

THE HON'BLE SRI JUSTICE A.SHANKAR NARAYANA

C.C.C.A.No. 96 OF 1999

JUDGMENT:

Assailing the judgment and decree in O.S.No. 1158 of 1992, dated 21-01-1999, on the file of the learned VII Senior Civil Judge, City Civil Courts, Hyderabad, the 1st defendant therein preferred the present regular appeal.

2. In a suit for partition, by the aforesaid judgment, the Court below passed preliminary decree for partition of suit schedule property to the extent of 3/8th share of the plaintiffs and for appointment of a commissioner for division by metes and bounds to allot plaintiffs' share.

3. Appellant herein is defendant No.1 in the aforesaid suit, while respondent Nos.1 to 3 are plaintiffs and respondent No.4 is defendant No.2.

4. For the sake of convenience, the parties hereinafter referred to as they were arrayed in the aforesaid suit.

5. The suit schedule property consists of ground floor and first floor constructed over an extent of 450 square yards bearing door No. 20-2-568, Sarae Bawahir, Hussaini Alam, Hyderabad, within specific boundaries shown in the plaint schedule. The suit house originally belonged to one Nazara-E-Hussain. On his demise, his two sons who are Karamullah, father of the plaintiffs and the 2nd

defendant, and Ali Mohammed, father of the 1st defendant, succeeded to the estate. The plaintiffs claimed that the father of the 1st defendant Ali Mohammed was residing with their grand-father Nazara-E-Hussain and thus, after the death of Nazara-E-Hussain, all the movables consisting of jewellery, costly furniture, cutlery and other belongings remained in the custody of the said Ali Mohammed and on his demise, in the custody of the 1st defendant. They stated that their father spent huge amount for re-construction and carrying out repairs to a portion of the suit property when it was in dilapidated condition. When a demand was made by them for partitioning the suit properties and allot their legitimate share, the 1st defendant did not agree and that constrained them to file the instant suit.

6. The 2nd defendant remained *ex parte*.

7. The 1st defendant resisted the claim. His case is that their grand-father, Nazara-E-Hussain had four issues, namely; (1) Ali Mohammed, (2) Karamullah, (3) Qurrat-E-Nazar and (4) Saleha Begum. He is the son of Ali Mohammed and his sister, Jameela died issueless. Karamullah had not only the plaintiffs and the 2nd defendant as sons but also four daughters who are all alive. Qurrat-E-Nazar died, survived by eight daughters and one son who are all alive. Concerning Saleha Begum, there are no survivors.

8. The death of Nazara-E-Hussain, their grand-father, occurred in 1953. The plaintiffs intentionally suppressed the particulars of

heirs and legal-representatives with a view to make wrongful gain for themselves. Therefore, in the absence of all the legal-representatives of late Nazara-E-Hussain, the suit is not maintainable.

9. The 1st defendant sets up a family settlement said to have arrived at between his father, Karamullah and his paternal aunts Qurrat-E-Nazar and Saleha Begum, in which, jewellery, costly furniture and cutlery were partitioned in the presence of the religious heads and the articles were handed over to the respective parties leaving the said house in which his father and the father of the plaintiffs and the 2nd defendant along with the plaintiffs were residing.

10. The suit house was partitioned between his father and the father of the plaintiffs and the 2nd defendant in 1968 in the presence of the religious heads (Hazaraths). Since late Karamullah had contracted debts and when the creditors tried to attach the suit property and brought it for sale, his mother advanced a loan of Rs.10,000/- to late Karamullah who paid the said amount to his creditors and discharged his loan and thus, saved the property from being attached and sold in public auction. The religious heads, taking the said circumstances into consideration, partitioned the house in the year 1968, whereunder the portion under his occupation was allotted to his father's share while the remaining portion was allotted to late Karamullah, in which portion the plaintiffs have been residing after his death. Thus, the partition was already effected in the year 1968. He states that the

father of the plaintiffs and the 2nd defendant, late Karamullah recorded his full satisfaction in the minutes book maintained by the religious heads by acknowledging the partition of the suit house in the year 1968 and, therefore, the suit as framed is not maintainable. Concerning the alterations and additions effected, he admits that since the suit house was in old one, they did carry out the alterations and additions by incurring necessary expenses from and out of their individual funds.

11. The 1st defendant thus, states that the plaintiffs never protested in regard to the partition and settlement that had taken place immediately after the death of their grand-father, Nazara-E-Hussain in the year 1968, the suit schedule property was partitioned by the religious heads. The other grounds raised by the plaintiffs are wholly incorrect. The plaintiffs and himself have been residing in their respective portions occupied under partition in the year 1968 and the plaintiffs are not entitled to claim any share of the property much less half share as claimed herein. Hence, sought to dismiss the suit.

12. Basing on the above pleadings, the Court below framed the following four issues:

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- (i) *Whether the Family settlement pleaded by the defendants is true and correct?*
- (ii) *Whether plaintiff is entitled to the relief of partition. If so, to what share?*

- (iii) *Whether the suit is bad for mis joinder and non-joinder of parties?*
- (iv) *To what relief? ”*

13. To substantiate their case, the 2nd plaintiff, besides examining himself as P.W.1, has examined one Mosaffar Ali as P.W.2 and got marked Exs.A1 to A6. On the other hand, the son of the 1st defendant examined himself as D.W.1 besides examining one of the religious heads by name, Sadullah Hussami as D.W.2 and got marked Ex.B1 and Exs.X1 to X3.

14. On issue No. 1, the Court below, holding that Ex.X3 does not satisfy the requirements of Section 63 of the Indian Succession Act, 1925, and it was not executed evidencing past transaction but relates to the transaction that took place contemporaneously requiring compulsory registration; that if it is a genuine document, the same ought to have been in the custody of the 1st defendant; that Exs.X1 to X3 were not confronted to P.W.1 by D.W.1; that concerning Ex.X2, the 1st defendant did not examine himself to prove the contents therein but his son was examined who is not a party to the suit; that Ex.X2, being a contemporaneous document and not being a record of past transaction, is also compulsorily registerable document even if it is true and valid; that Exs.X1 to X3 were not proved and, therefore, the 1st defendant failed to establish partition of 1968, recorded a finding as such on issue No. 1.

i) On issue No. 2, the Court below, not agreeing with the case of the 1st defendant and discarding the probability as to the residence of the scribe for the past 30 years and effecting repairs and alterations, decided the issue against the 1st defendant. On issue No. 3, the Court below, based on Ex.A3, in which the sisters of Karamullah and Ali Mohammed were not figured as executants, deriving the probability that they did not have share in the suit property and holding that their non-joinder not bad, decided the issue against the 1st defendant. Basing on the above findings recorded on issue Nos. 1 to 3, the Court below decreed the suit and the preliminary decree under challenge was passed directing to partition the suit property into eight equal shares and allot three such shares to the plaintiffs and for appointment of a commissioner for effecting division by way of filing a separate application in final decree proceedings.

15. The aforesaid judgment and decree are under challenge in the instant appeal preferred by the 1st defendant contending in the grounds that the Court ought to have found that the suit schedule property is not Matruka or partible estate but exclusive property of the 1st defendant; that the Court below ought to have found that the family settlement is a record of past events restating the rights already vested pursuant to the bequest which had already taken effect due to operation of law under Ex.X1 as the family settlement did not result in divesting and transferring of rights *inter vivos* and that pursuant to

Ex.X2, the suit property had devolved upon Karamullah and Ali Mohammed who had satisfied the conditions stipulated in the Will; that the Court below ought to have believed Ex.X2 contents and was not right in disregarding Ex.X2, despite the contents being proved; that the Will under Ex.X3 executed by Nazara-E-Hussain was lawful since a Muslim could execute a Will in favour of his heirs and the said bequest would be valid when ratified by other heirs and the same did occur in the present case and even the ratification was acted upon and, therefore, the Court below went wrong in rendering a finding on Ex.X3; that the Court below was wrong in holding that Exs.X1 and X2 were inadmissible as no objection at all was raised at the time of admission of these documents and that the Court below was not right in recording the finding on issue No. 3 and recorded an extraneous finding holding that the father and brothers must have performed the marriages of their paternal aunts and given them some share in 1953 though, the children of their paternal aunts were necessary parties.

i) It is also contended that the suit claim for recovery of possession was barred by limitation and the Court below was not correct in holding that a co-sharer cannot claim title by adverse possession without appreciating that upon ouster, time begins to run for prescriptive title to crystallize and become perfect in law. Hence, sought to set aside the judgment and decree.

16. Heard Sri S.R. Mahajir, learned counsel for the appellant - defendant No.1, and Sri Srinivas Emani, learned counsel for respondent Nos.1 to 3 - plaintiffs. Though, notice served on respondent No.4 - defendant No.2, none appears for him.

17. The following points would arise for determination:

- i) Whether the family partition said to have taken place in the year 1968 is true, and whether the family settlement pleaded by defendant No.1 evidencing the partition is true, valid and binding on the parties?
- ii) Whether the plaintiffs are entitled to the partition, and if so, to what share?
- iii) Whether Exs.X-1 and X-2 are proved?
- iv) Whether the suit is bad for non-joinder of parties?
- v) Whether the judgment and decree are liable to be set aside?
- vi) To what other reliefs?

Point Nos.1 to 3:

18. It is not in dispute that two branches i.e., Karamullah, to which plaintiffs and defendant No.2 belong, and Ali Mohammed branch, to which defendant No.1 belongs, have been in possession and occupation of the suit schedule house in distinct portions. It is also an admitted fact that they have been paying electricity consumption charges and water consumption charges to the respective departments separately, but so far as payment of property tax is concerned,

according to the evidence on record, both the parties have been jointly paying the municipal tax. Since the previous partition as pleaded by defendant No.1 having taken a definite plea in his written statement that it took place in the year 1968, the entire burden rests on him to prove affirmatively that Exs.X-1 to X-3 would cut at the root of the plaintiffs' case for the relief of partition sought for by them. Therefore, the proof or otherwise of Exs.X-1 to X-3 is the vital question that requires determination. Since Exs.X-1 to X-3 are set up by defendant No.1, he is obligated to prove that they bind both the branches.

i) At the outset, it is pertinent to mention that defendant No.1 for the reasons best known to him, has not stepped into the witness box. It is clear from the evidence of DW.1, who is no other than the son of defendant No.1 who has been acting on the General Power of Attorney executed by his father in his favour which is also marked as Ex.B-.1. Therefore, the evidence of DW.1 becomes material as he stepped into shoes of his father and stood in the witness box to assert to the case pleaded by his father in his written statement. Now, looking after at whether his evidence, thus, satisfies the evidentiary rule in proving Exs.X-1 to X-3. The evidence of DW.1 and Exs.X-1 to X-3 have been elaborately dealt with and discussed by the trial Court.

ii) Initially, when intrinsically examined the evidence of DW.1, it is forthcoming that his father was sitting in the Court Hall all through when PWs.1 and 2 were examined and cross-examined as witnesses. He would even answer to a question that his father was hale and healthy and there was no difficulty for his mobility. He answers to certain questions in his cross-examination that his father can talk, and admits that his father is moving out and can walk; that his father was sitting in the Court hall while PW.1 was being examined. From these answers, it is clear that his father, who is present defendant No.1, deliberately avoiding to examine himself as DW.1, perhaps with a view to screen himself being cross-examined and avoid confronting with relevant aspects of the case. For a moment even overlooking the absence of evidence of DW.1, when looked at the evidence of DW.1, his evidence does not improve the case of defendant No.1. Certain answers given by him in his cross-examination are worth-mentioned. The said answers would reads thus:

“ When Nazara Hussain died I did not know what were the properties kept by him movable and immovable and other details as I was 5 years old. My father knows all the details personally. It is true that I do not know under what circumstances Ex.A.3 was executed by Karamullah and grandfather in 1955. It is true that my father was examined in O.S. 110/58. It is true that in Ex.A.3, 6-9-55 it is stated that my grandfather and Karamullah are the owners of the suit property.

..... I do not know what was the extent of the property left by Nazara Hussain. I do not know the extent of the property in possession of the plaintiffs.

..... I do not have any documentary evidence to show that the suit property was divided between my grandfather and Karamullah...”

iii) Strangely, this witness answers to a question that a document was executed for partition in 1968 and there was no plan, and that he does not have the suit document with him. He answers to a question that he was not present when the document of partition was executed in 1968. Yet another answer given by him is that he cannot produce the said document. It is really strange and un-understandable as to why this witness asserts as to partition deed of 1968 said to have executed and why he expresses his inability to produce the said document. It is not known whether he intends to equate the said document with that of Ex.X-3 or Ex.X-1 or any other documents. Admittedly, Exs.X-1 to X-3 were exhibited through DW.2, who was Sadullah Hussami, who claimed himself to be a representative of Hadiya Jamata Sulamani Trust and Hussamuddaran Trust. When DW.2 was examined and Exs.X-1 to X-3 were marked, it is not known why DW.1 again did not step into witness box to speak about Exs.X-1 to X-3. In fact, DW.1 ought to have stepped into witness box, or at least defendant No.1 ought to have stepped into witness box as he claims personal knowledge on the contents of Ex.X-1 as could be gathered from the written statement. But, again for the reasons best known to him, he did not wish to examine himself as a witness to speak about Exs.X-1 to X-3. At least at a subsequent point of time

after DW.2 was examined by obtaining permission of the Court, he ought to have examined as a witness. These are all the circumstances which give rise to an inescapable inference standing adverse to the case set up by defendant No.1.

iv) Now, turning to the evidence of DW.2 as to whether he was competent to speak as a witness before the trial Court. In his cross-examination, he admits to a question that he was Accountant and Secretary of Hadiya Jamata Sulamani Trust, and admits that summons stands in the name of Dawathia Sulamani, and he has not filed any certificate to show that he has been working as Accountant-cum-Secretary of Hadiya Jamata Sulamani Trust, and he expresses ignorance, answering that he does not know whether their office has any authority under law to give judgment or to settle the dispute. Turning to his evidence with regard to contents of Exs.X-1 to X-3, irrespective of the fact whether Exs.X-1 to X-3 are valid documents. Ex.X-1, according to this witness, is a document containing five sheets and a plan annexed thereto in Urdu. He asserted that the said document contains the signatures of the parties and witnesses; Ex.X-2, according to him, is similar one between the same parties, dated 29.07.1954, consisting of two written papers; and Ex.X-3 is Will of Nazara-E-Hussain, dated 5th Rabiullah Awal 1352 Hijri consisting of two written sheets. When he was cross-examined touching Exs.X-1 to X-3, he states that they were not executed in his presence; that the

parties did not sign on Ex.X-1 in his presence; that the parties and the witnesses signed in the last page in Ex.X-1, but not in other pages; that when Ex.X-1 was executed, they were executed in a book; that out of that book, he has separated the sheets, which are marked as Ex.X-1 and also Exs.X-2 and X-3; that he does not know the relationship between defendant No.1 and the person who scribed Ex.X-1; that he does not know who are the witnesses in Ex.X-1 out of six persons signed; that he has not seen Karamullah and defendant No.1 signing in Exs.X-1 to X-3, and he has not seen anything as to Karamullah signing in any document; that he cannot say in respect of which property they have executed.

v) Concerning Ex.X-2, he admits to a pertinent question that on the reverse of the document i.e., on the second page, the writing appears to be in different ink; that Ex.X-2 was written by Mohd. Isaq on 04.09.1955, and it does not bear the signature of the defendant No.1, but it bears the signature of Ali Mohammed; and he volunteered that he was not competent to speak about Ex.X-2. Concerning Ex.X-3, according to him, it is a Will written by Nazara-E-Hussain, who is great grand-father of the parties herein; he answers that first page bears signatures of four witnesses and it does not contain signatures of the attestors at the end; that he has not seen Nazara-E-Hussain signing any document on Ex.X-3; that the persons, who signed as attestors in

Ex.X-3, are dead; of course, he denies the suggestion that Exs.X-1 to X-3 are created for the purpose of the suit.

vi) What is significantly important from the answers given by this witness is that there was no occasion for this witness to tear the relevant pages from the Register which are now marked as Exs.X-1 to X-3. It is also difficult to comprehend whether they were together one after another in the said Register or whether at different pages. It is not known why this witness has not brought the Register from which he tore Exs.X-1 to X-3 papers and why he failed to exhibit the said Register, to take it back if it is really maintained in the Trust by substituting the certified copy thereof. Certainly, the evidence of this witness, thus, gives rise to any amount of suspicion as to whether Exs.X-1 to X-3 are true.

vii) So far as validity is concerned, when Ex.X-3 is construed as a Will said to have executed by Nazara-E.Hussain, the grand-father of the parties, as rightly recorded by the trial Court, at least one of the witnesses signing as attesor, is required to be examined as a witness, as per the mandatory provisions of Section 63 of the Indian Succession Act. In case none of the attestors are alive, nothing prevented the defendant No.1 to examine the persons who can identify the signatures of any of the attestors to Ex.X-2, leaving it apart a document to attain validity, compulsorily registerable. So, for want of registration, it cannot be construed as a valid document though,

admitted in evidence, when a document, which is held to be invalid, cannot be looked into for any purpose. In such an event, Exs.X-1 to X-3 are to be held in a stroke that they are neither true, nor valid, nor binding on the parties as rightly held by the trial Court recording a positive finding thereon which cannot be said as patently correct. Therefore, viewed from any angle, it cannot be said that the defendant No.1 is successful in proving previous partition of 1968 as pleaded, in which case, the finding recorded by the trial Court that the suit properties are partible and granting relief as prayed for by the plaintiff cannot be upset as it does not suffer from any legal infirmity.

Point No.4:

19. Concerning the non-joinder of necessary parties, the trial Court has recorded definite findings that they are not necessary parties in true sense and, therefore, their non-joinder would not make the suit bad. There is no need to elaborate for the reason, though, even earlier a suit was pending in O.S. No.113 of 1958 and all the heirs were aware of the said suit, in which the Court concerned declared that sale deed executed by Karamullah and Ali Mohammed was sham document. It is no doubt true, defendant No.1 intended to put forth that Karamullah, father of plaintiffs and defendant No.2, was a spendthrift and when he contracted debts, his mother contributed Rs.10,000/- to clear all the debts. Of course, when a question was put to DW.1, he answered in specific terms that there is no document

evidencing the said transaction. Be that as it may, when defendant No.2 failed to prove previous partition pleaded by him and the fact that property tax being paid jointly, the mere circumstance that father of plaintiffs and defendant No.2 raised constructions separately on the portions that were in their occupation is no ground to view that there was earlier partition by metes and bounds between two branches against accepting and acting upon that they have been living separately.

Point Nos.5 and 6:

20. Therefore, viewed from any angle, the appellant - defendant No.1 is wholly unsuccessful in showing that the findings recorded by the trial Court are patently perverse warranting interference.

21. Hence, the appeal fails and, accordingly, dismissed confirming the judgment and decree passed by the trial Court. However, in the circumstances of the case, both the parties are directed to bear their own costs.

As a sequel thereto, miscellaneous applications, if any, pending in the appeal, stand disposed of.

A. SHANKAR NARAYANA, J

August 29, 2017.

JSK/Mgr