

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

SECOND APPEAL No.891 OF 2016

JUDGMENT :

This Second Appeal is filed challenging the judgment and decree dt.15.07.2016 in A.S.No.382 of 2011 of the IX Additional District Judge, West Godavari at Kovvur confirming the judgment and decree dtdt.30.08.2011 in O.S.No.405 of 2009 of the Junior Civil Judge, Jangareddigudem.

2. The appellant herein is the plaintiff in the suit. The 1st respondent is his father and 2nd respondent is his brother. The property whose partition was sought is an old tiled house bearing No.5-32 in an extent of 431 sq. yards. The said suit was filed on 31.10.2006.

3. The appellant contended that the 1st respondent's father by name Veera Raghavulu purchased 431 sq. yards of site under Ex.A1 sale deed dt.05.07.1957 from one C.Satyam, that Veera Raghavulu died intestate 25 years prior to the filing of the suit and the 1st respondent and his two brothers inherited the said site. He contended that there was an oral partition between the 1st respondent and his brothers in 1990 and the 1st respondent got 103 $\frac{3}{4}$ sq. yards and that this was sold to the 3rd respondent under Ex.B2

dt.06.07.2002. He contended that he was born on 09.08.1986, that he stayed in her grandmother's place at Hukumpeta village and he recently came to know about the sale in favour of the 3rd respondent, and since the property is ancestral property, he has got 1/3rd right therein and therefore he filed the suit for partition seeking 1/3rd share therein.

4. The respondents 1 and 2 were set ex parte.

5. The 3rd respondent filed a written statement stating that the suit schedule property was self acquired property of Veera Raghavulu; that his sons orally partitioned the same; the 1st respondent took 1/4th share in the property of Veera Raghavulu, which fell on the northern side; and property west of the site which fell to the share of 1st respondent, was the share of the 1st respondent's brother-Trimurthulu; that the southern side site fell to the share of Satyanarayana, another brother of the 1st respondent; and to the further south, the share of the last brother of the 1st respondent - Durga Rao was existing. She contended that the extents and boundaries mentioned in the plaint schedule property were false, that only an extent of 101 sq. yards fell to the share of the 1st respondent and that the appellant was fully aware of the transaction between the 1st respondent and the 3rd

respondent. She further contended that the sale by the 1st respondent to the 3rd respondent was for the benefit of the joint family, that she purchased 231 sq. yards of site consisting of tiled house bearing No.5-32/A with a shed from the three brothers of the 1st respondent on 06.07.2002 for Rs.3,10,000/- and after removing the shed, she constructed a terraced building with first floor on southern side of the site by leaving some extent of site on its southern side.

6. The trial Court framed the issue, “whether the appellant was entitled for partition of the plaint schedule property as prayed for?”.

7. Before the trial Court, the appellant examined PWs.1 and 2 and marked Exs.A1, while the 3rd respondent examined DWs.1 & 2 and marked Exs.B1 to B6.

8. By judgment and decree dt.30.04.2011 the trial Court dismissed the suit. *Inter alia* it held that the appellant had admitted that the 1st respondent had purchased vacant site under Ex.B3, where he constructed a two storied RCC building and that the appellant had also admitted that the 1st respondent had no income other than his salary from a cloth shop owner where he worked. It therefore, held that the appellant ought to have sought for partition of this item and

only with a view to harass the 3rd respondent, this litigation was initiated.

9. Challenging the said judgment and decree, the appellant filed A.S.No.382 of 2011 before the IX Additional District Judge, West Godavari at Kovvur.

10. By judgment and decree dt.15.07.2016, the lower appellate Court also dismissed the appeal. It held that the sale of the plaint schedule property by the 1st respondent to the 3rd respondent was for the benefit of the family of the appellant since the sale proceeds under Ex.B2 sale deed dt.06.07.2002 paid by the 3rd respondent were utilized by the 1st respondent to purchase a site of an extent of 180 sq. yards under Ex.B3 dt.13.12.2002 and he constructed a two storied building therein. It held that since the 1st respondent had no other source of income except his employment as a clerk in a cloth shop, the property purchased by the 1st respondent, where he constructed a two storied building, was still available with the 1st respondent, and since that building was constructed with the joint family funds, the appellant would be entitled to a share in the said building. It held that by the reason of sale of property to the 3rd respondent, the appellant did not suffer any loss. It also held that without claiming a share in the property purchased by the 1st

respondent by utilizing the sale consideration paid by the 3rd respondent and pursuing a claim for a share in the plaint schedule property, which was sold to the 3rd respondent, the appellant was attempting to unlawfully enrich himself. It also held that the appellant was fully aware of the sale in favour of the 3rd respondent by his father in the year 2002, since he was staying with him at that point of time and after the 3rd respondent spent lot of money for constructing a new house in the place of the old building, he has filed the suit for partition to cause harm to the 3rd respondent.

11. Challenging the same, this Second Appeal is filed.

12. Counsel for the appellant sought to contend that the findings of both the Courts below cannot be sustained. He contended that even if the appellant admitted that other property was purchased with the proceeds of sale of the plaint schedule property in favour of the 3rd respondent, he was not bound to seek partition of that property and that since the sale of plaint schedule property to the 3rd respondent was without the consent of the appellant, who was also a coparcener, the sale in favour of 3rd respondent, ought not to have been sustained.

13. From the facts noticed by both the Courts below, it is not in dispute that the plaint schedule property was ancestral property purchased by the grand father of the appellant and was partitioned by the 1st respondent and his brothers in 1990. It is also not in dispute that the 1st respondent under Ex.B2 had sold his share, which he obtained in the said partition, on 06.07.2002 to 3rd respondent. The evidence on record clearly points out that the 1st respondent then purchased 180 sq. yards of site under Ex.B3 dt.13.12.2002 and constructed a two storied building therein.

14. The respondents 1 and 2 remained ex parte in both the trial Court as well as the lower appellate Court.

15. The appellant admitted that the 1st respondent had no other source of income except salary from a job in a cloth shop. PW2 also did not dispute this fact. Therefore the only possible conclusion is that the 1st respondent purchased the property under Ex.B3 with the sale proceeds under Ex.B2 paid by the 3rd respondent. Thus the sale in favour of the 3rd respondent has benefited the family of the 1st respondent and 1st respondent as Karta was entitled to sell it for family benefit. In such an event, the sale cannot be set aside merely on the ground that the consent of the appellant,

who was also a coparcener, was not obtained for such transaction. That apart, the property purchased under Ex.B3 would also be joint family property and the appellant ought to have sought for partition of the said property also and could not have maintained the suit, even if it is his case that the property purchased under Ex.B3 was not with the sale proceeds obtained from the 3rd respondent by the 1st respondent under Ex.B2. It is settled law that suit for partial partition is not maintainable.

16. In this view of the matter, I do not find any substantial question of law arising in this Second Appeal warranting interference by this Court under Section 100 of Code of Civil Procedure.

17. Therefore, this Second Appeal is dismissed at the stage of admission. There shall be no order as to costs.

18. Consequently, miscellaneous petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

30th January, 2017.

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