

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.300 OF 2015

JUDGMENT:

The present Second Appeal is filed by the plaintiff in O.S. No.126 of 2010 on the file of the Principal Junior Civil Judge, Avanigadda, assailing the judgment and decree, dated 17.10.2014 in A.S. No.5 of 2013 on the file of the Senior Civil Judge, Avanigadda, Krishna District, whereby and where-under, the said first appeal was dismissed confirming the judgment and decree, dated 26.07.2013, passed by the trial Court in O.S. No.126 of 2010.

2. The present appeal is taken up for disposal at admission stage itself having heard Sri Ganduri Nageswara Rao, learned counsel for the appellant - plaintiff. The sole respondent - defendant though, served with notice, has not entered appearance. Thus, none appears for him.

3. The learned counsel for the appellant, in an attempt to substantiate the questions of law formulated in the grounds of appeal as constituting the substantial question of law, would submit that utter perversity crept in the judgments rendered by both the Courts below as the findings recorded are not well-reasoned and not based on proper appreciation of evidence on record in accordance with Evidentiary Rule. The substantial questions of law, according to the appellant, formulated in paragraph No.12 reads thus:

“

- a) Whether the defendant established that there is a two houses of his father name in the absence of not filing any of the proof is discharge his burden or not?
- b) Whether mere admitting that their father erected a thatched shed in road margin is a valid title of their father's property or not?
- c) Whether burden lies on defendant which was discharged properly or not and in the absence of the proof of the evidence observing the court below saying that the plaintiff admitted that there is a another property of their father is pervasive or not? ”

Whether do they really account for substantial questions of law require examination.

4. Before adverting to the aforesaid questions, it would be appropriate to refer to the fact-situation since the contention raised is that the findings suffer from utter perversity.

- i) The appellant and the respondent are sons of one Matta Subba Rao. The said Matta Subba Rao purchased Ac.0-28 cents of wet-land comprised in R.S. No.139-3, situated at Chinamuthevi village of Movva Mandal in Krishna District, Andhra Pradesh for a valuable consideration of Rs.1,764/- from Garapati Sudarsanam. Up to this point, there is no dispute between the parties.
- ii) The appellant - plaintiff then sets out his case that till the death of their father, their father was in peaceful possession and enjoyment of the said extent, and after his

death that occurred on 05.07.1999, who died in intestate, both of them arrived at an understanding to cultivate that extent every alternative year and, accordingly, both of them have been in joint possession and enjoyment of the said extent cultivating the crops one after another each year.

- iii) His specific case is that for the past five years next before institution of the suit, the respondent - defendant alone has been cultivating the suit land without allowing him to cultivate as per their understanding. Therefore, he demanded the respondent to partition the said extent and for allotment of half share to each of them.
- iv) The respondent went on postponing the said event on one pretext or other. Since there was no alternative, the appellant filed the suit.

5. The definite case of the respondent - defendant is that, the death of their father - Matta Subba Rao occurred on 05.07.2007 intestate, and immediately on completion of obsequies, both of them have partitioned the properties owned and possessed by their father.

- i) According to him, their father owned and possessed besides the schedule property extent, two houses situated in an extent of Ac.0.06 cents and 15 goats, they being shepherds and in the said

partition, the house and house site and 15 goats fell to the share of the appellant, whereas the suit property Ac.0-28 cents fell to the share of defendant, and since then they have been in possession and enjoyment of the properties that fell to their respective shares and, therefore, sought to dismiss the suit.

6. The trial Court based on the pleadings, settled the following three issues for trial:

1. Whether the plaintiff is entitled for partition of plaintiff schedule property as prayed for?
2. Whether the plaintiff is entitled for profits till recovery of possession as prayed for?
3. To what relief?

7. During trial, the appellant examined himself as PW.1 and also examined one Kalapala Raju as PW.2 and exhibited A-1 to A-6, which are registration extract of sale deed in favour of their father; land revenue receipts; death certificate of their father; office copy of registered legal notice and postal acknowledgment. The respondent besides examining himself has examined one Matta Prakasha Rao, as DWs.1 and 2. Of course, no documents were filed.

8. The trial Court taken up both issue Nos.1 and 2 for common discussion to record findings. Having analyzed the evidence of both, oral and documentary, let in by both the parties, observing that though, the evidence let in through PWs.1 and 2 and DWs.1 and 2

would clearly prove that their father did own and possess two houses and a house site, and in one of the houses, the respondent lived till the partition took place, held that the appellant deliberately excluded the houses and no reasons were assigned by him for not including the said two houses. Second reason assigned by the trial Court is the appellant and the respondent are married and 11 years after the death of their father, the appellant has not raised a little finger in the direction of seeking partition and they have been living with their respective families and there was absolutely no need for the appellant to wait for 11 years to demand for partition or to institute a suit for partition in case their properties were not divided. Third reason assigned by the trial Court is, evidence of DW.2 would clinching the issue as original title deed, under which the suit property was acquired by the father of the parties, has been in the custody of the respondent. Therefore, the trial Court recorded a finding that the appellant with a fraudulent intention filed the suit for partition to get wrongful gain to him and cause wrongful loss to the respondent, thereby dismissed the suit, by judgment, dated 26.07.2013, in O.S. No.126 of 2010.

9. Aggrieved over the said judgment and decree, when the appeal is preferred by the appellant in A.S.No.5 of 2013, the learned Senior Civil Judge, Avanigadda having referred to the pleadings and the issues settled for trial by the trial Court, formulated the following four points for consideration in paragraph No.9 thus:

- 1) Whether the plaintiff is entitled for partition of plaintiff schedule property as prayed for?
- 2) Whether the plaintiff is entitled for profits till recovery of possession as prayed for?
- 3) Whether the judgment and decree of the trial Court is liable to be set aside?
- 4) To what relief?

10. The learned appellate Court refers to the admissions made by PW.1 in his cross-examination that he has not shown in his plaint the two houses i.e., house of his brother and the house of his father wherein he is residing, and also opined that the very fact that 11 years after the death of their father, the demand for partition was made is a circumstance that stands adverse to the appellant. The appellate Court refers to the ruling relied on by the appellant in **G. Madhava Rao v. Dr. G. Padma Rao and another**¹. The appellate Court also refers to the observations made by a learned Single Judge of this Court in the aforesaid decision that such a plea was not specifically taken in defence and not made subject of an issue before the trial Court. The learned appellate Court then refers to the ruling in **T. Srinivasa Rao v. T. Venkata Rangaiah and another**² and yet another ruling in **Malireddy Sreeramulu Reddy and another v. Malireddy Rama Krishna Reddy and others**³ for the consistent proposition emphasized by a learned Single Judge of this Court that in a suit for

¹. 2012 (5) ALT 291

². 2006 (5) ALT 683

³. 2010 (4) ALT 632

partition, particularly, in the context of passing a preliminary decree, only two questions assume importance, viz., ascertainment of the properties that are available for partition and determination of the shares of respective parties, and in case the defendant pleads that the property was not available for partition, the burden rests on the defendant to substantiate it. The appellate Court then proceeds with the re-appraisal of evidence on record and on an analysis would arrive at the finding that the oral partition pleaded by the respondent is strongly probablised by the circumstances on record, that being, firstly, fact of filing the suit for partition 11 years after the death of father of parties; second, omitting to include the properties fallen to his share in the oral partition; third, the evidence of DW.2 to the effect that the appellant and the respondent did not cultivate the suit land on rotation as the evidence of DW.2 was unshaken. Thus, affirming the findings recorded by the trial Court, dismissed the appeal finding no merit in the appeal, by a judgment, dated 17.10.2014.

11. Now, the submissions made by the learned counsel for the appellant have been that the assertion of PW.1 that himself and his father resided in thatched hut erected in road margin in Chinnamuthevi village shows that father of the parties did not have valid title and, therefore, non-inclusion of that property is not material and cannot account for dismissal of the suit or the appeal. It is his submission that when a party who pleads prior partition, the entire

burden rests on the party pleading partition, and in the absence of convincing evidence on record, the alleged prior partition set up by the respondent ought not to have accepted by the Courts below and, thus, the finding recorded by the Courts below, therefore, are patently perverse. Hence, sought to allow the present appeal as substantial questions of law would arise as extracted in the above.

12. At the outset, it is to be observed that admittedly, the extent of Ac.0-06 cents, on which two houses are located, which also include open site in an extent of Ac.0-03 cents as per the evidence of both sides is not forming part of plaint property. Therefore, the partition now sought for has to be construed as the request for partial partition of properties held by the family in case the properties are held as joint family properties, in which direction, the evidence let in by the appellant must be so clinching to satisfy the conscience of the Court. The second reason is, it is an admitted fact that even according to the appellant's case, for the past five years before institution of the suit, the respondent alone has been cultivating the suit land. The appellant does not indicate any reason at all as to why he kept quiet in case he was not allowed the next year when his turn has come for cultivating the suit land and allowed the respondent cultivating that year and not only that year but also on the fourth year and ought to have either issued a notice demanding the respondent to allow him to cultivate the land or sought for partition, which he did not do though, he has set up

a mediation said to have held by Pedamuthevi Gnana Sundara Rao and Kodali Venkateswara Rao and their relatives, at the stage of evidence. But, a plea therefor is conspicuously absent in the plaint. Further, he has not examined any of the alleged mediators to speak on his behalf. One more circumstance that stands adverse to the appellant's case is, as rightly observed by both the Courts below and recording a finding that for 11 years the appellant has kept quiet after the death of their father and only thereafter started claiming a share in the suit property, would give rise to an inescapable inference as to partition being effected as contended by the respondent. Besides the same, except marking the land revenue receipts, no other documents are forthcoming to show joint possession of the plaint schedule land by both of them or at least evidencing that the name of their father was recorded under the relevant columns. The appellant has not assigned any reason therefor. Had the name of the appellant is recorded along with the name of the respondent under 'cultivator/possessor' column at least, the initial burden resting on the appellant that the suit schedule property is joint would have been held discharged. In the absence of the same, it is difficult to hold that the initial burden resting on the appellant stood discharged. In such an event, absolutely there is no necessity to look at the respondent's case as to the previous partition and thrusting burden to prove the plea of previous partition taken by the respondent.

13. Even, the very fact that the respondent vacated the house in which he hitherto used to reside from the date of partition which is not in dispute by the appellant and, in fact, a positive admission was made by the appellant in his cross-examination is yet another circumstance which strongly probablises the oral partition pleaded by the respondent. Thus, viewed from any angle, neither it can be construed that the concurrent findings recorded by the Courts below as patently perverse without there-being any sustainable material on record relied on by the appellant. Thus, when examined the substantial questions formulated by the appellant in his grounds of memorandum of appeal in the present second appeal, it neither constitutes question of law, much less substantial questions of law.

14. The present second appeal is, accordingly, dismissed. However, there shall be no order as to costs.

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

A. SHANKAR NARAYANA, J

August 31, 2017.

Mgr