

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

CCCA No.35 of 2016

Between:

Dr.P.Madan Mohan Rao.

... Appellant

And

1) Sri P.Surendranatha Rao

2) Smt. A.Bhavani Chandra

3) Smt. P.Raja Rajeshwari.

... Respondents

(Respondents 2 and 3 are not necessary parties vide Cause Title)

DATE OF JUDGMENT PRONOUNCED: 03.04.2017

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments?

Yes / No

2. Whether the copies of judgment may be
marked to Law Reporters / Journals?

Yes / No

3. Whether His Lordship wish to
see the fair copy of the Judgment?

Yes / No

*** THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**

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! Counsel for Appellant : Sri Eranki Phani Kumar

^ Counsel for Respondent No.1 : Sri T.Viswanadha Sastry

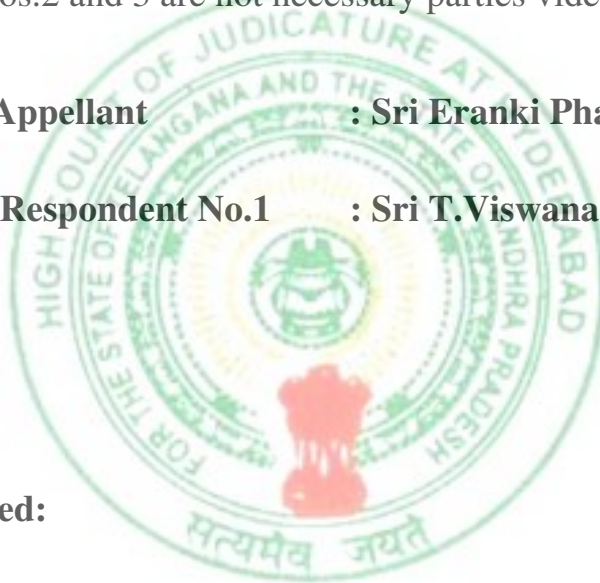
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? Cases referred:

1) AIR 1978 SC 845

2) AIR 1991 Ori 83



HON'BLE SRI JUSTICE U. DURGA PRASAD RAO**C.C.C.A.No.35 of 2016****JUDGMENT:**

The challenge in this appeal, at the instance of the appellant/2nd defendant, is the final decree proceedings dated 10.12.2015 in I.A.No.970 of 2002 in O.S.No.1341 of 1997 on the file of I Senior Civil Judge, City Civil Court, Hyderabad.

2) The parties in the appeal are referred as they were arrayed in the trial Court.

3a) Initially, the 3rd respondent/plaintiff filed the suit—O.S.No.1341 of 1997 against the 1st respondent/1st defendant, appellant/2nd defendant and 3rd respondent/3rd defendant for partition of plaintiff schedule mentioned double storied building situated in Adarshnagar, Hyderabad and for allotment of 1/4th share therein. Plaintiff and defendants are children of late P.Dhananjaya Rao who was the owner of plaintiff schedule property. Pending suit, plaintiff and 3rd defendant compromised with the defendants 1 and 2 and relinquished their respective 1/4th shares in favour of defendants 1 and 2 by accepting monetary consideration. Thus, defendants 1 and 2 became exclusive owners of the plaintiff schedule property. While so, the 1st respondent/1st defendant filed I.A.No.970 of 2002 for appointment of advocate commissioner for ascertaining *mesne* profits and he also filed I.A.No.971 of 2002 for passing final decree by dividing the suit property into two equal halves. The trial Court appointed an advocate commissioner who upon securing

a report from a chartered engineer with regard to mode of bifurcation of plaint schedule property, submitted his report on 07.03.2006 while noting the objections and contentions submitted by either party. The commissioner while agreeing with the Chartered Engineer opined that the property could be vertically divided into two portions. In the process, the advocate commissioner did not accede to the request of the appellant/2nd defendant for horizontal division of property for the reasons mentioned in his report.

b) While so, the trial Court in its order dated 22.11.2006 in I.A.Nos.970 and 971 of 2002 accepted the commissioner's report in toto for dividing the schedule property into two equal halves by constructing a vertical wall as suggested by commissioner in his plan. The trial Court observed that both the parties were at liberty to construct their stair cases in the portions allotted to them. It further observed that Northern side portion was allotted to the share of appellant/2nd defendant and Southern side portion to the 1st respondent/1st defendant as per Vastu Sastra, along with the land in an extent of 300.2 square yards each.

c) Challenging the above order, the appellant/2nd defendant filed C.R.P.No.2155 of 2007 impugning the order mainly on the ground that no allotment was made in respect of terrace in 2nd floor. A learned single Judge of this Court while observing that no final decree was yet passed by the trial Court, disposed of the CRP with a direction that the trial Court shall take into consideration the terrace, effect the partition of terrace and also by taking into consideration all the allied matters.

d) Thereafter, the trial Court passed the impugned final decree dated 10.12.2015 and directed the office to engross the final decree and send the same for registration.

Hence the instant appeal.

4) Heard arguments of Sri Eranki Phani Kumar, learned counsel for appellant/2nd defendant and Sri T.Viswanadha Sastry, learned counsel for 1st respondent/1st defendant. R2 and R3 are not necessary parties vide cause title.

5) Severely fulminating the final decree, learned counsel for appellant would, firstly argue that the idea of having a longitudinal bifurcation of plaint schedule property would bring down its utility to a naught more importantly, at the point of dining-cum-drawing hall situated in 1st floor which is presently under the occupation of appellant since such lopsided division will truncate the area of drawing-cum-dining hall. Further, the division will render the staircase totally useless and drive each party to re-build separate staircases where availability of vacant place is very much scant. The vertical division poses further problems in the matter of using drainage pipes and electrical connection and practically, each party has to remodel the drainage pipes, water connection and electrical circuits. Above all, the vertical bi-section defiles the aesthetic beauty of the structure. Therefore, he would emphasize, since the inception by way of objections, he opposed the idea of vertical division of the building and conversely suggested horizontal division of the building by keeping the dining-cum-drawing

hall in the 1st floor under his occupation as intact and also by allotting the entire 1st floor to him. As an owelty, the appellant was prepared to forgo the entire 2nd floor and the staircase to the 1st respondent/1st defendant. He also suggested for having separate drainage stream for each party in which case he expressed no objection for the sullage pipes being run under his ground. Other little adjustments could be made without much effort. His advices and objections were paid deaf ear by the trial Court and Commissioner and they budged to the wish and request of 1st defendant to make a vertical division. In effecting such division the 1st respondent/1st defendant was allotted more constructed area than the appellant/2nd defendant as evidently the 1st defendant was allotted 3456 square feet of the constructed area consisting of ground, 1st and 2nd floors, whereas the appellant was allotted only 2794 square feet of the constructed area carved from cellar, ground and 1st floor. No owelty was ordered to be paid by the 1st defendant in the final decree. Thus, a lot of injustice was done to appellant/2nd defendant in that regard. Though some adjustment was seemingly made in the order in I.A.Nos.970 of 971 of 2002 dated 22.11.2006 to compensate the extent of structural loss to the appellant, however, the finding in the said order was not incorporated in the final decree, thereby, the injustice meted out to the appellant remained unanswered. He, thus, requested to set aside the final decree and submitted that the appellant is ready to either retain the entire building by paying suitable amount to the share of 1st defendant or for a vice versa adjustment.

6 a) Per contra, severely opposing the appeal, Sri T.Viswanatha Sastry, learned counsel for 1st respondent/1st defendant would submit that the final decree was a consent decree, inasmuch as the appellant did never object for vertical division either before the trial Court or the Commissioner. He would submit that while preferring the C.R.P.No.2155 of 1997 his only objection was that the trial Court did not make allotment in respect of terrace and he had not questioned the vertical division approved by the trial Court. Therefore, he is now debarred from raising that issue for the first time at this belated stage after passing of final decree.

b) Nextly, learned counsel would argue, the difference in the allotment of structural area was already well compensated by the trial Court by exclusively allotting the entire constructed area in the cellar and also garage situated in the Northern side portion to the share of appellant/2nd defendant and therefore, he cannot plead injustice to him. He thus prayed to dismiss the appeal.

7) In the light of above rival arguments, the point for determination is:

“Whether the final decree passed by the trial Court is factually and legally sustainable?”

8) **POINT:** Admittedly, the suit schedule property is a double storied building bearing H.No.5-9-22/91 standing in plot No.80 in Adarshnagar, Shapurwadi, Hyderabad admeasuring 600.41 square yards. The building consists of cellar, 1st and 2nd floors with construction on the Southern

side and terrace on the Northern side in the 2nd floor. The building has amenities like a garage, compound wall around, sump for collection of public water, pump and over head tank etc. The cellar is below the ground floor on the Northern side. Below the ground floor the sub-garage comprises of rock sloping down to North. The drainage from the building joins the manhole on the south west corner in the yard. The sewerage disposal starts from the South West, skirting round the building along the compound wall and drains off into the public underground drain on the North West corner.

The above are vital features of the building which is subject matter of partition.

9) For better appreciation of the arguments of either side, the mode of partition effected by the trial Court in the final decree is extracted below:

“1) That the Commissioner report is accepted in TOTO by dividing the schedule property into two halves by constructing a vertical wall as suggested by the Commissioner in the plan annexed in this report dated 07.03.2006.

2) That the P.Surender Nath/Petitioner/Defendant No.1 is allotted southern side of the suit schedule property, admeasuring 3456 sq.ft constructed area of the building consisting of Ground, First and Second Floors more particulars shown in the plan (Shown in Green Colour) drawn by the Commissioner with all absolute rights and title over the property and he is entitled to enjoy the same as its absolute owner without interference by anybody. The petitioner/defendant No.1 and respondent No.2/defendant No.2 shall be entitled to equal area i.e, 300.20 sq.yds each out of 600.41 sq.yds.

3) *Sri P.Madan Mohan Rao, respondent No.2/defendant No.2 is allotted Northern side constructed portion of the suit schedule property admeasuring 2794 sq.feet consisting of Cellar, Ground and First Floor more particularly shown in the plan drawn by the Commissioner with all rights and title over the property allotted to him and he is entitled to enjoy the same as its absolute owner without interference by anybody. The petitioner/Defendant No.1 and Respondent No.2/defendant No.2 shall be entitled to equal area i.e, 300.20 sq.yds each out of 600.41 sq.yds.*

4) *The open terrace available on the First Floor that is on the Northern side of the building of the suit property is allotted to Dr.P.Madan Mohan Rao and he is entitled to enjoy all the rights in and over the terrace portion as its absolute owner as per Commissioner report dt.18.04.2008.*

5) *That both the parties have liberty to construct their respective staircase on the portion allotted to them as per Order I.A.No.970/2002, dated: 19-2-2009.*

6) *That the Commissioner Report dated: 07-03-2006 and 18-04-2008, along with plan shall form the part and parcel of this Final Decree.*

7) *Both parties shall enjoy existing amenities such as borewell water, drainage and municipal water connection.*

8) *That the Stamp Duty paid on 11-11-2000 of Rs.87,050/- may be taken to the account in full towards the compromise decree in partition suit issued on O.S.No.1341/97, and register the Final Decree before the Registrar for Registrations, Hyderabad on receipt of balance Stamp Duty and Registered the Final Decree."*

10) This Court after giving anxious consideration to the chartered engineer's report, commissioner's report and final decree passed by the trial Court, is of the firm view that vertical division made by the

engineer and approved by the commissioner and consequently by the trial Court is quite eccentric and lopsided resulting in loss and injustice to the appellant/ 2nd defendant. In the considered view of this Court, the pliant schedule property is amenable for neither horizontal nor vertical bifurcation.

11) Horizontal bi-section which was proposed by appellant, may at best effectuate a paper division but not an effective partition by metes and bounds. The reason is not far to seek. If the entire 1st floor is allotted to the appellant/2nd defendant and 2nd floor to the 1st defendant and the ground and cellar are either divided or kept joint, the resultant division would be that one sharer's property overlaps on the other causing severe problems and litigations in the matter of future expansion, demolition and alienation. Hence, horizontal severing is not a solution much-less a partition by metes and bounds. Hence, the same has to be rejected.

12) The vertical bifurcation made by the Commissioner and approved by the Court is also beset with many incongruities evident from the reports of Chartered Engineer and Commissioner themselves.

a) Firstly, the report of the Engineer would show that when the building was markedly divided vertically down by a wall, more or less in the center, right through from the top to foundations, there arises a difficulty for equal partition of dining-cum-drawing hall situated in the first floor. The Engineer expressed that he tried to make a vertical division in line with the central hall but that would foul the practical bifurcation because of the dining-cum-drawing hall in the first floor

which he noted as Gordian knot (intricate knot) to be resolved. He further noted that however much they pondered over the problem of equal bifurcation satisfactorily, they found themselves in a predicament, since the single dining-cum-drawing hall in the first floor was designed for any one single family only. When vertical division was tried to be made through the central line, the beams located at the center of the dining-cum-drawing hall coinciding with the central wall to be constructed. Therefore, to effect the vertical bifurcation, the Engineer suggested that the partition wall has to be constructed asymmetrically nearly 3ft. from the center line of the drawing-cum-dining hall. In which event, the drawing-cum-dining hall will have to be truncated and the two wings of the building will have to be suitably modified to the best possible orientation. By this asymmetrical division, the stair case has also to be cut unequally and thereby the stair case will become useless for either of the two brothers. Thus one of the most intricate problem in the vertical division is the cutting at the drawing-cum-dining hall in the first floor. At the central point of the drawing-cum-dining hall, there appears to be a beam and the said beam will coincide with the central line of division causing severe problem in the matter of future utility, expansion, demolition and alienation of the respective portions of either party. To obviate that problem, it appears, the Engineer suggested for moving the central line away from the central beam to an extent of 3ft at the cost of truncating one wing of the drawing-cum-dining hall and also the corresponding stair case which almost becomes useless.

b) The second incongruity is that due to the asymmetrical division, the respondent/defendant No.1 gets 3556 sq.ft of constructed area of the building consisting of ground, first and second floors whereas the appellant/2nd defendant gets 2794 sq.ft consisting of Cellar, ground and first floor and thereby the appellant falls short of 762 sq.ft of constructed area. In the final decree proceedings, though the said difference was noted, nothing was mentioned about the Owelty to be payable by the 1st defendant. No doubt in the common order in I.A.No.970/2002 and 971/2002 in O.S.No.1341/1997 dated 22.11.2006 the difference was mentioned as if 68.48 sq.ft and it was observed that since the garage situated in the Northern side portion of the schedule property was allotted to the share of the 2nd defendant, the difference in the constructed area was thus compensated. It must be noted that as per final decree proceedings, the difference is 762 sq.ft but not 68.48 sq.ft as mentioned in the common order. Further, in the final decree it was not specifically mentioned that the loss in the constructed area was compensated by allotting garage to 2nd defendant. Above all, nowhere the particulars of the garage and its area are mentioned to know whether allotment of garage could be an effective substitution for the loss of constructed area. This is another lacuna in the vertical bifurcation.

c) The third problem in vertical division is ofcourse, in respect of usage of the underground drainage system. As of now, the underground drainage for the Southern half is located towards Northwest corner i.e, the sewerage line starts from the Southwest, skirts the building around

the rear and joins the road lower down on the Northwest corner. If the property were to be divided North South wise, the holder of South block has to depend on the other owner to pass his sewerage line through the Northern part to reach the municipal manhole situated in the Northwest corner.

d) Therefore, for all these reasons, the vertical division is also not feasible. However, the trial Court failed to consider all these aspects in a pragmatic manner and simply carried away by the report of the Commissioner and accepted it mechanically.

13) When symmetric division of a property is not possible without truncating the utility of the portion allotted to one or more sharers and without defiling structural ambience and aesthetic beauty, necessarily other mode of partition has to be adopted. In this regard it is beneficial to extract Sec.2 of Partition Act, 1893:

“Section 2: Power to court to order sale instead of division in partition suits.—Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds.”

Thus as per the above provision, it is clear that when it appears to the Court that by reason of nature of the property to which the suit relates, as in the present case, or of the number of shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, then the Court may direct the sale of property and distribute the sale proceeds among the shareholders.

a) In similar circumstances, the Apex Court in the case of ***Badri Narain Prasad Choudhary and others vs. Nil Ratan Sarkar***¹, held as follows:

*“**Para 19:** Thus considered, it is clear that the provisions of Sections 2 and 3 of the Partition Act are not applicable to the peculiar circumstances of the case. At the same time, there is a concurrent finding of fact recorded by the courts below that the suit property is so small, that it cannot be conveniently and reasonably partitioned by metes and bounds, without destroying its intrinsic worth. This finding is unassailable. In our opinion in such a situation, the Court can devise such other feasible mode for effecting partition as may appear to it to be just and equitable in the circumstances of the case.*

***Para 20:** The suit property, being incapable of division in specie, there is no alternative but to resort to the process called Owelty, according to which the rights and interests of the parties in the property will be separated, only by allowing one of them to retain the whole of the suit property on payment of just compensation to the other. As rightly pointed out by K. Subba Rao, C. J. (speaking for a Division Bench of Andhra High Court in [MANU/AP/0118/1957](#) : A.I.R. 1958 A P 647), in cases not covered by Sections 2 and 3 of the Partition Act, the power of*

¹ AIR 1978 SC 845

the Court to partition property by any equitable method is not affected by the said Act.

b) In ***Fakir Khan vs. Kuanr Khan and others***² case, the High Court of Orissa came to a similar conclusion.

c) In view of the above facts and law, since the plaint schedule property is not amenable for either vertical or horizontal division as noted above, the only alternative is to follow a more pragmatic method.

14) In the considered view of this Court, the right of preemption must at first be extended to the appellant and first defendant to retain the property by paying suitable Owelty to other party and in their failure, auction the property and distribute the sale proceeds between both the brothers.

15) In the result, this Appeal is allowed and final decree in O.S.No.1341 of 1997 is set aside with the following directions:

- a) The appellant/2nd defendant and respondent/1st defendant shall, within two(2) months from the date of this judgment, arrive at the value of the plaint schedule property and intimate to the trial Court as to which one among them is going to retain the property by paying Owelty to the other.
- b) Failing to follow the above direction, the trial Court shall ascertain the market value of the plaint schedule property with the assistance of a qualified Civil Engineer and after hearing both parties, and thereafter, taking the value fixed by it as upset price, conduct auction among both the brothers.

² AIR 1991 Ori 83

- c) If the parties are not agreeable for auction *interse*, then the Court shall after fixing the upset price as mentioned in direction No.2, conduct a public auction of the plaint schedule property and distribute the sale proceeds between the appellant/2nd defendant and respondent/1st defendant after defraying the expenses for holding auction and pass a final decree accordingly.

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

Date: 03.04.2017
Murthy/scs

U. DURGA PRASAD RAO, J

