pooling of the respective extents together for the development, which no way negates the entitlement of share by the plaintiff. Further, the defendants cannot act contra to Exs.A.1 to A.3 even under the principle of estoppel for not entitled to approbate and reprobate as part of the principles of estoppel under the law as a rule of evidence to bind for even none of the defendants entitled any otherwise to deprive the benefit of the plaintiff.

13. Having regard to the above, once applied under Exs.A.1 to A.3 for all their common construction and obtained the permission under Ex.A.1 in March 2008 and pursuant to which constructions are made and the earlier suit of D.6 in O.S.No.618 of 2006 in partition when

undisputedly while pending in which plaintiff also one of the beneficiaries with similar averments of the present suit in O.S.No.475 of 2008 since that was withdrawn behind back of plaintiff who was even originally exparte and application of her to set aside pending. behind her back, the present suit for no way barred much less by any principles of abitur or estoppel or res judicata or the like, and the law is very clear in this regard as laid down in **Cheedella Radhakrishna Sharma Vs. Cheedella Radhakrishnamurthy** reported as **Cheedella Padmavathy Vs. Cheedella Lakshminarasimha Rao** ^[1]

14. Accordingly, and in the result, the appeal is dismissed with no costs. Consequently, miscellaneous petitions, if any, pending in this appeal stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 28.01.2016

VVR

^[1] (2015) 5 ALT 634