

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ A.S.No.2950 of 1999

% 29-01-2018

Daulatram Vyas (died)
per LRs

... Appellants/
Defendants

Vs.

\$ Vallabha Vyas
and 3 others.

... Respondents/
Defendants

! Counsel for the appellant: M.V. Suresh Kumar, Senior counsel
Aravala Sreenivasa Rao

Counsel for the Respondents: S. Sriram,
B. Shiva Kumar and
Muralidhar Reddy Katram

< Gist:

> Head Note:

? Cases referred:

1. AIR 1977 Karnataka 173
2. AIR 1992 Delhi 118
3. 2000 (2) ALD 292
4. AIR 1948 Madras 451
5. AIR 1954 Madras 83
6. AIR 1971 SC 2184
7. 2010 (10) SCC 512
8. AIR 1983 Calcutta 337
9. 1989 (1) ALT 91
10. 1959 (II) AWR 23
11. 1982 (1) SCC 4
12. AIR 1997 AP 53
13. (2006) 1 SCC 697
14. (1995) 2 SCC 543
15. (1980) 2 SCC 247

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

A.S.No.2950 of 1999

JUDGMENT:

This appeal arises out of the judgment and decree dated 30.10.1999 in O.S.No.41 of 1988 passed by the I Additional District Judge, Rajahmundry.

2. For the sake of convenience, as this is a first appeal, the parties are referred to as the plaintiffs and the defendants only.

3. The brief facts of the plaintiffs' case are as follows:

i) Originally, the first plaintiff filed the suit against the defendants 1 to 4 on the file of the Sub-Court, Rajahmundry seeking the following reliefs:

- a) partition of plaint A, C and E schedule properties into three equal shares and for allotment of one such share to the plaintiff.
- b) for applying partition Act in respect of plaint-B schedule properties and to allot 1/3rd of the sale proceeds realized thereon to the plaintiff or for sale of the machinery in plaint-B schedule and for allotment of 1/3rd of the sale proceeds to the plaintiff and for division of the vacant site into three equal shares and for allotment of one such share to the plaintiff.
- c) for partition of plaint-D schedule property into three equal shares and for allotment of one such share to the plaintiff.
- d) for partition of the plaint F-schedule property into three equal shares and for allotment of one such share to the plaintiff and separate possession.
- e) for future profits on the share of the plaintiff over the plaint schedule properties till the date of delivery; and
- f) for costs of the suit.

ii) Subsequently, the second defendant was transposed as the 2nd plaintiff as per the orders, dated 30.10.1998 in I.A.No.1269 of 1998 in O.S.No.41 of 1988 and consequential amendments to the plaint were brought.

iii) The plaintiffs and the first defendant are brothers and are the sons of late Parasuram Vyas. Late Parasuram Vyas died in the year 1952 leaving behind the plaintiffs, 1st defendant and their mother-Smt. Somini Bai as his heirs. Later, Smt. Somini Bai also died in the year 1980 leaving behind the plaintiffs and the first defendant as her heirs. After the death of late Parasuram Vyas, the plaintiffs, first defendant and their mother partitioned the joint family properties under a registered partition deed dated 06.11.1958. The E-schedule in the said partition deed was kept joint in between the plaintiffs and the first defendant. Out of the same, item-II of the said E-schedule was lost by them in court litigation and as far as item No.3 is concerned, the Government acquired the same and the compensation amount thereto was shared equally. Excluding the said properties, the remaining properties of said E-schedule of partition deed are shown in the present suit as plaint-A schedule. The plaintiffs and the first defendant are entitled each to a 1/3rd share in the plaint-A schedule properties.

iv) There is an oil Mill at Vizianagaram under the name and style as M/s. Ganesh Rice and Groundnut Oil Mill with machinery, boiler etc. After the partition, the Rice Plant was sold away and the proceeds were divided equally in between the plaintiffs and the first defendant. The remaining property of the above said Mill is shown in plaint-B schedule. The plaintiffs and the first defendant are entitled each to 1/3rd share in the said property. The said property being machinery with sheds etc., the same cannot be partitioned in specific into three equal shares. Therefore, the Partition Act has to be applied and the said property is to be sold out as a single Unit and the proceeds realized thereon have to be divided into three equal shares between the plaintiffs and the first defendant.

v) Subsequent to the said partition, the plaintiffs and the first defendant jointly purchased the properties shown in the plaint-C schedule with their joint funds and for their benefit. Item-II of the plaint C schedule and sub-items therein along with the other properties were purchased by the first defendant in court auction held in E.P.No.14 of 1968 in O.S.No.47 of 1966 of Sub-Court, Vizianagaram. Out of the properties so purchased, item-II of C schedule alone was delivered to the first defendant and the judgment debtors in the said proceedings are still continuing in possession of the remaining property covered by the said auction sale. The plaintiffs and the first defendant are each entitled to

1/3rd share in plaint-C schedule properties. Sub-item No.1 of item-II of plaint C schedule was leased out by the plaintiffs and first defendant to the third defendant on a monthly rental of Rs.50/- and is in his possession as a tenant. The third defendant is not paying any rent on the said item. The first defendant is residing in sub-item (ii) of item-II of the plaint C schedule. The plaint-D schedule movable properties are jointly owned and to be partitioned in between the plaintiffs and the first defendant.

vi) On the death of Smt. Somini Bai in the year 1980, her properties devolved on the plaintiffs and the first defendant in equal shares and the plaintiffs and the first defendant are entitled each to 1/3rd share thereon.

vii) The father of the plaintiffs and the first defendant carried on business under the name and style as 'M/s. Sivakaran and Harikaran' at Rajahmundry. Late Parasuram Vyas purchased in or about 1922, a vacant site and out-house and later constructed a building thereon and named it as 'Sivahari Bhavan. His pious wish and desire was that the said building should be exclusively used for the use of visiting pilgrims from Marwar on a nominal rental. While so, the Hindu Religious and Charitable Endowments Department initiated proceedings for a declaration that the aforesaid building is a public Trust. Later, the Department also filed a suit in O.S.No.1 of 1972 on the file of the District Court, Rajahmundry for a declaration that the said building in a

public Trust. At the time when the partition was effected in between the plaintiffs and the first defendant, as the above proceedings were pending, the plaintiffs and the first defendant, on the valuable advice of their then family advocate late Sri I. Suryanarayana Murthy, nominally put the said building to the share of the first defendant, he being the eldest of the three brothers with the specific understanding and arrangement that the first defendant should continue to implement the pious wish and desire of their late father. It was also specifically understood in between them that in case the above building is not put to the use as desired by their father, the same should be divided equally in between them.

viii) Subsequent to the finalization of the proceedings initiated by the Endowments Department, the first defendant leased out a portion of the said building to the fourth defendant for the purpose of running a lodge, which was quite inconsistent with the pious wish and desire of his father. Since the first defendant deviated from the purpose for which the F schedule building was to be utilized, the plaintiffs are entitled to file the suit for eviction of the fourth defendant therefrom and for partition of the said building into three equal shares and for allotment of two such shares to the plaintiffs.

4. The first defendant filed a written statement contending as follows:

a) He denied that 'Hari Bhavan' building shown in F schedule of the plaint was nominally allotted to his share. He is not aware of the specific understanding pleaded in para 10 (b) of the plaint. The lease in favour of the fourth defendant is true, valid and binding. Initially, Sri Suryanaraya Murthy put the 'F' schedule property under the head of the items of the properties that were kept joint, but when Poosram Bajaj brought to his notice that it was allotted to the share of the first defendant, the advocate struck it off and clearly put it to the share of the first defendant. Therefore, it was definitely understood that 'Sivahari Bhavan' was given to him with absolute rights.

b) The first defendant, therefore, prays for a decree (a) for partition of A, C and E schedule properties into three equal shares and for allotment of one such share to the first defendant; (b) for applying Partition Act in respect of machinery in plaint 'B' schedule and sell the machinery and for payment of share of the first defendant and for partition of vacant site and for delivery of the first defendant's share; (c) for partition of plaint 'D' schedule except item-3, into three equal shares and for allotment of one such share to the first defendant or their value; (d) for partition of silver and gold ornaments in the custody of the plaintiffs belonging to the three brothers; (e) for an account of the business carried on and rents realized by the 2nd plaintiff in respect of plaint 'B'

schedule property and for payment of the first defendant's share; (f) for an account of the rents realized by the 2nd plaintiff in respect of annexures I & V since 1974 and for payment of the share of the first defendant; and (g) for dismissing the suit in respect of 'F' schedule property with costs of the first defendant.

5. The 3rd defendant a filed written statement contending that he was inducted as a tenant in the shop by the 1st defendant. He has not committed any default in payment of the rent to the 1st defendant. He is not a necessary party to the suit. Therefore, the suit may be dismissed against him.

6. The 4th defendant filed written statement admitting that he is the tenant of the portion of 'F' schedule under a lease deed obtained by him from the 1st defendant. He is not aware of the disputes between the plaintiffs and the 1st defendant. Only a portion of the 'F' schedule building was set apart for the pilgrims from Marwar etc. The rest of the building is being let out since a long time. The lease in favour of the 4th defendant is valid and is binding on the plaintiffs and the 1st defendant.

7. Based on the above pleadings, the lower Court framed the following issues for trial:

- i) Whether the plaintiff is entitled to ask for partition of ACDEF into three equal shares and allot one such share to the plaintiff and in respect of 'D' schedule either one share or its equal value?

- ii) Whether the plaintiff is entitled to ask for partition of 'B' schedule by applying partition Act dividing into 3 equal shares and to allot 1/3rd sale proceeds?
- iii) Whether the plaintiff is entitled for future profits?
- iv) Whether 'D' schedule is not correct? If so, what is the correct schedule?
- v) Whether the 1st defendant and 3rd and 4th defendants are not necessary parties to the suit?
- vi) Whether the 'E' schedule was allotted for the benefit of the 1st defendant?
- vii) To what relief?

8. For the plaintiffs, PWs.1 to 4 were examined and Exs.A.1 to A.3 were marked. The 1st defendant was examined as DW.1 and Exs.B.1 and B.2 were marked for the defendants.

9. The lower Court after considering the evidence on record and the submissions granted a preliminary decree for the purpose of the plaint schedule properties into three equal shares, which is as follows:

- i) that item-I of the plaint 'C' schedule, item-3 of plaint 'D' schedule, items I, II and III of the plaint 'E' schedule and plaint 'F' schedule properties be divided into three equal shares and the plaintiffs 1 and 2 be put in separate possession of the 1/3rd share of each.

It is this judgment that is impugned in the present appeal.

10. Heard Sri M.V. Suresh Kumar, learned senior counsel & Aravala Sreenivasa Rao, learned counsel appearing for the appellants and Sri S. Sriram, B. Shiva Kumar and

Muralidhar Reddy Katram, learned counsels appearing for the respondents.

11. The essential question that is urged in the appeal and is argued by the learned counsel for the appellants and respondents is about the F-schedule of the plaint, which is a building bearing door No.7/186 situated in the site of 1147 square yards or 960.04 square meters. The focus of all the learned counsels is on this property alone. For the rest of the properties, there is no dispute at all and thus, this judgment is also being confined to the points urged with regard to F-schedule property only.

11. The documents marked in this case are also limited. The facts which are not really disputed by either of the learned counsels are as follows:

The father of the plaintiffs and the contesting first defendant died in 1952. The parties belonged to a trading family which had extensive assets and businesses. The family members decided to partition the properties both movable and immovable and in fact completed the partition in 1958. For the sake of partition, the plaintiffs and the contesting first defendant relied upon the advice and guidance of Sri I. Suryanarayana Murthy, a counsel of their family. Both the parties admit that Sri Suryanarayana Murthy was a lawyer of repute and a man of integrity and knowledge. He was the author of Exs.A.1 and A.3, which are the two critical documents involved in this case. The F schedule property is a

building in Rajahmundry town. It was constructed by the father of the plaintiffs and the contesting first defendant and was used as a transit house/choultry for people coming from the Marwar Region of Rajasthan. The plaintiffs' family emigrated from that area and settled in Andhra Pradesh. Therefore, the father of the plaintiffs by name Parasuram desired and used this property for use of travelers from Marwar region.

12. It is the case of the plaintiffs that the Hindu Religious and Charitable Endowments Department initiated proceedings against this building for a declaration that it is a public trust. They also filed a suit O.S.No.1 of 1972 for a declaration that the said building is a trust. As per the plaintiffs, when the partition was being effected in 1958, as per the advice of their family advocate, late I. Surya Narayana Murthy, the building was nominally kept in the name of first defendant with a specific understanding that the first defendant should continue to implement the pious wish of the plaintiff and use the building for the pilgrims of marwar region only. It is the case of the plaintiffs that as per the said understanding if the first defendant deviates from the said wish, the same should be partitioned amongst the family members.

13. On the other hand, it is the case of the contesting first defendant that in the partition deed of 1958, this building was specifically allotted to him. The said deed was a

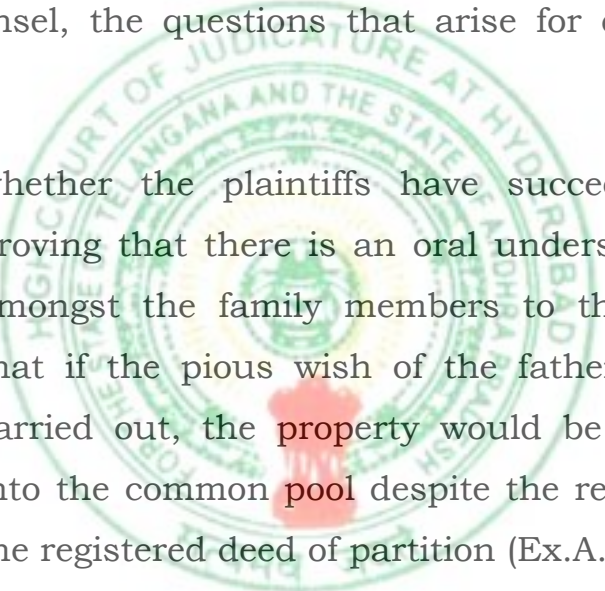
registered deed. Therefore, he states that he is the absolute owner of the same. It is also asserted by him that there is no understanding at all to the effect that if the building is not used as desired by the father, it would be thrown back into the common pool.

14. The lower Court rightly clubbed the issues 1, 4 & 6 for common discussion and decision. There is no dispute amongst the parties about the other items except the F-schedule property. It is also to be noted here from the evidence that there was a decision to partition the properties and a partition was affected. Thereafter, a draft partition deed was prepared, which is marked as Ex.A.1. After the draft was corrected and finalized, the partition deed was duly registered. A certified copy of the registered partition deed is marked as Ex.A.3. It is also important to note that the parties to Exs.A.1 and A.3 kept certain items of their family properties as joint for various reasons including the litigation pending. It is these properties that are kept joint in 1958 and the properties left behind by the mother on her death that are the subject matter of the present suit in addition to the 'F' schedule.

15. The properties that are kept joint are not in dispute. In the initial draft that is prepared and marked as Ex.A.1, the present F-schedule property was included as a joint property. However, the same is struck off clearly in the draft i.e., it is excluded from the properties kept joint. Later,

in the registered partition deed, the F-schedule property is allotted to the first defendant. The said deed of partition was registered in the year 1958. The present suit was filed in the year 1988 raising a serious dispute about the F-schedule properties.

16. Now, the question that falls for consideration and which is the crux of the appeal is issue No.6, which is to the effect: “whether the F-schedule property was allotted to the first defendant.” Based on the submissions made by both the learned counsel, the questions that arise for determination are:

- 
- a) whether the plaintiffs have succeeded in proving that there is an oral understanding amongst the family members to the effect that if the pious wish of the father is not carried out, the property would be thrown into the common pool despite the recitals of the registered deed of partition (Ex.A.3); and
 - b) whether oral evidence can be given of an understanding contrary to the terms of Ex.A.3 registered partition deed.

17. As far as point No.1 mentioned above is concerned, the burden is squarely on the plaintiffs to prove that there is an oral understanding as pleaded by them in paragraph-10(b) of the plaint and that the property was kept ‘nominally’ in the name of the first defendant.

18. It is the specific submission of the learned senior counsel for the appellants that the plaintiffs have accepted the entire contents of Ex.A.3 partition deed. The same was acted upon and each party has taken their respective shares. From 1958 till 1988, there was no challenge to the terms and conditions of the deed except with the present plaint. The learned counsel therefore submits that the conduct of the plaintiffs' estoppes them from challenging the terms of the deed. It is also his submission that the claim of the plaintiffs is barred by time as more than 30 years expired from the date on which the terms of the deed have been entered into. It is also his alternative submission that both the parties have made it clear in their evidence that in the year 1976 the 'F' schedule property was leased out to the third parties and was no longer used by the parties for which it was intended as per the plaintiffs' case. From 1976 till 1988 when the present suit was filed, the plaintiffs did not take any steps to challenge the so-called action. Therefore, the learned counsel submits that the plaintiffs' case is barred by the principles of estoppel/acquiescence; standing by apart from the law of limitation. According to the learned counsel for the appellants, the plaintiffs have filed a suit for partition in order to avoid a bar of limitation. As per him to get over the bar of limitation a suit for a declaration was not filed. According to the learned counsel, Article 59 of the Limitation Act applies and plaintiffs should have sued for a declaration for the

cancellation of Ex.A.3. From 1975 onwards on the plaintiffs were aware that the property was not used for the alleged purpose for which it is meant for. Therefore, the suit is filed as barred by time as per him.

19. On the other hand, the learned counsel for the respondents argued that there is need to file a suit for declaration that the F-schedule property is kept 'nominally' and that the contents of the deed are not correct. The learned counsel relying upon ***Syed Rasool and others v. Mohammad Moulana***¹, ***Sanjay Kaushish v. D.C. Kaushish and others***², ***Seera Simhachalam and another v. Pediredla Simhachalam and others***³, ***Sahul Hameed Rowther v. K.C.P. Mohideen Pichai***⁴, ***Khata Chinna Eswarareddi and others v. Kukkala Reddigari Venkatachellamma Reddi***⁵ contends that there is no need to file a suit for declaration since the property was kept nominally in the name of the first defendant in view of the pending litigation on the said property.

20. A reading of the case law cited by the learned counsel for the respondents, clearly shows that these cases relate to documents or decrees which are being challenged a sham or nominal or vitiated. They relate to cases where the entire document was challenged as a nominal document or cases where the document was found to be 'void'. None of the above cases can be applied to the facts of the present case,

¹ AIR 1977 Karnataka 173

² AIR 1992 Delhi 118

³ 2000 (2) ALD 292

⁴ AIR 1948 Madras 451

⁵ AIR 1954 Madras 83

because the entire document of 1958 is acted upon and it is the plaintiffs' case that only one particular part of the property is kept 'nominally' in the name of first defendant. All the parties to Ex.A.3 acted upon the same; divided the properties and enjoyed the same as the owners. Therefore, this Court is of the opinion that the judgments cited by the learned counsel are not really applicable to the facts and circumstances of the present case. It is also argued that merely because a property is kept 'nominally' in the name of a person, it does not become 'void'. It is at best a voidable document, which has to be necessarily set aside or avoided through a proper decree by filing a suit for a declaration. In this case also, this Court is of the opinion that even if the theory advanced by the plaintiffs is found to be true and the F schedule property is found to be kept in the name of the first defendant nominally, the proper relief to be sought is a declaration that the F-schedule property was kept nominally in the name of the first defendant and for a consequential relief of partition. This Court agrees with the submissions of the learned counsel for the appellants that the form of suit is not correct.

21. As a continuation to this, the learned senior counsel argued that since the property was put in his client possession in 1958, the suit filed in 1988 is hopelessly barred by time. In reply thereto, the learned counsel for the respondents argues that a right to seek a partition is

admittedly recurring right or a permanently recurring right.

The learned counsel relied upon ***Syed Shah Ghulam Ghouse Mohiuddin and others v. Syed Shah Ahmed Mohiuddin Kamisul Quadri (died) by LRs and others***⁶ for this proposition.

The learned senior counsel distinguished the case and drew the attention of this Court to the facts of the said case wherein it is found that the fraud in the cited case was discovered on 13.08.1938 and the suit was filed on 24.07.1941. Therefore, the Court held that the case is not barred by time. Even otherwise, that was a case of fraud and fraud vitiates everything. Therefore, the learned counsel submits that the same cannot be equated to the case of this nature.

22. It is also the submission of the learned counsel for the appellants that if the right to seek partition can be treated as a periodically recurring right, the period of limitation is three years as per Article 104 of the Limitation Act. The right to sue accrued to the plaintiffs in 1976 when the so-called understanding was breached by the defendants and the property was leased commercially infringing upon the plaintiffs rights as per the oral understanding. The learned counsel also argues that by clever pleading 'F' schedule is included in the suit with properties that are left joint in the partition deed. He argues that even if the earlier submissions are not accepted, Article 113 of the Limitation Act would

⁶ AIR 1971 SC 2184

apply and right to sue according to the plaintiffs came in the year 1976, when they realized that the first defendant has allegedly misused the building by renting it out commercially. This Court finds force in the argument of the learned counsel for the appellants. Even if the theory advanced by the plaintiffs of an oral understanding contrary to the terms of the deed is accepted; by the year 1976, they were aware of the fact that the property was used commercially and contrary to the fathers desire. Therefore, the suit should have been filed within three years therefrom when the right to sue has accrued as per Article 113 of the Limitation Act.

23. Both the learned counsel argued on the issue of limitation. Even though no specific plea is taken in the lower court about the bar of limitation, Section 3 of the Limitation Act, 1963 casts a duty upon this Court to reject the case on the ground of limitation. Therefore, after hearing all the submissions of the learned counsels on the matter of limitation, this Court is of the opinion that the frame of the suit is wrong and that the claim relating to 'F' schedule is barred by limitation under Article 113 of the Limitation Act.

24. The learned counsel for the appellants also strongly attacked the finding of the lower Court which held in para-34 of the judgment that there is no cogent evidence to show that the F-schedule property was enjoyed with absolute rights by the first defendant from 1958 (Ex.A.3). The learned counsel for the appellants pointed out that the lower Court

totally ignored the evidence that was available on record. He drew the attention of this Court to cross-examination of PW.1 which is the following effect:

“It is true that after partition under Ex.A.3, we the three brothers submitted individual income tax returns as per the share allotted under Ex.A.3. It is true that myself and 1st plaintiff did not show our 1/3rd share in the ‘F’ schedule in our income tax returns. Even after Ex.A.3, the accounts maintained by us disclose that we are enjoying plaint ‘F’ schedule property jointly. One staff member wrote the accounts in ‘Marvadi’ language. We did not produce the accounts. The accounts are with me. I do not remember till which year the accounts were being maintained regarding the plaint ‘F’ schedule property. We the three brothers had only one auditor even after Ex.A.3. I do not know till what date. Now we are submitting our income tax returns individually through separate auditors. Myself and the 1st plaintiff are having only one auditor.

.....

We came to know that D-1 leased out portion of the plaint ‘F’ schedule property in the year 1976, and we the plaintiffs informed the same to our advocate Suryanarayanamurty. I do not know whether the draft of the lease deed was prepared by our advocate Suryanarayanamurty. Our advocate told us that he would enquiry with D-1. I do not know the whereabouts of D-1 by that time, but he might be residing at Vizianagaram, Rajahmundry or Secunderabad. The distance between our house and plaint F schedule property is about 4 furlongs. We did not question D4 as to why he took a portion of plaint ‘F’ schedule property on lease from D-1, when the property is our joint family property.

Myself and 1st plaintiff never issued any notice to D-1 prior to the filing of this suit demanding our share in the income and in ‘F’ schedule property.”

He, therefore, concludes that the plaintiff a) said that the accounts show the alleged joint enjoyment but he did not file

the same nor did he examine the auditor, b) did not file any evidence to show that he questioned the deviation. The learned counsel points out that if it was the intention that the F-schedule property is being enjoyed by the first defendant contrary to the terms of the deed, a duty is cast upon the plaintiffs to immediately protest about the same and his inaction leads to the conclusion that he was aware that the 'F' schedule is allotted to the first defendant absolutely. The failure to file the accounts also leads to this conclusion as per him. In addition, the learned counsel also points out the chief examination of first defendant at page No.115, which reads as follows:

"I met all the litigation expenses and was also enjoying the rents. As per the entries in the Municipal Record the 'F' schedule property stands in my name. PWs.1 and 2 never demanded me any share in the rents treating the property as joint family property. PWs.1 and 2 never demanded me to pay their shares of rent through late Sri I. Suryanarayana Murthy."

The learned counsel points out that there is no cross-examination on this important affirmation on oath by the first defendant as DW.1. He argues and rightly says that failure to cross-examine amounts to an admission. The decision of the Hon'ble Supreme Court of India in ***Man Kaur (dead) by LRs. v. Hartar Singh Sangha***⁷ and the decision of the Calcutta High Court in ***Traders Syndicate v. Union of India***⁸ are very relevant here. The cross examining counsel was clearly had a duty to cross

⁷ 2010 (10) SCC 512

⁸ AIR 1983 Calcutta 337

examine on these aspects. The failure to do so; leads to the conclusion that the plaintiff cannot dispute the statement.

25. This Court also agrees with the submissions made by the learned counsel for the appellants and holds that the lower Court committed an error in para-34 of the judgment that the first defendant has not filed 'any evidence' to show that he has been enjoying the property. The fact that the first defendant alone has leased the property in 1976 to the other defendants is a factor which shows that he exercised the right of ownership. Leasing of property through the 'registered' lease deed is in view of this Court an exercise of a right of ownership of the first defendant. The plaintiffs' admission is that the said property is only 100 feet away from their residence and they were aware of the lease deed executed in 1976 itself. This Court agrees with the submission that the first defendant cannot be called upon to prove that he was enjoying the property 'absolutely'. It is for the plaintiffs who are challenging the contents of the deed to show that the property was kept nominally in his name and that they have still got some rights in the property entitling them to relief from this Court. This Court therefore holds that the finding of the lower court on the enjoyment of the F-schedule property by the first defendant is incorrect. The first defendant asserted as mentioned earlier that the property was mutated in his name; that he was using the same as the owner; and that he has converted the same and gave it on

lease in 1976. PW.1 also admits in his cross examination that the first defendant alone attended the enquiry before the Additional Commissioner of Endowments Department. He deposed as follows on this issue:

“It is true that by the date of Ex.A.1, the Endowments Department was disputing that the choultry was a public choultry and the matter was pending enquiry before Additional Commissioner, Endowments, Rajahmundry. I do not remember whether we three brothers attended the enquiry before the Additional Commissioner, Endowments Department, Rajahmundry. I did not attend the enquiry. D.1 attended the enquiry.”

Therefore, it is clear that the first defendant was doing all that is necessary to enable the Court to conclude that he was enjoying the property and safeguarding the same. Hence, the finding of the lower Court on this point is incorrect.

26. The most critical issue on which both the learned counsel argues at length is about the so-called oral understanding that was pleaded by the plaintiffs. It is the case of the plaintiffs that the F-schedule property was kept ‘nominally’ in the name of the first defendant with an understanding that the same shall be allotted equally amongst the brothers if the building is not used as desired by the father. This averment in the plaint was clearly denied by the first defendant. Therefore, the following questions would arise on this issue a) whether the plaintiffs proved that there was an oral understanding, b) whether the evidence of the oral understanding can be given, since there is registered

partition deed of 1958 signed by all the parties concerned and whether Section 92 of the Evidence Act permits the same.

27. A reading of the entire evidence makes it clear that the plaintiffs did not discharge their burden of proving that the property was kept 'nominally' in the name of the first defendant. As per the law on the subject and ultimately as the suit is for a partition meaning thereby establishing a right over the property, the burden is heavily on the plaintiff to prove the same. There is absolutely no evidence of this 'oral' understanding. PW.1 also admits that except his oral evidence, there is no documentary evidence to prove that the F-schedule property was allotted to the first defendant. He also admits that he and 1st plaintiff did not ask their lawyer to get a document executed for allotting 'F' schedule property nominally in the name of first defendant. The other testimony available is that of PW.2 – he says he was 'told' by plaintiff and first defendant that plaintiff 'F' schedule was kept nominally in the name of first defendant. His evidence is thus not reliable. The evidence available on record also shows that the first defendant exercised rights of ownership and was openly enjoying the property from 1958 till 1988 when the present suit was filed. This enjoyment of the property does not support the theory that he is the nominal owner and not the real owner.

28. The other and larger important question is whether the plaintiffs can introduce evidence to contradict or vary the terms of a written document and the effect of Section 92 of the Indian Evidence Act. The learned counsel for the appellants relied upon ***Bonam Venugopal Rao and others v. Tavvala Veerabhadra Rao and others***⁹ and a Division Bench of this Court in ***Bolumal Dharmdas v. Venkatachelapathi Rao***¹⁰ and argues that the oral evidence contrary to the terms of the document cannot be introduced. In ***Bonam Venugopal Rao***'s case (7 supra), the learned single Judge of this Court held that when the validity of the document has not been impeached, it is not open to the plaintiffs to lead any evidence contrary to the recitals in the document. In ***Bolumal Dharmdas***'s case (8 supra), the Division Bench of this Court discussed Section 92 of the Indian Evidence Act clearly along with the exceptions provided therein and clearly held that the object of Section 92 cannot be nullified by the exceptions to that section. The exceptions or proviso to the section are not meant to render the section itself nugatory. The Division Bench clearly held that in case the terms of the document impeached are not clear, then oral evidence can be introduced to explain the same. But if the meaning of the words is clear, the Division Bench held that no evidence can be introduced.

⁹ 1989 (1) ALT 91

¹⁰ 1959 (II) AWR 23

29. In reply thereto, the learned counsel for the respondents relying upon ***Gangabai v. Chhabubai***¹¹, ***Habeeb Khan and others v. Valasula Devi and others***¹² contends that as the document was meant to be nominal, there is no bar to introduce the oral evidence. A close perusal of the judgment reported in ***Gangabai***'s case (11 supra) shows that while dealing with Section 92 proviso (1) of Indian Evidence Act, the Hon'ble Supreme Court held that the sub-section (1) is not attracted when the transaction recorded in the document was never intended to be acted upon. Such a question would arise when the party asserts that there was a different transaction altogether than what is recorded and the document was intended to be of no consequence whatsoever. This is a case of an entire document being challenged. Similarly, in ***Habeeb Khan***'s case (10 supra) also, the learned single Judge of this Court was called upon to decide whether the sale deeds and agreement of sale in that case were actual sale deeds and agreement of sale or nominal documents and in reality they were anomalous mortgage deeds. The learned single Judge also relied upon ***Gangabai***'s case (11 supra) and came to the conclusion that the oral evidence can be given if the recorded transaction was not meant to be what it says. The learned single Judge went into the terms of the document and came to the conclusion that the document in question

¹¹ 1982 (1) SCC 4

¹² AIR 1997 AP 53

although styled as a sale deed is in reality an anomalous mortgage.

30. In the case on hand, the entire document is accepted as held by both the parties and only in the case of F-schedule property it is argued that it is kept 'nominally' in the name of the first defendant. The learned counsel for the appellants argued that as per Section 92 of the Evidence Act, no oral evidence can be allowed to be admitted for the purpose of contradicting or varying the terms of the deed. He therefore argues that Section 92 is a clear bar to consider the oral evidence on record. The judgment of **Gangabhai's** case (11 supra) was considered in **R. Janakiraman v. State**¹³, and the following extract from para-24 is an answer to the respondents' arguments as per the learned counsel for the appellants.

"24. We may cull out the principles relating to Section 92 of the Evidence Act, thus:

i) Section 92 is supplementary to Section 91 and corollary to the rule contained in Section 91.

ii) The rule contained in Section 92 will apply only to the parties to the instrument or their successors-in-interest. Strangers to the contract (which would include the prosecution in a criminal proceeding) are not barred from establishing a contemporaneous oral agreement contradicting or varying the terms of the instrument. On the other hand, Section 91 may apply to strangers also.

iii) The bar under Section 92 would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the transaction itself is different from what it purports to be. To put it differently, the bar is to oral evidence to disprove the terms of a contract, and not to disprove the contract itself, or to prove that the document was not intended to be acted upon and that intention was totally different."

¹³ (2006) 1 SCC 697

31. The learned counsel can also draw the attention of this Court to proviso (2) of Section 92 which states that the existence of a separate oral agreement on a matter on which the document is silent and which is not inconsistent with the terms can be proved. In considering whether or not this proviso applies, the Court should consider the degree of formality of the document as per the learned counsel.

32. The learned counsel also submits that the proviso is not applicable because the document is not 'silent' on the matter of allotment of F-schedule property. It is shown to be clearly allotted to the first defendant. It was initially included and later deleted from the draft. He therefore submits that this is not a 'silent' matter on which evidence can be given. He also argued that oral evidence of an understanding would be inconsistent with the recorded terms, because the alleged oral agreement is to the effect that if the first defendant acts in a particular manner, the property would be taken out of the partition and thrown back into the common pool. The learned counsel submits that this is totally 'inconsistent' with what is recorded in the document. Therefore, he urges that an oral agreement to vary the terms of the document and oral evidence which is inconsistent with the terms of document cannot be taken. This Court finds force in the contention of the learned counsel for the appellants and holds that the oral evidence to take the property out of the partition deed and to bring it back into the common pool would also be

‘inconsistent’ with its terms and therefore, the same cannot be considered.

33. The later half of the proviso to which the learned counsel drew the attention of this Court is the degree of ‘formality’ of the document. In this case, it is clear that the parties were all experienced businessmen. They had decided to partition the property. They have in fact partitioned the property. They met a senior counsel who as stated by all drafted the deed. The initial draft of the partition deed was prepared (Ex.A.1). The F-schedule in that was struck off. Thereafter, the formal deed was registered in 1958 and acted upon by all the concerned. A registered deed carries a presumption that the transaction is a genuine one. Only in 1988 (almost 30 years later) was the challenge mooted to a formal registered partition deed. The learned counsel also argued basing on the last two lines of the proviso that the document in question is very formal document executed after a great deal of thought. He also points out that a reading of the document reveals that whenever there was a property belonging to the family that was the subject matter of a dispute, the same was very clearly mentioned in the deed itself, wherein it is clearly described that certain items are kept joint because of the pendency of the litigation. He points out to the case pending with regard to item No.1 in schedule-C where a case is filed in the Court of Munsif, Vijayawada and an injunction not to use the furnace as also the eviction

petition pending in the Court of Secunderabad Rent Controller were mentioned. The learned counsel also points out that it is very clearly mentioned in the document that the respective sharers will pay the taxes of Schedule ABCD properties from 01.01.1958 and on A1, B1, C1 properties from the date of the document. Similarly, expenses towards income tax, sales tax etc. shall be borne equally up to the date of deviation and from there onwards, it will be borne by each party separately. In case of this 'F' schedule property, if the litigation or claim of the Endowment Department was an issue, it would have been included in the list of properties kept joint due to litigations; as per the learned counsel. He also points out that as per the terms in the deed, the sharers shall enjoy the properties forever with absolute rights. They shall not be any dispute amongst them as to the differences in the quantum of share etc. The document as per the learned counsel clearly is a very formal document, well thought out; reasoned and ultimately registered with the consent of all the parties. It is his contention that the oral evidence cannot be introduced or considered about its terms. This Court is of the clear opinion that the plaintiffs in the suit did not prove the nominal nature of the document and even otherwise the evidence of an oral understanding contrary to the terms of Ex.A.3 cannot be considered.

34. For all the above reasons, this Court is of the opinion that the oral evidence to prove the nominal nature of a particular part of the deed cannot be entertained and the lower Court committed an error in relying upon the so-called oral agreement contrary to Section 92 proviso (2) of the Indian Evidence Act.

35. The other contentious issue is about the court fee paid. It is the contention of the learned counsel for the appellants that the suit for a declaration should be filed and that the court fee should be paid on the market value. On the other hand, it is the contention of the learned counsel for the respondents that the possession of one joint owner is possession of all the joint owners and that therefore, as the property yet to be divided, the mere fact that one party is not in joint possession does not lead to the conclusion that there has been an ouster. The learned counsel relying upon ***Annasaheeb Bapusaheb Patil v. Balwant***¹⁴ and ***Neelavathi v. N. Natarajan***¹⁵, argues that the court fee paid is correct. A close reading of these cases, particularly ***Neelavathi***'s case (12 supra) reveals that the Supreme Court held that as long as the right to a share and the nature of the property as joint is not disputed the law presume that he is in joint possession.

36. In the case on hand, on review of the entire evidence, it is clear that as far as the F-schedule property is

¹⁴ (1995) 2 SCC 543

¹⁵ (1980) 2 SCC 247

concerned, the plaintiffs are not in joint possession with the first defendant. Their possession is disputed and their right to a share is disputed. The first defendant was enjoying the F-schedule property as the owner. It is his act of leasing the property to the 4th defendant that as lead to the present litigation. The 4th defendant began to run a commercial establishment therein. The first defendant also asserted in his evidence that municipal taxes are in his name only. Thus, there is no evidence of joint possession of 'F' schedule of the partition in 1958. Therefore, as the reading of the entire evidence shows that the plaintiffs and the first defendant are not in joint possession, this Court is of the opinion that the court fee paid is incorrect to seek a relief against 'F' schedule.

37. For all the above reasons, this Court holds that the lower Court did not correctly decide the matter with regard to the 'F' schedule property. The findings of the lower Court are contrary to the law and therefore, this Court holds that the judgment of the lower Court should be set aside as far as it relates to the plaint-F schedule property only. The 'F' schedule is held to be the property of the first defendant alone. As far as the other aspects of the impugned judgment is concerned apart from 'F' schedule and the court fee paid, there is no dispute about the same. Hence, the same are not touched upon or discussed.

38. With the above observations and modification, the appeal is partly allowed. The 'F' schedule is held to be the property of the first defendant alone and cannot be partitioned. The rest of the judgment relating to other properties is held to be correct. In the circumstances of the case, there shall be no order as to costs. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 29.01.2018
Isn

Note: L.R. Copy marked.

