

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 3370 of 2017

ORDER:

1) Assailing the order dated 28.06.2017, passed in O.S.No.31 of 2010 on the file of the Principal District Judge, Chittoor, wherein an objection raised by defendant Nos.1 , 7 and 8 with regard to non-admissibility of Xerox copy of the partition list dated 31.07.1989 was rejected, the present Civil Revision petition is filed.

2) The facts in issue are as under:

Respondent Nos.1 to 4 herein, who are the plaintiffs in O.S.No.31 of 2010, filed the above suit seeking division of the schedule properties into 7 equal shares by taking into consideration, the good and bad qualities and to allot 1/7th share to plaintiffs and put them in separate possession of their respective share. The averments in the plaint would show that the plaintiffs and defendant Nos.1 to 3 are the members of a undivided hindu joint family. It is stated that due to differences, the elder brother of the plaintiffs and defendant Nos.1 and 2 by name K.Lokanatha Reddy started living separately. Defendant No.3 is the wife of K.Lokanatha Reddy. Though K.Lokanatha Reddy was living separately but the plaint schedule properties were looked after by K.Lokanatha Reddy and after his death, defendant Nos.1 to 3 were looking after the schedule properties.

The plaintiffs were residing in different villages and they are depending on defendant Nos.1 to 3, in managing their properties. The plaintiffs used to make their share of income every year in the month of August, after harvesting the mango crop. For the past two years, the defendant Nos.1 to 3 were not furnishing proper accounts of the income and used to give meager amounts to the plaintiffs. Suspecting foul play, the plaintiffs thought that it will not be safe to keep the schedule properties in joint and called upon defendant Nos.1 to 3 to divide the properties by metes and bounds. Defendant Nos.1 to 3 refused for division of the properties and assured that they will produce the accounts for the income and expenditure honestly. Recently, the plaintiffs came to know that defendant Nos.1 to 3 obtained pattadar pass books and title deeds in their names. When the same was questioned, it was informed that they obtained the same in order to avail loans in the banks. Defendant No.3 also executed registered gift deeds in favour of defendant Nos.4 to 6, though she has no exclusive right over the property. Hence, the plaintiffs filed the partition suit.

3) First defendant filed his written statement denying the averments made in the plaint. It is stated in the written statement that the plaintiffs have intentionally suppressed the existence of a "will" dated 15.01.2000, executed by K.Lokanatha Reddy, bequeathing his share in properties to K.Bhanu Prakash and K.Jaya Prakash. It is also stated that defendant No.3, has no

right to execute documents and that she is not in exclusive possession and enjoyment of any of the properties mentioned in the plaint and that she got only life interest in the share of her husband.

4) Defendant No.3 filed written statement denying the averments made in the plaint. It is stated that the plaint schedule properties were orally partitioned with the intervention of elders between K.Lokanatha Reddy, K.Jagannadha Reddy, K.Viswanatha Reddy and Arunamala Reddy's second wife Vallemma and the same was reduced into writing on 31.07.1989. Subsequent to the oral partition, there was no joint family property and the plaintiffs have no right or possession over the same. It is also stated that the present suit is filed only as a counterblast the suit in O.S.No.170 of 2010 filed by defendant No.3 seeking declaration of title and for other reliefs. In order to overcome the difficulty in prosecuting the said suit, defendant No.1 herein engaged and made the plaintiffs herein to file the present frivolous suit. It is also stated that the plaintiffs are not entitled to any share in the suit schedule properties. In the said suit the evidence of plaintiffs as well as defendant Nos. 1, 7 and 8 is over and when the same was coming up for defendant No.3 evidence, she wanted to bring a document referred to as "Bhaga Vimarsha Parikattu Patram" dated 31.07.1989 as evidence. When an objection was raised by the learned counsel for defendant Nos.1,7 and 8 with regard to its admissibility, the trial

Court took up the matter, to determine whether the photocopy of document dated 31.07.1989 is admissible in evidence as secondary evidence under Section 65 of the Indian Evidence Act.

5) After hearing both sides as to the admissibility of the said document, the trial Court held that the photo copy of partition deed dated 31.07.1989 is admissible in evidence as secondary evidence under Section 65 of the Indian Evidence Act and that it can be received in evidence through DW.4 by marking it as exhibit on behalf of defendant No.3. The objection raised by learned counsel for defendant Nos.1, 7 and 8 was held to be not sustainable. The trial Court also held that the probative value of the document can be taken into consideration after considering all the relevant aspects, while appreciating the evidence on record, at the time of disposal of the matter. Challenging the said order, the present Civil Revision petition is filed by defendant No.1.

6) Learned counsel for the petitioner mainly submits that the trial Court while allowing the petition held that the recitals of the document reveal that there was partition among four sharers about a year prior to the execution of said document, evidencing earlier partition and acknowledging the said partition by the respective shares. The Court further held that a reading of the document coupled with pleadings of defendant No.3, would show that the said document was executed evidencing earlier partition and no rights over the properties have been

created for the first time on the respective shares under the document. In view of the above, it is urged that since the document deals with partition of the property and this being a xerox copy of the document, which refers to past partition of the property among four sharers, it cannot be marked even as secondary evidence since the original itself, which is unstamped, is inadmissible in evidence.

7) Learned counsel for the respondents would submit that the very same document was marked through the evidence of PW.1 as Exs.P11 and P12 (to the extent of marking signatures) and no objection was raised at that point of time. Since the document to the extent of signatures was already marked, learned counsel for the respondents would submit that no prejudice would be caused if the contents of the said documents are marked. He further submits that the original document is in the custody of the plaintiffs and in spite of repeated requests they have not produced the same. Hence, the respondents are forced to prove their case by producing the Xerox copy of the unstamped past partition deed. He also submits that a reading of the document, as a whole, does not convey division of properties but it only refers to an arrangement being made for more efficient usage of the properties that fell to their respective shares.

8) In order to appreciate the same, it would be useful to refer to the relevant portion of the document, which is as under:

9) A reading of the said document would clearly show that a year prior to the date of execution of the document the property was divided into four shares and each one of the sharers is enjoying the said property. The same was sought to be reduced into writing. Therefore, it can be said that the said document reflects arrangement of property for efficient usage but on the other hand it clearly spells out past partition.

10) As seen from the impugned order, the learned trial Judge did not refer to the provisions of the Stamp Act, while holding that the document reflects past partition of the property. Admittedly the said document was executed in the year 1989. Instrument of partition is defined under Section 2 (15) of the Indian Stamp Act. According to which, Instrument of partition means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and includes also a final order for effecting a partition passed by any revenue-authority or any civil court and an award by an arbitrator directing a partition; and a memorandum regarding past

partition. The expression 'memorandum regarding past partition' was inserted to sub-section 15 of Section 2 of the Indian Stamp Act by way of an amendment under A.P. Act 17 of 1986, with effect from 16.08.1986.

11) When the document in question is termed as past partition, falling within the meaning of "instrument of Partition", definitely provisions of Indian Stamp Act would get attracted.

12) The Apex Court in *Bipin Shantilal Panchal v. State of Gujarat and another*¹ while dealing with marking of a document to be treated as secondary evidence observed as under:

"When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed."

13) Therefore, the argument of the learned counsel for the respondents that the admissibility or otherwise of the said

¹ AIR 2001 SC 1158

document can be dealt with at later point of time or at the time of final hearing cannot be accepted. Since the document being a xerox copy of the past partition deed, attracting the provisions of the Stamp Act, the admissibility or otherwise of the same has to be dealt with as and when an objection is raised.

14) In *Avinash Kumar Chauhan v. Vijay Krishna Mishra*² the Apex Court held as under:

“21. [Section 35](#) of the Act, however, rules out applicability of such provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.”

15) A three Judge Bench of the Apex Court in *Hariom Agrawal v. Prakash Chand Malviya*³ held as under:

“A plain reading of Sections 33, 35 and 2 (14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in evidence under section 35 of the Stamp Act. Sections 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2 (14). There is no scope for the inclusion of the copy of the document for the purposes of the Indian Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this

² (2009) 2 ALT 19 (SC)

³ (2007) 6 ALD 105 (SC)

cannot be admitted as secondary evidence under the Indian Stamp Act, 1899.”

16) In *Akkam Laxmi v. Thosha Bhoomaiah and others*⁴ a learned Single Judge of this Court held that “when a copy of an instrument needs no stamping, the same cannot be permitted to be introduced by means of secondary evidence when the original itself is not duly stamped, inasmuch as such a document cannot be acted upon.”

17) Though the learned counsel for the respondents relied upon a Division Bench judgment of this Court in *M. Vidyasgar Reddy and others v. M. Padmamma and others*⁵, but in my view the same will not apply to the case on hand. It was a case where there was a memorandum of family settlement containing list of properties to be enjoyed by each of sharers. Under those circumstances, the Bench held that, the said document cannot be construed as an instrument of partition and the same does not require compulsory registration. It was held that if the document represents the arrangement by way of convenience for more efficient usage of the properties that fell to the respective sharers, it may not require registration.

18) In view of the judgments referred to above and as the document which is sought to be marked as secondary evidence, is a xerox copy containing part partition of the properties, the same cannot be even treated as secondary evidence. Since the

⁴ (2002) 4 ALD 808

⁵ (2016) 4 ALD 775 (DB)

original itself is not stamped or registered, the question of treating a Xerox copy as a secondary evidence would not arise. It may be true that the very same document must have been marked for the purpose of the signatures on the said document through the plaintiffs, but, it is also to be noted that the said document came to be marked as no objection was raised at the time of marking.

19) For the aforesaid reasons, the Civil Revision Petition is allowed setting aside the order dated 28.06.2017 passed in O.S.No.31 of 2010.

20) Miscellaneous Petitions, if any, pending in this Civil Revision Petition, shall stand closed. There shall be no order as to costs.

23.08.2017
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JUSTICE C. PRAVEEN KUMAR

