

**HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO**

**C.R.P.No.2460 OF 2015**

**ORDER :**

The revision petitioner is the unsuccessful petitioner in I.A.No.44 of 2015 filed under Order 18 Rule 3 CPC reserving the right to adduce rebuttal evidence on the plea of past partition pleaded by some of the defendants while other defendants are admitting suit properties liable for partition as claimed by the plaintiff.

In the partition suit O.S.No.79 of 2008, which was on the file of Senior Civil Judge, Sompeta, Srikakulam District, the impugned order of the lower Court dated 11.03.2015 in dismissing the application reserving rebuttal evidence is with observation that the suit is of the year 2008 and is one of the identified cases and the issues settled in April, 2010 were recasted by framing additional issues in December, 2014 by allowing I.A.No.570 of 2014, for additional issues, which were during the cross-examination of PW.1 and later evidence of defendants also adduced and DWs.3 and 4, but for DW.5 in part even cross examined and at this stage rebuttal evidence application is filed which is not tenable and also by saying as per the expression of this Court in **Sundaragiri Ramulu v. Sundaragiri Siddi Rajaish @ Siddi Raju**<sup>[1]</sup>, even some of the defendants pleaded past partition, the burden initially on the plaintiff when not admitted entitlement to partition, to prove the entitlement of the partition and by ultimately dismissed the application. Same is now impugned in the revision as unsustainable and of the decision has no application to the facts, more particularly when some of the defendants admitted the

plaintiff's entitlement to partition supporting the suit claim and other defendants while not disputing entitlement, but for saying already there was an oral partition. It is practically to say from reading of Order 18 Rule 1 CPC read with Section 101 to 103 of the Evidence Act, the burden is on such of the defendants to disentitle the plaintiff's relief for partition from their plea of oral partition for otherwise they are admitting the entitlement. So also the other defendants admitting the entitlement leave it as it is PW.1 already came to the witness box that is the sole plaintiff and at that stage the rebuttal evidence application filed after commencement of trial. No doubt, with a right to reserve on the issues where the burden is on the contesting defendants setting up oral past partition. The law is fairly settled that procedural law is a hand made and not a mistake of justice and it will no way affect the substantial rights of the parties by irregularity in procedure. In fact, the expression of this Court earlier is very clear more particularly from **Nalajala Narasayya vs Nalajala Sitayya And Others**<sup>[2]</sup> which are reiterated in subsequent expressions of reserving rebuttal evidence right is only academic once entitled even no memo or application filed to reserve, from the right to rebut by shifting the burden, the party is entitled to adduce rebuttal evidence after the evidence of other side on whom the burden lies on some of the issues. Once such is the case, without even filing memo or application to reserve the rebuttal evidence on some of the issues on which burden lies on the other side to adduce evidence after the other sides evidence. Here when an application is filed, the dismissal of the same by the trial Court is baseless and unsustainable, so also the reasons are untenable.

Therefore, the revision petition is allowed by directing the trial Court to permit the plaintiff to adduce rebuttal evidence on the

pleas raised by some of the defendants setting up oral past partition after their evidence in that regard. The trial Court shall make endeavour for early disposal of the suit, pending for the past eight years. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in the revision shall stand closed.

**Dr.B.SIVA SANKARA RAO,J**

02.08.2016

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**HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO**

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**DATE: 02.08.2016**

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[\[1\]](#) 2008 (6) ALT 314  
[\[2\]](#) 1991(3) ALT 285