

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.185 of 2015

JUDGMENT:

This appeal is filed by the defendants challenging the decree and judgment dated 22.06.2011 in A.S.No.9 of 2008 on the file of the Court of Senior Civil Judge, Gurazala, wherein whereby the decree and judgment dated 13.02.2008 in O.S.No.77 of 2003 on the file of the Court of Junior Civil Judge, Macherla, decreeing the suit for partition, was confirmed.

2. For the sake of convenience, the parties hereinafter will be referred to as they were arrayed in the suit.

3. The facts leading to filing of the second appeal are briefly as follows:

The plaintiff is the sister of defendants 1 to 3. The plaintiff and the defendants are the children of one Dattatreya Sarma. The father of the plaintiff and defendants died intestate eight years back leaving behind him the plaintiff and defendants as legal heirs, who succeeded his estate. The marriage of the plaintiff was performed on 15.03.1998 by defendants 1 and 2 with the amount kept by her father towards her marriage expenses. The plaintiff and defendants 1 and 2 have been in possession and enjoyment of the plaint schedule property as members of the joint family. The plaintiff demanding the defendants 1 and 2 for partition of the plaint schedule property since two years. The defendants 1 and 2 have been postponing the partition of the suit schedule property on one pretext or other. The plaintiff got issued a legal notice dated

26.03.2001 directing the defendants to come forward for partition of the property. Defendants 1 and 2 issued a reply notice with false allegations. Hence, the suit for partition.

4. The third defendant remained *exparte*. Defendants 1 and 2 filed written statement admitting the *inter se* relationship between the parties *inter alia* contending that defendants 1 and 2 and their father have partitioned the plaint schedule property in the year 1995 and in the said partition, defendants 1 and 2 got the plaint schedule property. The defendants paid an amount of Rs.1,00,000/- (Rupees one lakh only) to their father towards his share. The father of the defendants gave Rs.50,000/- each to the plaintiff and third defendant towards their share. Defendants 1 and 2 are the absolute owners of the suit schedule property. Defendants 1 and 2 paid an amount of Rs.40,000/- to the plaintiff on 12.03.1988 towards her marriage expenses. The defendants also gave fixed deposit amount of Rs.50,000/- to the plaintiff on 12.03.1988. The plaintiff executed a receipt in favour of the defendants 1 and 2 relinquishing her right in the family property and received Rs.50,000/-. So there is no joint family relation in between the plaintiff and defendants. The plaintiff was never in possession of the suit schedule property. The defendants 1 and 2 issued a suitable reply to the legal notice got issued by the plaintiff. Hence, the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff and defendants constituted a joint family?

2. Whether the suit schedule properties are ancestral, joint family properties and whether they are available for partition?
 3. Whether there was a partition of the joint family properties and whether the properties are allotted as mentioned in written statement of the defendants?
 4. Whether the plaintiff is entitled for partition as prayed for?
 5. To what relief?
6. Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A7 were marked. On behalf of the defendants, D.Ws.1 to 6 were examined and Exs.B1 to B17 and X1 to X6 were marked.
7. After having a thoughtful consideration to the oral, documentary evidence and other material available on record, the trial Court decreed the suit in favour of the plaintiff by allotting 1/4th share to the plaintiff in the plaint schedule property. Feeling aggrieved by the decree and judgment of the trial Court, defendants 1 and 2 preferred A.S.No.9 of 2008 on the file of the Court of Senior Civil Judge, Gurazala. The first appellate Court after reappraising the oral, documentary evidence and other material on record, arrived at a conclusion that the plaintiff is entitled to 1/4th share in the suit schedule property and dismissed the appeal. Hence, the present second appeal.
8. Heard the learned counsel for the appellants-defendants and the learned counsel for the first respondent-plaintiff. The questions of law urged by the learned counsel for the appellants-defendants are as follows:
1. Whether the findings recorded by the Courts below with regard to Ex.B1 are perverse?
 2. Whether Ex.B1 requires registration?

9. The following admitted facts can be culled out from the pleadings and evidence. Plaintiff and third defendant are daughters and defendants 1 and 2 are the sons of late Dattatreya Sarma. The said Dattatreya Sarma died in the year 1995. The marriage of the plaintiff was performed on 15.03.1998. The suit schedule property is the ancestral property of Dattatreya Sarma. It is the case of the plaintiff that she is entitled to 1/4th share in the suit schedule property being one of the coparcener's joint family. The case of the defendants is that the joint family properties were partitioned in the year 1995 during the life time of late Dattatreya Sarma, therefore, the plaintiff is not entitled to any share in the suit schedule property.

10. The composite state of A.P. made amendments to Hindu Succession Act by inserting Section 29-A. As per the provisions of Section 29-A of the Act, the female members of the joint family are also entitled for equal share in the joint family or ancestral property being coparceners. Even as per the version put forth by the defendants, the alleged partition took place in the year 1995. The marriage of the plaintiff was performed on 15.03.1998. Unless and until a contrary is proved, the Court can presume that all the members of the family are entitled for share in the joint family property. The burden of proof lies on the person, who pleads previous partition, to establish the factum of partition. In the instant case, the defendants have taken a specific plea that joint family properties were partitioned in the year 1995. Except the oral testimony of witnesses, there is no other convincing evidence to establish that the joint family properties were partitioned in the

year 1995. During the course of cross-examination, the learned counsel for the defendants put a suggestion to P.W.1 that the joint family properties were partitioned in the year 1993. There is no consistency in the stand taken by the defendants with regard to the date, month and year of the alleged partition. The Court cannot place reliance on a stray sentence in the cross-examination of the witnesses. The Court has to consider the oral and documentary evidence as a whole in order to appreciate the rival contentions.

11. The factum of previous partition is purely a question of fact. Both courts disbelieved the factum of partition set up by defendants 1 and 2. It is a settled principle of law that in civil matters, the litigation commences from the date of issuance of legal notices. The plaintiff got issued a legal notice dated 26.03.2001 under original of Ex.A1 directing the defendants to come forward for partition of the suit schedule property. The defendants got issued a reply notice under Ex.A4. The defendants have not taken a specific plea in the reply notice that they and their father have partitioned the joint family properties either in the year 1993, as introduced in the evidence, or in the year 1995, as contended in the written statement. For the first time, the defendants have taken the plea in their written statement that the joint family properties were partitioned in the year 1995. Non-mentioning of the factum of alleged partition in Ex.A4 reply notice is one of the factors to be considered by the Court while appreciating the rival contentions. Both Courts concurrently held that non-mentioning of factum of partition in Ex.A4 creates a doubt with regard to the

previous partition as pleaded by the defendants. The above observation of the Courts below was based on sound reasoning and logical conclusion.

12. The defendants have taken a specific plea in the written statement that the plaintiff had relinquished her share in the joint family properties by accepting an amount of Rs.50,000/-. By taking the said plea, the defendants clearly admitted that the plaintiff is also entitled for a share in the joint family property. If Ex.B1 is considered to be a relinquishment deed as pleaded by the defendants, the same requires a registration as contemplated under Section 17 of the Registration Act. It is not in dispute that Ex.B1 is not a registered document. Even assuming but not conceding that Ex.B1 is only receipt, the next question that falls for consideration is whether the defendants have proved the same. For one reason or other, the defendants did not choose to examine the scribe of Ex.B1. One of the attestors of Ex.B1 is maternal uncle of plaintiff and defendants. For one reason or the other, the defendants did not choose to examine their maternal uncle. D.W.3 is one of the attestors of Ex.B1 receipt and close friend of defendant No.1. Therefore, possibility of D.W.3 deposing in such a way to suit the claim of defendants cannot be ruled out completely. In such circumstances, the Court has to scrutinize his testimony meticulously so as to eliminate the exaggerations. Ex.B1 is dated 12.03.1998, whereas, the marriage of the plaintiff was performed on 15.03.1998. In Ex.A4 reply notice, the defendants have not taken a plea that the plaintiff executed a receipt in their favour on 12.03.1998. The existence of Ex.B1 is within the exclusive

knowledge of defendants 1 and 2 by the time of issuance of Ex.A4 reply notice. If that is so, what prevented the defendants 1 and 2 to mention in Ex.A4 reply notice about the execution of Ex.B1 receipt dated 12.03.1998 by the plaintiff. Non-mentioning of existence of Ex.B1 in Ex.A4 reply notice creates a suspicion with regard to the genuineness of the same. The trial Court as well as the first appellate Court disbelieved Ex.B1 receipt. Both courts concurrently held that the defendants have failed to prove the execution of Ex.B1 receipt.

13. No credibility can be attached to Ex.B1 receipt for non-mentioning of the same in Ex.A4 reply notice. If the findings recorded by the Courts below are not based on evidence or based on evidence which is not legally admissible, then those findings can be termed as perverse. If the findings recorded by the Courts below are perverse, certainly this Court can set aside the same while exercising the jurisdiction under Section 100 CPC. In the instant case, the trial Court as well as the first appellate Court assigned reasons much less cogent and valid reasons while disbelieving Ex.B1 receipt. The findings recorded by the Courts below do not suffer with any legal error. On the other hand, the findings recorded by the courts below on Ex.B1 are supported by evidence much less legally admissible evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellants-defendants that the findings recorded by the Courts below on Ex.B1 are perverse and liable to be set aside. As observed earlier, if Ex.B1 is taken into consideration as a relinquishment deed, the Court cannot place reliance on it for want

of registration. Viewed from that angle also, no reliance can be placed on Ex.B1 receipt. Merely because the pattadar pass books were issued in the name of defendants 1 and 2 that itself will not extinguish the right of the plaintiff, who is one of the coparceners of the joint family, in the suit schedule property. The plaintiff being the daughter of Dattatreya Sarma and sister of defendants 1 and 2 is entitled for share in the ancestral property of the joint family i.e., the suit schedule property. The Courts below considered the oral and documentary evidence in right perspective.

14. The trial Court decreed the suit granting 1/4th share to defendant No.3. As stated supra, defendants 1 and 2 preferred the appeal. During the pendency of the appeal, defendants 1 and 2 not pressed the appeal so far as the defendant No.3 is concerned. By not pressing the appeal, defendant Nos.1 and 2 conceded part of the judgment and decree of the trial Court so far as granting 1/4th share in favour of defendant No.3, who is a co-sharer. Thus, the decree and judgment granting 1/4th share in favour of defendant No.3 became final. The plaintiff and defendant No.3 are sisters of defendants 1 and 2. If the defendant No.3 is entitled for 1/4th share in the joint family property, automatically the plaintiff is also entitled for 1/4th share along with other coparceners. Viewed from this angle also, defendants 1 and 2 are not entitled to challenge the finding of the trial Court as to the entitlement of 1/4th share of the plaintiff is concerned.

15. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of CPC, the Hon'ble apex Court held at paragraph No.16 as follows:

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that there is no question of law much less substantial question of law involved in this appeal, which warrants interference of this Court with the concurrent findings of fact recorded by the courts below.

17. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

6th December, 2017.

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¹ (2010) 13 SCC 216