

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

Appeal Suit No.1318 of 1995

JUDGMENT:

Aggrieved by the dismissal of plaintiffs' suit for partition in O.S.No.29 of 1993 by the District Judge, Ranga Reddy District at Saroornagar, Hyderabad in his judgment dated 25.07.1995, the instant appeal is preferred.

2) The parties in the appeal are referred as they stood before the trial Court.

3) The factual matrix of the case is thus:

a) Plaintiffs 1 to 3 and defendants 2 and 3 are daughters of Vishwanatha Rao who died in 1970; D1 is the brother of said Vishwanatha Rao; D4 to D9 are third party purchasers; D10 and D11 are sons of D1.

b) The suit—O.S.No.29 of 1993 was filed by plaintiffs for partition and separation possession. Plaintiffs' case is that their father and D1 were coparceners and members of joint Hindu Family which owned agricultural lands admeasuring Ac.20.27 gts. in Sy.Nos.260 and 376 of Puppalaguda village mentioned in 'A' schedule and two houses bearing Nos.4-7-198 and 4-7-276 to 278 in Esamia Bazar, Hyderabad mentioned in 'B' schedule; during his life time, Vishwanath Rao being the Kartha of joint family, used to manage the joint family properties; after his death, plaintiffs and D1 are in joint possession and D1 is managing the

suit properties as Kartha; plaintiffs, D2 and D3 being lady members are staying at different places with their husbands; taking advantage of the same, D1 used to give small quantities of paddy and paltry amounts to them stating that he was incurring losses; then they demanded for partition for which he denied; plaintiffs learnt that D1 surreptitiously incorporated his name in the revenue records misrepresenting that he is the sole heir of Vishwanatha Rao.

Hence the suit.

c) Plaintiffs amended the plaint by adding para-5-A that sales if any effected in favour of D4 and D5 in respect of 'A' schedule properties and in favour of D9 in respect of 'B' schedule properties are void *ab initio* and not binding on them; that their grand-mother—Shivamma had no right to execute a Will in respect of 'B' schedule properties in favour of D10 and D11.

d) D.1 filed written statement admitting the relationship but denied existence of joint family; he contended that oral partition was already effected in 1942 and hence joint family status severed; Chandrappa had two sons—Vishwanatha Rao and Jaideva Rao (D1) and one daughter by name—Shyamamma; Chandrappa who was working in Revenue Department purchased agricultural lands in Rudraram and Puppalaguda villages in the name of Vishwanatha Rao; in the said oral partition, the lands in Sy.Nos.714 and 716 admeasuring Ac.22.11 gts. situated at Rudraram village fell to the share of Vishwanatha Rao and the lands in Sy.Nos.260 and 378 admeasuring Ac.20.27 gts. situated at Puppalaguda village fell to the share of D1; thereafter, Vishwanatha Rao sold away

the lands in 1950 itself and appropriated the sale proceeds; D1 is in exclusive possession and enjoyment of 'A' schedule lands and hence plaintiffs have no right over the said lands; so far as 'B' schedule properties are concerned, they are Stridhana properties of Shivamma wife of Chandrappa having purchased from out of her own funds; she sold away house bearing No.4-7-276 to 278 in favour of D9 in 1975 itself and bequeathed house bearing No.4-7-198 and 199 situated at Esamia bazar in favour of D10 and D11 who are the children of D1 by way of Will deed dated 04.11.1979; hence there are no joint family properties as contended by plaintiffs; D1 also denied about giving small quantities of paddy and paltry amounts to plaintiffs.

e) D.1 filed additional written statement averring that sales effected in favour of D4 and D5 in respect of 'A' schedule properties and in favour of D9 in respect of 'B' schedule properties are perfectly valid and binding on the parties and plaintiffs have no right to question the same. He contended that plaintiffs deliberately under valued the suit and hence suit claim is hopelessly time barred. He thus prayed for dismissal of the suit.

f) Basing on the above pleadings, the trial Court framed the following issues for trial.

1. *Whether the plaintiffs are entitled for partition of the suit schedule properties and allotment of 3/10th share in their favour?*
2. *Whether the plaint 'A' schedule properties are the exclusive properties of D1?*

3. *Whether plaint 'B' schedule properties are 'Stridhana' properties of late Shivamma?*
4. *Whether the suit properties are not available for partition as alleged in written statement of D1?*
5. *Whether there was earlier partition in the year 1942?*
6. *Whether the suit is properly valued and court fee paid is sufficient?*
7. *To what relief?*

g) The trial Court on appreciation of both oral and documentary evidence held, on issue Nos. 2, 4 and 5 that earlier there was partition of joint family properties in 1942 and the lands lat Puppalaguda fell to the share of D1. The trial Court on issue No.3 held that since the earlier partition was established, the plea of adverse possession is redundant. On issue No.6, it held that suit was properly valued and thus decided against the defendants. In view of findings in the above issues, the trial Court in respect of issue No.1 held that plaintiffs are not entitled to partition of suit schedule properties and ultimately dismissed the suit.

Hence, the appeal by plaintiffs.

4) Earlier, my learned brother Judge—M.Satyanarayana Murthy heard arguments and framed the following points for consideration.

1. *Whether the suit filed by the plaintiffs is within the period of limitation?*
2. *Whether the partition pleaded by the first defendant in the year 1942 and allotment of plaint 'A' schedule property to the share of the first defendant is true, valid and genuine?*

3. *Whether the plaint 'B' schedule property is the exclusive 'Stridhana' property of Shivamma, W/o. Chandrappa and if not, whether Shivamma is competent to convey part of plaint 'B' schedule property in favour of Balakrishna and execute a Will in favour of the children of the first defendant?*
4. *Whether the Will dated 04.11.1979 is true, valid and executed in sound disposing state of mind and if so, whether the plaintiffs are entitled to claim a share in the house bearing door Nos. 4-7-198 and 199?*
5. *Whether the sale of house bearing door Nos.4-7-276 to 278 in favour of Balakrishna by Shivamma is valid and binding on the plaintiffs, if not, whether the plaintiffs are entitled to claim 3/10 shares in the property?*
6. *Whether the plaintiffs and defendants are in joint possession and enjoyment of the plaint schedule property and, if not, whether the Court fee paid is in accordance with law?*

5) In respect of point No.1, learned Judge observing that the trial Court failed to frame appropriate issue regarding limitation, remanded the appeal suit by order dated 01.06.2015 to the trial Court after framing additional issue on limitation, for recording a finding thereof by affording an opportunity to both sides to adduce evidence and send the finding to this Court. Ergo, learned Judge has not given any finding on point Nos.2 to 6. Thereupon, the Principal District Judge, Ranga Reddy District passed judgment dated 26.04.2016 holding that the suit was within the period of limitation.

The matter is thus taken up for hearing.

6) Appellant No.4 was brought on record as L.R. of deceased Appellant No.1 as per Court order dated 17.04.2014 in ASMPNo.482 of

2014. Respondents 12 to 14 were brought on record as LR's. of R2 vide order dated 04.07.2014 in ASMPNo.687 of 2014.

7) Heard Sri B.Vijayasen Reddy, learned counsel for appellants and Sri A.Sudarshan Reddy, learned senior counsel appearing for Mr.G.Madhusudhan Reddy, learned counsel for respondents.

8a) Firstly, severely criticizing the trial Court's finding that the partition took place way back in 1942 as erroneous, learned counsel for appellants would argue that the said oral partition is quite unrealistic because, surprisingly Chandrappa—the father of Viswanatha Rao and D1, did not allocate any share for himself in the said oral partition. As he was a retired revenue employee by then, naturally reserve a share considering the future of himself and his wife. Thus, non-taking a share is a circumstance against the partition. Next, he would argue, by the time of alleged partition in 1942 D1 was only two years old child as such there was no necessity for the father of D1 to effect partition at that stage. He would further argue, if really the lands at Puppalaguda fell to the share of D1, he would not have kept silent without getting those lands mutated in his favour till 1974. His conspicuous silence till 1974 and applying for mutation only after the death of Viswanatha Rao in 1970, would speak volumes that all the properties were in fact joint family properties purchased by their father in the name of Viswanatha Rao, which stood in his name till his death, as he acted as Kartha of joint family during his life time. Learned counsel argued, as Kartha, Viswanatha Rao sold the lands of Rudraram village for the benefit of the

joint family. He further argued, not only inordinate delay in applying for mutation, the reason shown for mutation would also manifest that the lands were joint family properties. He would submit, if really the lands of Puppalaguda fell to his share in oral partition, D1 ought to have mentioned the said fact in mutation application and same would have reflected in the concerned revenue register. However, he would point out, in Ex.A1—mutation register, D1 got it mentioned as if he succeeded his brother—Viswanatha Rao as sole surviving legal heir. This is obviously a wrong statement because Viswanatha Rao was survived by his daughters i.e. plaintiffs and D2 and D3. Therefore, the prior partition in 1942 is a myth, he remonstrated. He would also contend that Vishwanatha Rao died in 'B' schedule house wherein D1 is also residing which indicates there was no partition. Further, Hakim Veerabhadraiah one of the alleged mediators for partition, was not examined by D1 which shows there was no partition.

b) Secondly, on 'B' schedule house property, learned counsel argued that the two houses were in fact purchased by Chandrappa in favour of his wife—Shivamma as Benami like he purchased the lands in the name of his son—Viswanatha Rao. Shivamma had no independent source of income and no evidence was placed that her parents gave any properties to her to enable her to purchase 'B' schedule houses. Therefore, the two houses shall be held as part of joint family properties in which case, Shivamma would have no right either to sell away or bequeath those properties and such transactions are invalid and not binding on plaintiffs. Even for argument sake it is admitted that those properties are

her self-acquisitions, still Ex.B1 can be held as forged document because so many suspicious circumstances were surrounding the Will. Shivamma was admittedly 80 years old lady, suffered fracture and confined to bed. The Will was allegedly executed on 04.11.1979 and she died on 27.04.1980 i.e. within short time thereafter. By that time she was admittedly in the grip of D1 who played a dominant role in execution of Will. Above all, the Will was an unregistered one. Hence, the Will has to be discarded. He argued that the evidence of DW2 cannot be believed because Viswanatha Rao turned down her request to give his daughter in marriage with her son. He thus prayed for allowing the appeal. Learned counsel cited following decisions on the principle that onus rests on propounder to clear off the suspicious circumstances surrounding a Will.

1. *H. Venkatachala Iyengar vs. B.N.Thimmajamma*¹

2. *Shantha Bai vs. Shanker Rao*²

3. *Shashi Kumar Banerjee vs. Subodh Kumar Banerjee*³

4. *Bai Jamna Devji vs. Heirs of Bai Jakhu – Vallabhabhai D.Tandel*⁴

9a) In oppugnation, while supporting the judgment, learned senior counsel Sri Sudarshan Reddy appearing for respondents would argue that the joint status was severed way back in 1942 itself as the father effected partition between two sons. This fact was clearly spoken by DW2 who is the sister of Viswanatha Rao and D1. Since the lands stood

¹ AIR 1959 SC 448

² 2010 (1) ALD 310

³ AIR 1964 SC 529

⁴ MANU/GJ/0347/1998

in the name of his elder son and as his younger son i.e. D1 was a minor boy less than 5 years and as he grew old and suffering with TB, Chandrappa the father, might thought it expedient to effect partition as otherwise, after his death, his elder son may appropriate the properties for himself, for, they stood in his name. That was the reason why Chandrappa effected partition though D1 was a tender aged boy by the time of partition. Chandrappa did not opt for a share because the share of minor would be decreased in that event. Therefore, the partition was genuine and perfectly valid. In the said partition Viswanatha Rao got the lands of Rudraram village whereas D1 got the lands of Puppalaguda village. Viswanatha Rao sold away his share of lands and D1 never objected for the same. Learned senior counsel vehemently argued, if really Viswanatha Rao sold the lands only as Kartha of joint family, certainly that fact would be mentioned in the sale deeds executed by him but the plaintiffs did not produce those sale deeds which infers that those lands were sold by him in his individual capacity but not as Kartha of joint family. Explaining the entries in Ex.A1, learned senior counsel argued that since the partition was oral and there may be objection for mutation for want of proof of partition, D1 might have got it mentioned in Ex.A1 to the effect that he got the lands as sole surviving brother of Viswanatha Rao. Merely such mentioning was made in Ex.A1 the partition need not be doubted.

b) Nextly, regarding 'B' schedule properties, he would argue that they belong to the mother and therefore, in her right she sold one of the houses to D9 and for the remaining, she executed a Will in favour of

D10 and D11. The execution of Will was duly proved by DWs.2, 3, 5 and 6. He thus prayed to dismiss the appeal.

10) **PONT No.1**: As stated supra, this Court remanded the matter for a finding by the trial Court, which, by its judgment dated 26.04.2016, held that suit was well within time and not barred.

11) It should be noted, against the above finding, the defendants have not filed any cross-objections in terms of Order XLI Rule 22 CPC but only filed written objections. So, at the outset, the question is whether the defendants can challenge finding on additional issue which went against them without filing cross-objection under Order XLI Rule 22 CPC.

a) The law is no more *res integra*, as the Apex Court held that after 1976 Amendment to CPC, in an appeal filed by a plaintiff against the decree went against him, the defendant while supporting the decree can question the issue or finding which was decided against him without the necessity of filing appeal or cross-objections. Vide—

1. Banarsi vs. Rampal⁵

2. Hardevinder Singh vs. Paramjit Singh⁶

3. Tej Kumar Jain vs. Purushottam⁷

It has now to be seen, whether the finding of the trial Court on the said issue is correct or not.

⁵ AIR 2003 SC 1989

⁶ (2013) 9 SCC 261

⁷ AIR 1981 MP 55

12) As per Article 110 of Limitation Act, 1963, suit has to be filed by the plaintiff who has been excluded from the joint family property within 12 years of the exclusion when such exclusion becomes known to him.

13) The plaintiffs filed the suit for partition on 30.03.1984. The trial Court after considering the admission of DW1 in his cross-examination and also considering the other facts held, suit was within the period of limitation. It observed that as per the pleadings of DW1, partition took place in 1942 itself and hence suit was barred by limitation; however in the cross-examination DW1 categorically stated that Viswanatha Rao died in 'B' schedule house in the year 1970; plaintiffs 2 and 3 and defendants 2 and 3 while studying in St.Francis School, Secunderabad used to go from 'B' schedule house; he performed the ceremony of Kanyadanam in the marriages of plaintiffs, defendants 2 and 3; mutation was sanctioned in his name for 'A' schedule properties in 1974; **plaintiffs might not have knowledge of earlier partition of properties.** Taking these admissions, particularly the one that the plaintiffs might not be having knowledge of earlier partition and also about the mutation in favour of DW1 in respect of 'A' schedule properties as he did not issue any notice to plaintiffs before such mutation, the trial Court held that suit was within the period of limitation. The trial Court also considered further admission of DW1 to the effect that till effecting mutation in 1974, the said lands stood in the name of Viswanatha Rao and DW1 never proclaimed that, he (DW1) has been enjoying them as the absolute owner and possessor. The trial

Court thus observed the question of plaintiffs having knowledge that DW1 was claiming exclusive right in respect of plaint 'A' lands does not arise. On this observation also the trial Court held that suit was within the period of limitation.

a) Sofaras house properties are concerned, the trial Court observed that it was not the case of defendant No.1 either in the pleadings or in evidence that plaintiffs have knowledge of the sale deed executed by late Shivamma under Ex.B12 or her execution of Will under Ex.B1 in favour of sons of defendant No.1. Hence, by the date of filing of the suit the plaintiffs had no knowledge about the oral partition, the mutation of plaint 'A' schedule lands in the name of defendant No.1 and also in respect of sale deed and Will said to be executed by Shivamma. Accordingly, the trial Court held the additional issue in favour of plaintiffs.

14) I gave anxious consideration to the above finding. Though in the objections filed by DW1 he criticized the said finding as erroneous but could not substantiate the same. His contention is as usual that the partition took place in 1942 itself and plaintiffs knowing this fact very well filed the suit in 1984 and thus the suit was barred. However, he clearly admitted in the cross-examination, plaintiffs might not have knowledge about the earlier partition of the properties. In view of the said admission and the plaintiffs' categorical stand that they made a demand for partition on 04.03.1984 and on his refusal their filing the suit on 30.03.1984, it can be held that suit is within the time.

This point is answered accordingly.

15) **POINT No.2:** It is the case of plaintiffs that plaintiff schedule properties are joint family properties and there had never been any partition. However, D1 would contend partition was effected by his father—Chandrappa in 1942 itself wherein his brother was allotted the lands of Rudraram and he was allotted the lands of Puppalaguda and Viswanatha Rao sold away Rudraram lands in 1950 itself.

a) It is trite law that the party who admits the properties as joint but asserts there was severance by oral partition should take up the burden on himself to establish the said fact. Vide—

1. *Chinthamani Ammal vs. Nandagopal Gounder and Anr.*⁸

2. *Damodara Naicker vs. Collector of Chengalpattu*⁹

3. *Mahadu Appa Wanjole vs. Laxman Veerappa Wanjole and Ors.*¹⁰

16) To discharge his burden, D1 apart from himself (DW1) examined DWs.2 and 5.

a) Regarding partition, his evidence is that his father was employed in Revenue Department and died 1944 due to TB; his brother Viswanatha Rao got married in 1940 and ever since he got separated from the family and was not taking interested in the family affairs; he was working in Commercial Tax Department, his father acquired agricultural lands in Rudraram village in an extent of Ac.22.00 covered by Sy.Nos.714 and 716 and he also acquired equal extent in

⁸ (2007) 4 SCC 163

⁹ MANU/TN/0512/2003 = 2003 (2) CTC 551

¹⁰ MANU/MH/0958/2008 = 2008 (5) Maharashtra Law Journal 680

Puppalaguda village in Sy.Nos.260 and 376 and those properties were obtained in the name of Viswanatha Rao; the two houses shown in plaint 'B' schedule were acquired by his mother from her Stridhana property as his maternal grand-father gave some money to her. He further stated, since his elder brother got separated and not looking after the family members and as his father became sick and suffering from TB, he effected oral division of properties in 1942 in the presence of his mother, his sister (DW2) and neighbour—Veerabhadraiah; in the said partition the lands in Rudraram were allotted to the share of Viswanatha Rao and the lands of Puppalaguda were allotted to his share; his brother alienated the lands in 1950 itself; he enjoyed the lands for which his brother never questioned and he died in 1970; he sold away his share of lands to defendants 4 to 7 under different sale deeds and vendors are in enjoyment of those lands. He further stated he never gave any share or income derived from the lands of Puppalaguda to the plaintiffs and D2 and D3; he got those lands mutated in his name as they were allotted to his share. He also deposed about 'B' schedule house properties which I will discuss later while dealing with other points.

b) In the cross-examination he stated he was born in 1939 and his brother was elder by 22 years; his father purchased the lands even prior to his birth; he was aged 3 to 4 years at the time of partition; his father did not take a share in partition; he applied for mutation first time in 1974; though the lands in Puppalaguda stood in the name of his brother, he (DW1) was in actual possession since partition; prior to 1974, since the lands were in possession of lessees, their names were shown but his

name was not reflected in the revenue records; he requested a person to get the lands mutated in his name; the lands at Rudraram were sold in 1950. He denied the suggestion that properties were joint and Rudraram lands were sold by his brother for the benefit of joint family in the capacity of Kartha.

On recall, DW1 produced Exs.B7 to B20. During the further cross-examination, he admitted that in Exs.B6 to B9—sale deeds it was not mentioned that those properties were allotted to him in the partition and it was only mentioned that property was mutated in his name and thereby he became the absolute owner of those lands. This is the evidence with regard to partition.

c) DW2 is the elder sister of DW1. She deposed, her elder brother—Viswanatha Rao was working in Sales Tax department; got separated from the father after marriage; by the date of death of her father 1st defendant was 5 years; her father suffered with TB prior to his death; her elder brother was not looking after his father; her father acquired lands at Rudraram and Puppalaguda; prior to his death her father called her, her brothers and elders and effected partition; lands at Rudraram were taken by Viswanatha Rao and lands at Puppalaguda were allotted to D1; her maternal uncle—Shivarajappa, her husband and one Hakim Veerabhadraiah were mediators, of which her husband and uncle died; after partition, her brothers were enjoying their respective shares; her father died about 50 years back, mother died in 1980 and her elder brother died in 1970; by the date of death, he performed marriages of

four of his daughters; his wife pre-deceased him; after her death, Viswanatha Rao stayed at Hyderabad for 10 years in the house of her mother from 1960 to 1970; the unmarried daughter of her brother was under the custody of 2nd daughter of Viswanatha Rao who was looking after her; her elder brother sold away his lands at Rudraram and her younger brother also sold away the lands of Puppalaguda; there were no disputes between the brothers; **her father purchased the lands in the name of her elder brother because her younger brother was not yet born by then; since the lands at both the villages stand in the name of her elder brother—Viswanatha Rao, her father effected partition between the brothers though D1 was aged only 5 years by the date of partition;** another reason for partition was his ill-health. Witness also deposed about the house property which I will discuss later.

In the cross-examination she stated that partition was oral and as his father was bed ridden, he did not take steps to get the lands mutated in the name of her bothers separately. She denied the suggestion that her elder brother was looking after the family members after the death of her father. She volunteered that he was living separately and her mother and younger brother were living together. She stated that she just thought of giving her son in marriage to the daughter of her elder brother but in fact she did not talk with him regarding the same. She denied the suggestion that herself and her husband requested her elder brother to give his daughter to his son and he refused and thereby differences arose between the two families and that was why she was

giving false evidence in favour of D1. She denied further suggestion that there was no partition.

d) DW5 is a native of Puppalaguda. He deposed that the family of Chandrappa owned 20 acres of land in his village; the name of the land is Kotha Bavi; to his knowledge, Viswanatha Rao never cultivated the said land and it was under the enjoyment of 1st defendant alone; in fact he cultivated the said land on the crop share basis (Battai) for 20 years from 1953 to 1973; he entered into lease agreement with Shivamma; after he surrendered the land, 1st defendant cultivated and thereafter sold away to Bata Narsimha, Shankaraiah and their children about 10 years back; Shivamma told that the lands in Kotha Bavi were allotted to D1 during partition.

In the cross-examination he stated, he took the lands on lease during 1952 and out of 20 acres only 1½ acres was fit for cultivation and he was giving 2 to 3 bags of rice towards share of landlord.; K.Yettaiah, Narasaiah, Anjaiah were his co-tenants; he was giving crop share to 1st defendant and Shivamma as they gave land on lease to him.

17) On a scrutiny of the above evidence, as rightly observed by the trial Court, the following factors would emanate for and against partition.

The factors in favour of partition:

(i) DW2 who is none other than the sister of Viswanatha Rao and D1 clearly deposed there was oral partition effected by her father in the presence of herself, her husband, her paternal uncle—Shivarajappa and Hakim Veerabhadraiah and allotted Rudraram lands to her elder bother

and Puppalaguda lands to her younger brother. Though this witness was intensely cross-examined nothing fruitful was elicited to discredit her testimony. The only suggestion that since her elder brother refused to give his daughter in marriage with her son she was deposing falsehood was staunchly denied by her. On that score the evidence of DW2 need not be looked with suspicion. The reasons shown by DW2 for her father effecting partition were logically convincing. The lands were admittedly purchased in the name of her elder brother; the father became old and suffering with TB and D1 was only a tender aged boy and less than 5 years by 1942. Hence, the sickly old man might have apprehended that on his death, there might be a possibility of his elder son appropriating the lands since they stood in his name. Since such events were not uncommon in the society, Chandrappa thought it fit to partition the lands even though D1 was only an infant. It should be noted Viswanatha Rao was already living separately with his wife since after his marriage and not taking family responsibilities. Hence, in my considered view there cannot be any better reasons for the partition than the above. In this regard, Chandrappa not taking any share for himself cannot be considered as a ground to disbelieve the partition for the reason that since he was sickly, he might not have reserved a share for himself as disputes may crop up among the family members for division of his share after his death. Similarly, non-examination of Hakim Veerabhadraiah is also not a ground to disbelieve partition because the evidence of DW2 on this aspect is convincing and reliable. It is well settled principle that *evidence is to be weighed but not counted*.

(ii) The next factor which supports partition is that admittedly Viswanatha Rao sold the lands at Rudraram in 1950 and D1 did not raise any dispute. Of course, plaintiffs would contend he sold those lands as Kartha for the benefit of joint family. If that were true, the sale deeds effected by him would certainly reflect that fact because D1 was still minor by 1950 and purchasers would insist for a clear mentioning as to in what capacity he was selling the properties. The plaintiffs in order to substantiate their contention did not produce copies of sale deeds executed by Viswanatha Rao. D1 by examining DWs.2 and 5 discharged his onus regarding partition. However, plaintiffs except contending that the lands of Rudraram were sold by their father as Kartha did not discharge their evidentiary burden by placing those sale deeds or examining the purchasers. Therefore, an adverse inference has to be drawn against them to the effect that, if produced, those sale deeds would manifest that Viswanatha Rao sold those lands in his individual capacity but not as Kartha of joint family.

(iii) As rightly observed by the trial Court there is no evidence to show that Viswanatha Rao or plaintiffs ever demanded and received a share in produce in the lands of Puppalaguda.

(iv) The evidence of DW5 would show he cultivated the lands in Puppalaguda fell to the share of D1 on lease basis.

The factors against the partition:

(i) Then, the main factor which would weigh against the partition is that, till 1974, the lands in Puppalaguda stood in the name of

Viswanatha Rao and D1 got mutated those lands in his name only in 1974 on the ground that he was the sole surviving heir of his late brother but not on the ground that he got those lands during the partition in 1942. However, this anomaly can be understood. As per evidence of DW1, he got the lands mutated through one Patel by name Srihari. Since there was no written partition, the said mediator might have chosen a safest way for mutation, by making a mention as noted in Ex.A1. In the light of strong reliable evidence supporting partition, this drawback in Ex.A1 will not disprove the partition.

(ii) Next, in Ex.B9 sale deed executed by D1 he mentioned that the subject land was owned by him by way of mutation but not by way of partition. Since the link document i.e. Ex.A1 reflects the said fact, in Ex.B9 also the same fact must have been mentioned. Therefore, Ex.B9 will not over throw the factum of partition.

Therefore, on a conspectus of facts and evidence, it is held that partition took place in 1942 wherein Rudram lands fell to the share of Viswanatha Rao and plaint 'A' schedule property fell to the share of D1.

This point is answered accordingly.

18) **POINT Nos.3 to 5:** These points are interlinked. Hence, answered together.

a) Shivamma purchased 'B' schedule houses under two registered sale deeds covered by Exs.B10 and B11. The property covered under Ex.B11 was sold by her to D9 under Ex.B12 sale deed. Whereas the remaining property was bequeathed by her under Ex.B1—Will in favour

D10 and D11. The contention of the plaintiffs is that the properties covered by Exs.B10 and B11 were in fact purchased by late Chandrappa in the name of Shivamma as Benami and hence Shivamma had no right either to sell or bequeath those properties. Needless to emphasize, the burden of proof is on the plaintiffs to establish the Benami nature of transaction. Except the oral assertion of PW1 there is no other plausible evidence to uphold their contention. On the other hand, in Exs.B10 and B11 there is no whisper that the properties were purchased by Chandrappa in the name of Shivamma. Further, the convincing evidence of DW.2 in this regard is, her mother owned two houses which she acquired, out of her Stridhana; she had a sister and brother and both of them died; so, her grand parents used to reside with her mother; they gave their property to her mother; they got the house constructed for her mother; one of the houses sold away by her mother during her life time; her mother enquired her (DW.2) whether she would take the building but she informed she had sufficient property; since 1st defendant was not an employee, she (her mother) then thought of giving her house to the grand children. DW.2 specifically stated she had no objection for Shivamma giving away her house to her grand sons; her mother was staying with D1 during her lifetime and her mother informed that she executed a Will in favour of sons of 1st defendant.

b) Thus, the evidence of DW2 would clearly indicate that her maternal grand parents used to stay with her mother after the death and their son and another daughter. Therefore, naturally they gave away whatever they had to their only surviving daughter i.e. Shivamma.

Therefore, it can be believed that Shivamma purchased the two houses with her Stridhana. There is another reason to believe this fact. If really the properties were purchased by Chandrappa in the name of Shivamma as benami as contended by the plaintiffs, he would have effected partition of those properties also as he did in respect of lands purchased by him in the name of his elder son. That he did not include 'B' schedule properties in the partition in 1942, gives a strong inference that those properties were the self-acquisitions of Shivamma. In that view, she had every right to execute Ex.B12—sale deed in favour of D9 and also Ex.B1—Will in favour of D10 and D11. Of course, the genuinity of Ex.B1 has to be established by D1, D9 and D10 as they are the propounders of the Will.

c) Coming to Ex.B1—Will, admittedly Shivamma was 80 years old and bed ridden due to fracture of leg and she was under the care and custody of D1. In the light of these facts, it is trite law as argued by appellants that the propounders have to establish that the Will was genuine and not a fabricated one. They examined DWs.3, 4 and 6 to prove the execution of Will. DW3 is the brother of Pathi Viswanatham who is one of attesters of the Will. Since said P.Viswanatham died in 1993, DW3 attended the Court and identified his signature. DW4 is the family doctor of Shivamma who certified on the reverse side of the document about her fit condition to execute the Will. Then, DW6 is second attester of the Will. He deposed that he knew the 1st defendant and Shivamma through other attester—Pathi Viswanatham. He stated that Shivamma executed the Will bequeathing the property to the sons

of D1 in the presence of this witness, P.Viswanatham, DW4, 1st defendant and one Durga Das. Sons and wife of D1 were also present. He specifically stated Shivamma affixed her thumb mark in his presence and after she affixed her thumb mark, P.Viswanatham affixed his signature and thereafter this witness affixed his signature. Subsequently the doctor affixed his signature to the Will. He stated that Shivamma's health was very sound when she executed the Will. He identified his signature on Ex.B1. Thus, with the help of DWs.3 and 6 due execution of the Will was established. They were thoroughly cross-examined but nothing specific was elicited to suspect the genuinity of the Will. Above all, DW2—the daughter of Shivamma also avouched the genuinity of the Will.

Thus, these points are held against the plaintiffs.

19) **POINT No.6:** Regarding this point the trial Court observed that though the plaintiffs initially paid court fee under Section 34(2) of A.P. Court Fees and Suit Valuation Act, 1956 but subsequently after amendment of the pleadings suit was valued and court fee was paid under Section 34(1) of the said Act. The trial Court further observed except the oral evidence of DW1 that property was under valued and the market value is about Rs.9 lakhs, he did not produce any evidence. The trial Court thus held issue No.6 against the defendants. I find no reason to interfere with the same.

20) In the result, in view of findings in points 1 to 6, this appeal is dismissed by confirming the judgment and decree of the trial Court in O.S.No.29 of 1993. No costs.

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

U. DURGA PRASAD RAO, J

Date: 12.09.2017
Murthy

