

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N.BALAYOGI**

+ Appeal Suit No.4105 of 2004

% 21-7-2017

A.Rama Krishna, S/o late A.Ganapathi,
Aged 63 years, R/o 29-1357/1/1,
Deena Dayal Nagar, Ramakrishnapuram,
Neredmet, Secunderabad;
and 14 others

... Appellants/Defendants

Vs.

\$ 1. Akula Venkatamma, W/o late A.Ganapathi,
Aged 80 years, R/o Near Banjaradandhu,
Reddiwada, Bhongir,, Nalgonda District (died);
and 10 others

... Respondents/Plaintiffs

! Counsel for the Appellants 1 to 5 & 9 to 12:

Mr. Vedula Venkata Ramana,
Senior Counsel

Counsel for Appellants 6 to 8& 13 to 15: Mr. R.A. Chary

Counsel for Respondents: Mr. P.Raja Sripathi Rao,
representing Mr. G.Tirupathi Reddy

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? Cases referred:

**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
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Judgment: *(per V.Ramasubramanian, J.)*

Aggrieved by the preliminary decree for partition granted in favour of the mother and daughters, the sons have come up with the above regular appeal.

2. Heard Mr. Vedula Venkata Ramana, learned Senior Counsel appearing for the appellants 1 to 5 and 9 to 12, Mr. R.A. Chary, learned counsel appearing for the appellants 6 to 8 and 13 to 15, and Mr. P.Raja Sripathi Rao, learned counsel, representing Mr. G.Tirupathi Reddy, learned counsel appearing for the respondents.

3. The 1st respondent (who is now no more) was the wife of one A.Ganapathi. She along with her daughters, who are respondents 2 to 5 (2nd respondent in the appeal died and their legal heirs are respondents 6 to 11) filed a suit in O.S.No.109 of 2001 for partition and separate possession of the 1/10th share of each one of them in the suit schedule properties. The appellants 1 to 5 were the defendants in the suit. The appellants 3 and 4 having died during the pendency of the appeal, their legal representatives have been brought on record as respondents 6 to 8 and 9 to 12 respectively.

4. The case of the plaintiffs in the suit was that the 1st plaintiff was the wife, the plaintiffs 2 to 5 are the daughters and defendants 1 to 5 are the sons of one

A.Ganapathi; that the said Ganapathi died intestate, leaving the plaint schedule properties and the plaintiffs and defendants as his legal heirs; that the suit properties were the self-acquired properties of Ganapathi; that after the death of the said Ganapathi in the year 1986, the name of the 1st plaintiff and the names of the defendants were recorded in the Revenue records, but no partition was effected; that the plaintiffs and the defendants continued to be in joint possession of the properties and that when the plaintiffs demanded partition, the defendants refused forcing the plaintiffs to come up with a suit.

5. The 1st defendant filed a written statement contending *inter alia*, that the suit was barred by limitation; that the suit was not properly valued and the relief sought for was not maintainable; that the suit properties were not the self-acquired properties of Ganapathi; that Ganapathi died on 21-02-1983 and not in 1986 as claimed in the plaint; that the plaintiffs were never in possession of the suit properties either prior to the demise of Ganapathi or thereafter; that the defendants alone are in exclusive possession; that it is true that Ganapathi died intestate; that the suit properties were acquired by Ganapathi from ancestral nucleus and from the sale of ancestral properties situate in Bhongir; that the Revenue records contained the name of the 1st plaintiff merely as a nominee party; that even assuming that the plaintiffs are entitled to any share, they have been excluded from

possession and enjoyment during the last two decades and the plaintiffs have abandoned and waived their right and that there was no cause of action for the suit.

6. On the above pleadings, the trial Court framed the following issues for trial:

i. Whether the plaintiffs had abandoned their right of share in the suit lands more than 20 years back and if so, whether the suit claim is in time?

ii. Whether the suit property is incapable of being identified as required under Order 7, Rule 3 CPC and is liable to be dismissed as pleaded by the defendants?

iii. Whether the suit is properly valued and the court fee paid is correct?

iv. Whether the plaintiffs are entitled for partition and separate possession of the suit schedule property as prayed for?

v. Whether the defendants are entitled to compensatory costs? and

vi. To what relief?

7. The 1st plaintiff, whom we shall refer to as the mother of the other plaintiffs and the defendants, was examined as P.W.1. The 2nd plaintiff was examined as P.W.2. The certified copies of the pahanies for the year 1999-2000 in respect of Survey Nos.1081, 1082, 1083 and 1084 were respectively marked on the side of the plaintiffs as Exs.A-1 to A-4.

8. On the side of the defendants, the 2nd defendant was examined as D.W.1. The sister's son of Ganapathi was examined as D.W.2. Two receipts for payment of land tax were filed as Exs.B-1 and B-2.

9. On issue No.2 relating to valuation and Court Fee, the trial Court held that there was no evidence to prove ouster and that therefore the valuation under Section 34(2) of the Andhra Pradesh Court Fees and Suits Valuation Act, was correct. On issue No.3 with regard to identification of the property, the Court below found that there was no difficulty in identifying the properties. On issue No.1, the Court below held that ouster was not established and that there was no evidence to show that the plaintiffs had abandoned or relinquished their rights. On issue No.4, the Court below found that the defendants having pleaded ancestral nucleus, miserably failed to establish the same and that therefore the plaintiffs were entitled to partition. In the light of these findings, the trial Court decreed the suit as prayed for.

10. Mr. Vedula Venkata Ramana, learned Senior Counsel appearing for the appellants, basically raised 3 contentions, namely, (i) that the trial Court wrongly shifted the burden of proof upon the defendants, without first calling upon the plaintiffs to prove that the properties were self-acquired properties, (ii) that on the question of limitation, the trial Court failed to apply Article 110 of the Schedule to the

Limitation Act, 1963 and (iii) that the Court below failed to appreciate the plea of waiver in the right perspective.

11. We have carefully considered the above submissions.

12. From the contentions, it appears that the following issues arise for determination in this appeal:

(i) Whether the Court below wrongly shifted the burden of proof upon the defendants?

(ii) Whether the suit was barred by time in terms of Article 110 of the Schedule under the Limitation Act, 1963? and

(iii) Whether the plaintiffs can be said to have abandoned or waived their right?

Issue No.(i):

13. The first issue arising for determination in this appeal is as to whether the trial Court wrongly shifted the burden of proof upon the defendants.

14. As we have pointed out earlier, the case of the plaintiffs before the trial Court was very simple. They pleaded that the suit schedule properties were purchased by A. Ganapathi and that after he died intestate in the year 1986 (actually in 1983), the properties devolved equally upon his wife, 4 daughters and 5 sons, entitling each one of them to 1/10th share.

15. In the written statement filed by the defendants, they claimed in Paragraph-6 that the suit schedule properties

were not the self-acquisition of A. Ganapathi. Again in paragraph 7 of the written statement, the defendants claimed that the suit properties were acquired by their father from the nucleus and sale of ancestral properties situated at Bhongir and elsewhere. The defendants admitted that A. Ganapathi died intestate.

16. In the light of the above pleadings, two things were clear namely (1) that the properties stood in the name of A. Ganapathi and (2) that A. Ganapathi died intestate. Once these two aspects are clearly admitted, then any person pleading that the properties did not belong to Ganapathi absolutely and that he acquired the properties only by the sale of ancestral properties, is bound to prove what he pleads. The law is well settled that a person pleading ancestral nucleus and the source of purchase should prove the same.

17. The trial Court rightly took note of the above well established principle of law and also cited the decision of the Supreme Court in **Mudi Gowda Gowdappa Sankh v. Ram Chandra Ravagowda Sankh** (AIR 1969 S.C.1976), to come to conclusion that there is no presumption that the property held by a person is a joint family property. The initial burden lies upon the person who seeks to assert that the property is joint. It is only when this initial burden is discharged then the burden shifts to the other side to prove the contra.

18. Drawing our attention to the admissions made by PW.1 (mother) to the effect that A. Ganapathi acquired 5 shop

rooms and a tiled house by way of succession from his adoptive father and that he disposed of the same, Mr. Vedula Venkataramana, learned senior counsel contended that the acquisition of the suit properties was from those sale proceeds. But this contention of the learned senior counsel for the appellants is unsustainable. It appears that the mother, who was the first plaintiff, was 80 years of age when she was examined as PW.1. It appears from the re-examination that at the time when her evidence was recorded, she was living with the sons. It was suggested to her during re-examination that she was residing with her sons for the past 2 months and that therefore, she was influenced by them.

19. Even *de hors* the statements of PW.1 during cross-examination, nothing turned on the admission made by PW.1 that 5 shops and a tiled house were sold by Ganapathi. In cross-examination, PW.1 stated that her husband was a native of Kothagudem and that when he was a child of just 12 days, he was brought by his maternal aunt and given in adoption. Those 5 shops and one tiled house belonged to the adoptive father and PW.1 claimed that they were sold for the purpose of fighting a tenancy case. It was the claim of PW.1 that the sale proceeds were utilised for the purpose of buying the suit schedule properties. On the contrary, PW.1 stated that her husband was carrying on dairy business.

20. The above statements of PW.1 are not sufficient to indicate an ancestral nucleus. The evidence of PW.1 was nowhere near a suggestion that the suit properties were brought out of the sale proceeds of ancestral properties. The shops and tiled house, got by A. Ganapathi, did not have the character of ancestral property.

21. Therefore, the trial Court was right in placing the burden of proof upon the defendants to show ancestral nucleus and a sale of the ancestral properties for the purpose of acquiring the suit properties. Hence, the first point arising for consideration is answered against the appellants and in favour of the respondents.

Issue No.(ii):-

22. The second issue arising for determination is as to whether the suit is barred by time in terms of Article 110 of the Schedule under the Limitation Act, 1963?

23. For the applicability of Article 110 of the Schedule to the Limitation Act, 1963, two conditions are to be satisfied namely (a) that a person seeking to enforce a right to a share in the property should have been excluded and (b) that such exclusion should have become known to the plaintiff. Under Article 110, the period of limitation for making a claim to a share in the joint family property is 12 years, and the date of commencement of the period of limitation is the date on which the exclusion becomes known to the plaintiff. In other words, a person setting up a plea of limitation should plead

as well as prove (1) exclusion and (2) knowledge of such exclusion.

24. In the case on hand, the defendants merely pleaded exclusion without even indicating the date on which such exclusion became known to the plaintiffs. In fact, after the death of A. Ganapathi in the year 1983 mutation was effected in the revenue records not exclusively in the names of the defendants, but jointly in the names of the first plaintiff and the defendants.

25. Interestingly, the claim of the defendants in para-8 of the written statement was that the plaintiffs were excluded from possession and enjoyment during the last 2 decades. But Ganapathi died even according to the defendants on 21-02-1983 and the suit was instituted in 2001. The mother was alive and she was the first plaintiff.

26. In order to discredit the testimony of the mother examined as PW.1, it was claimed by DW.1 that his mother colluded with the revenue officials and managed to get her name recorded in the revenue records. The trial Court rejected such a suggestion and rightly so, since PW.1 was with her sons when she was examined. She was an illiterate lady and could not have colluded with the revenue officials. As rightly pointed out by the trial Court, the mere absence of the names of the daughters in the revenue records will not conclusively show ouster. It was neither pleaded nor proved

by the defendants that before effecting mutation, the revenue officials put the daughters on notice.

27. Ouster was not even pleaded in so many words by the defendants. The defendants pleaded exclusion, without any reference to the date from which the plaintiffs were excluded. Instead of pleading ouster, the defendants actually set up the defence of abandonment and waiver. Irrespective of the nomenclature used by the defendants, all these things require concrete proof, as they have the ability to extinguish valuable rights.

28. The trial Court rightly relied upon the decision of the Supreme Court in **Karbalai Begum vs Mohd. Sayeed And Anr** (AIR 1981 SC 77), wherein the Supreme Court pointed out that the mere non-participation by a co-sharer in the rents and profits of a property does not amount to ouster. Though the trial Court did not actually look at Article 110 of the Schedule to the Limitation Act, the trial Court came to the right conclusion on the plea of ouster. In such circumstances, the defendants could not prove exclusion and could not either plead or prove knowledge of exclusion, and hence, the suit cannot be said to have been barred by limitation in terms of Article 110 of the Schedule to the Limitation Act, 1963. Hence, the second issue is answered against the appellants and in favour of the respondents.

Issue No.iii:-

29. The third issue arising for determination is as to whether the plaintiff can be said to have abandoned or waived their right.

30. At the cost of repetition it should be pointed out that the properties obviously stood in the name of A. Ganapathi and he admittedly died intestate in the year 1983, leaving behind him surviving his wife, 4 daughters and 5 sons. After the death of A. Ganapathi, the revenue officials effected mutation in the records, including the names of the first plaintiff and the defendants. When the mother joined the daughters and instituted the suit, the sons took a defence that neither the mother nor the daughters were entitled to a share in the suit properties. But they admitted that the mother's name was included in the revenue records. Therefore, it was for the defendants to establish abandonment or waiver by concrete evidence. But no evidence was forthcoming from the defendants. Hence, the trial Court was right in rejecting the plea of abandonment or waiver.

31. As indicated in Halsbury's Law of England, waiver is the abandonment of a right in such a way that the other party is entitled to plead abandonment by way of confession and avoidance, if the right is thereafter asserted. Waiver may arise either by virtue of equitable or promissory estoppel or from an election. Though waiver could be express or implied, waiver by implication should arise from conduct as it is inconsistent

with the continuance of the right. It is important to note that mere acts of indulgence will not amount to waiver and a party setting up the plea of waiver, cannot have benefit from the waiver unless he has altered his position in reliance on it.

32. As pointed out time and again by Courts, the principle of waiver is akin to the principle of estoppel. But the difference between two lies in the fact that while estoppels is a rule of evidence and not a cause of action, waiver may constitute a cause of action.

33. None of the elements of waiver or abandonment is present in this case. Though Mr. Vedula Venkataramana, learned senior counsel upon a decision of the Supreme Court in **B.L. Sreedhar and others v. K.M. Munireddy**¹, we do not think that the said case has any application to the facts of the present case. The question involved in B.L. Sreedhar was as to whether one of the parties to the litigation was estoppel from questioning a sale transaction. A sale would normally defeat the right of a person to the property sold. Therefore, the failure of the party to challenge the same, in certain circumstances could be taken advantage of by raising the plea of estoppel as it is a rule of evidence. But waiver and abandonment stand on a slightly different footing. Therefore, the decision is of no assistance to the appellants.

34. Even in **B.L. Sreedhar and others v. K.M. Munireddy**, the Supreme Court noted the distinction between

¹ AIR 2003 SC 578

the waiver and estoppel by quoting an extract from the Halsbury's Laws of England to the following effect:

"The essence of waiver is "estoppel" and where there is no "estoppel" there can be no "waiver", the connection between "estoppel" and "waiver" being very close. But, in spite of that, there is an essential difference between them and that is whereas estoppel is a rule of evidence waiver is a rule of conduct. Waiver has reference to man's conduct, while estoppel refers to the consequences of that conduct."

35. Therefore, we are considered view that the plaintiffs cannot be said to have abandoned or waived their rights. Accordingly the third issue is also answered in favour of the respondents and against the appellants.

Conclusion:

36. Therefore, we find no valid reason to interfere with the judgment of the decree of the trial Court. Hence, the appeal is dismissed with costs throughout.

The miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs.

V.RAMASUBRAMANIAN, J

N.BALAYOGI, J

Date: 21-07-2017

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**HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N.BALAYOGI**



Appeal Suit No.4105 of 2004
(per VRS, J.)

21st July, 2017.