

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Second Appeal No.999 of 2016

JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908, by the unsuccessful 5th defendant is directed against the judgment and decree, dated 21.09.2016, of the learned I Additional District Judge, Mahabubnagar, passed in A.S.No.34 of 2014, whereby, the learned Additional District Judge while allowing the said first appeal filed by the 3rd defendant had set aside the judgment and decree, dated 01.07.2014, of the learned Principal Junior Civil Judge, Kalwakurthy, passed in O.S.No.141 of 2005 filed for partition of the plaint schedule properties into five equal shares and for allotment of 1/5th separate share to the original plaintiff, Vadyala Narsimha Reddy, the 2nd respondent herein.

2. I have heard the submissions of *Sri M.Rajamallu Reddy*, learned counsel appearing for the appellant/ 5th defendant (hereinafter, '5th defendant') and of *Sri R.Dheraj Singh*, learned counsel for the caveator 1st respondent/3rd defendant/transposed 2nd plaintiff. I have perused the material record.

3. At the stage of admission, submissions of the learned counsel for the parties are heard on the limited aspect as to whether the questions being raised as substantial questions or any other substantial questions are really involved; and if so, whether the second appeal deserves to be admitted for disposal on merits.

4. Before proceeding further, it is to be noted that the learned counsel appearing for the appellant/ 5th defendant formulated the following questions, as the substantial questions involved in the second appeal and they read thus:

- a) Whether the lower Appellate Court is justified in reversing the well considered judgment and decree of the trial Court

without touching the finding given by the Trial Court to the effect that the suit lands are owned and possessed exclusively by the 1st defendant/3rd respondent herein and the 1st defendant/3rd respondent herein has every right to alienate the suit schedule lands to whomsoever he wants to?

b) Whether the Lower Appellate Court is justified in reversing the well considered judgment and decree of the Trial Court without touching the finding of the Trial Court to the effect that the suit schedule land was purchased by the original 5th defendant/ appellant herein with the knowledge of the plaintiffs/respondents 2 to 5 herein?

c) Whether the Lower appellate Court is justified in reversing the well considered judgment and Decree of the Trial Court without considering the fact that the 2nd defendant/4th respondent herein as well as the husband of the original 3rd defendant/1st respondent herein put their signatures as witnesses to the sale deed in favour of the original 5th defendant/appellant herein which act of the 2nd defendant/4th respondent herein and the husband of the original 3rd defendant/1st respondent herein would amount to absolute sale by 1st defendant/3rd respondent and 2nd defendant/4th respondent herein under Section 41 of Transfer of Property Act and even assuming without admitting that the sale in favour of original 5th defendant/appellant is not for legal necessity?

d) Whether the Court below is justified in not working out the equities by allotting the property purchased by the original 5th defendant/appellant herein to the shares of defendants 1 and 2/respondents 3 and 4 herein?

e) The other reasons given by the Lower appellate Court in allowing the A.S.No.34 of 2014 by setting aside the well considered judgment and decree passed by the Court below are unsound and untenable in law?"

5. To begin with, it is necessary to mention the following vital aspect. The 2nd respondent/ sole plaintiff originally brought the suit against the defendants. However, as per the orders in I.A.No.31 of 2010 of the trial Court, the 3rd defendant, Lankala Jayaprada, got herself transposed as the 2nd plaintiff and prosecuted the suit. On the dismissal of the suit, the original 3rd defendant (2nd

plaintiff) preferred the first appeal. On the first appeal being allowed, the 5th defendant preferred this second appeal. The parties hereinafter shall be referred to as arraigned in the original suit for convenience and clarity.

6. The plaint averments, in brief, are as follows:

The original plaintiff and the 2nd defendant are the sons and the original 3rd defendant (transposed as 2nd plaintiff) and the 4th defendant are the daughters of the 1st defendant, Vadyala Venkat Reddy. The suit schedule lands are ancestral lands of the undivided joint family of the said parties and each member of the family is having a 1/5th share. On the death of Chadra Reddy, the father of the 1st defendant, succession was granted in the name of the 1st defendant being the son though the 1st defendant is not the exclusive owner of the suit schedule lands. The original plaintiff and the 2nd plaintiff and the defendants 1, 2 and 4 are in joint possession of the suit lands, as there was no partition by metes and bounds. The marriages of the 2nd plaintiff and the 4th plaintiff were performed after the amendment to the provisions of the Hindu Succession Act. So, they being the daughters of the family are also entitled to share in the suit lands of which the 1st defendant is the nominal pattedar. He has no right to alienate the same to others. When the original plaintiff came to know that the 1st defendant is taking advantage of the nominal patta in his name, and tried to alienate the properties, she opposed for the same. The 1st defendant with a *mala fide* intention and without any family needs alienated the suit schedule land in Sy.No.65 of an extent of Ac.8.21 guntas, on 18.03.2004, to the 5th defendant without the consent of the original plaintiff, the original 3rd defendant (transposed as 2nd plaintiff) and the 4th defendant. The said sale in favour of the 5th defendant is illegal, void and sham and is not binding on the plaintiff. The plaintiffs are coparceners. They need not seek cancellation of the said document. The 1st defendant also tried to sell some other lands, which are suit schedule lands. Hence, on 10.11.2005, the original plaintiff demanded the defendants for partition. But, the defendants 1 and 2

did not agree. The plaintiffs being coparceners are entitled to file the suit for partition irrespective of the illegal and void sales. Hence, the suit is filed.

7. The 1st defendant had remained *ex parte*. The original 3rd defendant (transposed as 2nd plaintiff) and the 4th defendant together filed a written statement supporting the case of the plaintiff. The 2nd defendant adopted the written statement of the said defendants 3 and 4.

7.1 The averments in the written statement of the 5th defendant, in brief, are as follows:

The relationship between the original plaintiff and the defendants 1 to 4 is correct. The 1st defendant is the Kartha and head of the family of the defendants 2 to 4. The land in Sy.No.65 is of an extent of Ac.15.02 guntas. The 1st defendant and his agnate, Vadyala Ram Reddy, S/o Kishta Reddy, are the joint owners of the said land. The 1st defendant and the said Ram Reddy are having half share each in the said land. The 1st defendant and the said Ram Reddy were in need of funds to meet the necessities of their respective families. So, on 10.10.2003, they offered to sell the said land of Ac.15.02 guntas to the 5th defendant @ Rs.26,000/- per acre. The 5th defendant gave Rs.21,000/- to the 1st defendant and Vadyala Ram Reddy as advance and earnest money. At that time, the original plaintiff and the 2nd defendant were also present. The said offer and acceptance was got reduced into writing as an agreement of sale on 30.10.2003. At that time, Vadyala Ram Reddy, the plaintiff, the defendants 1 & 2, Damodar Reddy, who is the husband of the 3rd defendant/transposed 2nd plaintiff, and Ajay Kumar Reddy, the husband of the 4th defendant, were all present along with other elders. At that time, the 5th defendant paid a sum of Rs.1,50,000/- to the 1st defendant and Vadyala Ram Reddy as part of sale consideration. Vadyala Ram Reddy signed the sale agreement. The 2nd defendant, who is the next elder member of the family, has also put his signature on the agreement in proof that the 1st defendant

entered into sale transaction for the benefit of the family and that the sale consideration was received for the benefit of the family. Several other elders and relatives of the family have put their signatures on the agreement of sale. In terms of the agreement, the 5th defendant paid the entire sale consideration to the 1st defendant and Vadyala Ram Reddy in the presence of the plaintiff, the 2nd defendant and the husbands of the defendants 3 and 4 and with their consent. The said Ram Reddy, the plaintiff, the defendants 1 and 2 and the husbands of defendants 3 and 4 having thus received the balance of consideration and delivered possession of the above mentioned lands to the 5th defendant and invited him for getting the document registered. Accordingly, on 18.03.2004, the 5th defendant went to the office of the Sub Registrar, Kalwakurthy. By that time, the sale deed was ready and the vendors together with the 5th defendant have presented the said sale deed for registration. The 2nd defendant, husband of the 3rd defendant, and others have put their signatures as witnesses to the said sale deed. Accordingly, the sale of the land was completed in favour of the 5th defendant. The allegation that the plaintiff and the defendants 1 to 4 are in joint possession of the above land is incorrect. The sale of the land was affected by the 1st defendant as head of the family to meet family expenses and the rights of the plaintiff and the defendants 1 to 4 have been extinguished. The plaintiff therefore cannot claim to be a co-owner and seek partition of the above said land, which was purchased by the 5th defendant. The allegation in the plaint that the 1st defendant's name was entered on succession and that he is the nominal pattedar and that the property is the ancestral property and that in that property, the original plaintiff, the 2nd plaintiff (3rd defendant) and defendants 1, 2 and 4 are having equal shares and that the plaintiff being the coparcener can ignore the sale and seek partition are all false. After the purchase of the above mentioned land of Ac.15.02 guntas in Sy.No.65 by the 5th defendant, the same was mutated in the name of the 5th defendant and his name was recorded in the Record of Rights

and pattedar pass book and title deed book were also issued to him in respect of the said land. Hence, the 5th defendant is the absolute owner and possessor of the said land. Therefore, the suit for partition is not maintainable and is liable to be dismissed. The land purchased by the 5th defendant cannot be included in the schedule of the properties of the suit for partition. The intention of the plaintiff and the defendants 1 to 4 is to create litigation. The suit in the present form is not maintainable.

8. Based on the above pleadings, the trial Court formulated the following issues for trial:

1. Whether the plaintiff is entitled for partition and separate possession of the suit land as prayed for?
2. Whether the plaintiff has included the land of Vadyala Ram Reddy out of Sy.No.65 to gain wrongfully?
3. Whether the plaintiff is liable to pay court fee U/s. 34(1) of A.P.C.F and S.V. Act?
4. To what relief?

8.1 At trial, on behalf of the plaintiff, PW1 was examined and Exhibits A1 to A4 were marked. No oral and documentary evidence was adduced by the defendants. The aggrieved 2nd plaintiff (transposed 3rd defendant) filed the first appeal suit; and the said first appeal suit was allowed. Therefore, the 5th defendant, who is the purchaser of the land in an extent of Ac.15.02 guntas in Sy.No.65 from the 1st defendant, brought this second appeal.

9. The learned counsel for the 5th defendant while reiterating the contentions of the 5th defendant in his written statement would forcefully contend that the property in Sy.No.65 in an extent of Ac.15.02 guntas was originally owned by the 1st defendant and his agnate and that the 1st defendant is the head of the family consisting of himself, the plaintiffs 1 & 2 and the defendants 2 and 4 and that the 1st defendant and Ram Reddy for their family necessities offered to sell the property and that at that time, not only the 1st

plaintiff but also the husbands of 2nd plaintiff and the 4th defendant and others were also present and that they were also present at the time of sale deed and receipt of balance sale consideration and that not only the family members but also the elders and relatives were also present and that in fact, the sale deed, which was registered was duly attested by Vadyala Ram Reddy, 1st plaintiff, Damodhar Reddy, the husband of the 2nd plaintiff, and Ajay Kumar Reddy, the husband of the 4th defendant, and that since alienation is made by the head of the family for family necessities and with the consent of the other members of the family, the suit for partition is not maintainable and that the sale deed is binding on the original plaintiff, the 2nd plaintiff (transposed 3rd defendant), defendants 1, 2 and 4 and that the 5th defendant is in peaceful possession and enjoyment of the property purchased by him and that the 1st appellate Court erroneously allowed the 1st appeal and that there are no concurrent findings and that the substantial questions, which are mentioned in the grounds of appeal, are involved, and hence, the second appeal may be admitted for hearing at the appropriate stage on merits. He alternately contended that the suit for partition without challenging the sale deed executed by the 1st defendant in favour of the 5th defendant is not maintainable and that in any view of the matter the 5th defendant who is the purchaser of the land is entitled to seek equities and that the 5th defendant's second appeal, therefore, deserves to be admitted.

9.1 On the other hand, the learned counsel on caveat for the 2nd plaintiff (transposed 3rd defendant) while supporting the decree and judgment of the Court below stated that there are no substantial questions of law involved in the appeal and that for working out equities, there is no need to admit the second appeal as the equities can be worked out if the said 5th defendant is entitled to any such equities at the time of passing of the final decree and that, therefore, the second appeal is devoid of merit and is liable to be

dismissed as no questions much less substantial questions are involved in the second appeal.

10. I have bestowed my attention to the facts and submissions.

11. The 1st plaintiff and the 2nd defendant are the sons and the 2nd plaintiff (originally 3rd defendant) and the 4th defendant are the daughters of the 1st defendant. The 1st plaintiff originally brought the suit for partition by impleading the 5th defendant, who purchased Ac.15.02 guntas in Sy.No.65 from the 1st defendant and one Ram Reddy under a registered sale deed. A half share in the said land is also the subject mater of the instant suit for partition. During the course of trial, the 3rd defendant is transposed as the 2nd plaintiff.

12. Now, the short question is – ‘Whether the 1st appellate Court is correct in reversing the decree and judgment of the trial Court and in decreeing the suit for partition?’

13. The property originally belonged to the father of the 1st defendant is not disputed before this Court and the Courts below. Even the case of the 5th defendant is that the 1st defendant is the Kartha of the joint family of the plaintiffs and the defendants 2 and 4 and that to meet the family necessities, he executed the sale deed in favour of the 5th defendant on 18.03.2004 along with Ram Reddy. Therefore, it is not the case of the 5th defendant that the half share in the property that was purchased by him from the 1st defendant and his agnate, Ram Reddy, is the exclusive half share of the 1st defendant. It is pertinent to note that the 2nd plaintiff (transposed 3rd defendant) was examined as PW1 and she reiterated the case pleaded in the plaint and placed reliance on Exhibits A1 to A4, which are the certified copies of the pahanies for the years 2002-03, 2000-01, 2001-02 and 1990-91, wherein the name of the 1st defendant was shown as pattedar and person in possession of the suit schedule property. She was not cross-examined and her evidence remained

unchallenged. It is not even explained as to why the 5th defendant has not cross-examined PW1 on any of the aspects of her examination in chief. The 5th defendant has neither deposed in the matter nor examined any witness on his side to dislodge the case of the plaintiffs and to substantiate his defence. So, he neither cross examined the PW1 nor adduced any evidence. He did not even file his sale deed. In spite of all these facts, the trial Court dismissed the suit for partition. Despite the fact that 5th defendant did not even file his sale deed, the trial Court made observations with regard to the contents of the said document, which is not before it, in an illegal manner and the said course is quite impermissible under facts and in law. When PW1 translated the pleaded case into acceptable evidence and when she was not cross examined, it follows that the statements in her chief examination are admitted. Further, non-examination of the defendant no.5 is also fatal to his defence as it is settled law that mere pleading is not evidence. Though it is the specific case of the 5th defendant that the 1st defendant alienated his share of the property covered by the sale deed as Kartha for family necessities, the 5th defendant failed cross examine the PW1 and further failed to adduce any evidence on his side. In fact, he did not even produce his sale deed before the trial Court.

13.1 Though the learned counsel for the 5th defendant/ appellant vehemently contended that the original plaintiff and the 2nd plaintiff failed to challenge the sale deed by seeking the relief to set aside the sale deed, the fact of the matter is that it is sufficiently established that the property is the coparcenary property of the family of the plaintiffs and the defendants 1, 2 and 4. Admittedly, the 1st defendant, who is one of the sharers and coparceners, alienated the property ignoring the shares of other sharers. Therefore, under the said document, no valid right, title and interest passed to the purchaser/ 5th defendant insofar as the shares of other sharers. Though the trial Court dismissed the suit mainly on the ground that the original plaintiff and the 2nd plaintiff (transposed 3rd defendant) failed to take steps for cancellation of the

registered sale deed dated 18.03.2004 in favour of the 5th defendant said to have been executed by the 1st defendant and his agnate, Ram Reddy, it is to be noted that the original plaintiff specifically pleaded that the property is ancestral coparcenary property and the sale deed is sham and nominal and that the said alienation was made with *mala fide* intentions and that he and the other sharers being coparceners, the said document is void in the eye of law and that he can file the suit for partition ignoring the said sale deed. As rightly held by the Court below, the sale of coparcenary property by one coparcener ignoring the shares of other sharers is void in so far as the shares of other sharers/ coparceners and therefore they need not seek to set aside the sale deed. Therefore, there is no need for the other coparceners or the co-sharers to seek cancellation of the sale deed, which is void to the extent of their shares. No one can convey a better title than what he has is the well settled proposition of law. Though it is the case of the 5th defendant that the property was alienated by the 1st defendant for family necessities, he failed to cross examine PW1 and adduce any oral evidence in rebuttal; and, even his document was not produced and exhibited before the trial Court; thus, the said defence was not established. Thus the evidence on the side of the plaintiff remained unchallenged and unrebutted. Learned counsel for the appellant-5th defendant placed reliance on the decision in Union of India and others v. Vasavi Co-operative Housing Society Limited and others¹ in support of the proposition that in a suit for declaration of title and recovery of possession, the burden always lies on the plaintiff to make out and establish a clear case for granting the said declaration and that the plaintiff succeeds on plaintiff's own strength but, not on the weakness, if any, of the case set up by the defendant and that the weakness in the case of the defendant would be no ground to grant the relief to the plaintiff. There is no dispute with the legal proposition. In the case on hand, the appellant-5th defendant did not cross-examine the sole

¹ (2014) 2 SCC 269

witness examined on behalf of the plaintiff and, therefore, the evidence on the side of the plaintiff remained unchallenged; further the appellant/5th defendant failed to enter into the witness box and give evidence and, therefore, the plaintiff's evidence remained un-rebutted and the defence of the appellant-5th defendant remained un-established. Therefore, it follows that in the case on hand the Court below recorded its well considered findings on the strength of the plaintiff's case but not on the weakness of the defence.

14. On the above analysis, this Court finds that the 1st appellate Court is justified in allowing the appeal and in decreeing the suit for partition.

15. Before parting, it is to be noted that the learned counsel for the 5th defendant/appellant also alternately contended that for the purposes of working out equities and to give an opportunity to the 5th defendant to work out his rights on the said aspect, it is just and fair to admit the second appeal for disposal on merits. On this aspect, learned counsel for the appellant-5th defendant relied upon a decision in *Stamahalakshmi v. Ramachandra Rao and others*² in support of the contention that in case of private alienation of a share by a coparcener, the purchaser of the share of the coparcener is entitled to seek equities and for examining the appellant's entitlement to equities and working out equities, the second appeal deserves to be admitted. In the instant case, the appellant-5th defendant having not cross-examined PW1 and not challenged the oral and documentary evidence on the side of the plaintiff and having not adduced any evidence in rebuttal did not even translate the case based on equities into acceptable evidence. In the well thought-out judgment of this Court, the said contention is also devoid of merit as the equities, if any, to which the 5th defendant would be entitled to under facts and in law, can always be worked out even during the final decree proceedings

² AIR 1957 AP 572

and the said aspect can be effectively be considered by the trial Court at the time of passing of the final decree.

16. Viewed thus, this Court finds that no substantial questions of law are involved and that the questions being sought to be raised as substantial questions are indeed not substantial questions and that there are no substantial questions involved in the second appeal and that there is no merit in the second appeal and that the second appeal is liable to be dismissed.

17. In the result, the Second Appeal is dismissed at the stage of admission.

It is needless to state that the 5th defendant is at liberty to claim, if he so chooses, any equities to which he may be entitled to under facts and in law, in the final decree proceedings.

No costs.

Pending miscellaneous petitions, if any, shall stand closed.

28th February, 2017
RAR

M. SEETHARAMA MURTI, J

