

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

A.S.No.1126 of 1999

O R D E R:

This appeal is filed questioning decree and judgment dated 29.07.1991 in OS.No.44 of 1980 passed by the Additional Subordinate Judge, Ongole.

As this is a first appeal, the parties are referred to as the plaintiff and defendant only.

The brief facts of the case are that the suit OS.No.44 of 1990 is filed by the plaintiff/appellant. He is the son of Bujjaiah and defendant No.5. Defendant Nos.1 and 2 and the father of the plaintiff are the sons of Subbaiah and defendant No.6 is the widow of Subbaiah. Defendant Nos. 2 and 3 are the sons of the defendant No.1. The husband of defendant No.6 died prior to the year 1946. After that defendant Nos.1 and 4 and Bujjaiah father of the plaintiff continued to live as members of joint family and their mother Pamidi Chinnammi has been living with them. Bujjaiah married defendant No.5. The landed property owned by the family of defendant Nos.1, 4 and Bujjaiah set out in the plaint 'A' schedule and the house property possessed by the said joint family is shown in the 'B' schedule while the movable properties and outstanding of the family are set out in 'C' schedule. In all the A, B and C schedule mentioned joint family properties, Bujjaiah's branch

was entitled to 1/3rd share. While so, Bujjaiah died undivided. His son/plaintiff is entitled to half share and the other half share of Bujjaiah devolved upon the plaintiff and defendant Nos.5 and 6. They have been in possession and enjoyment of the properties. Defendant No.5 is a woman of weak intellect and she has been under the influence of defendant Nos.1 and 4. The next friend of the plaintiff came to know that a partition was effected in about the year 1972 between the defendant Nos.1, 4, 5 and 6 and the properties said to have been allotted to the plaintiff's share were put in possession of defendant No.5. The plaintiff's next friend further came to know that defendant No.5 cultivated some items in one or two years and that subsequently defendant No.1 is cultivating those items also. The next friend of the plaintiff thereafter gave notice to defendant Nos.1 and 4 demanding them at least to deliver possession of the property said to have been allotted to the minor plaintiff and also to account for the outstandings. The defendant Nos.1 and 4 received the notices and gave a reply with all false allegations. In their reply notices, defendant Nos.1 and 4 mentioned that the lands said to have been allotted to the minor plaintiff were leased out by defendant No.5 to defendant No.1 for a period of five years and the outstandings which according to them were Rs.12,000/- completely given to them. The next friend of the plaintiff upon receiving the notice made enquiry and learnt that the

partition said to have taken place in the year 1972 is not a just and equitable partition and that it was not for the benefit of the minor plaintiff and that the plaintiff was not given his due share and that he was completely defrauded. The minor plaintiff was not at all given a share in the movables and outstandings. The plaintiff therefore submits that defendant No.5, who has been and is also under the influence of defendant No.1 did not represent the minor plaintiff properly in the partition said to have taken place in 1972 and that any documents executed by her even if true are not valid and binding upon the minor plaintiff. Further, the plaintiff, being a minor, the alleged partition is *ab initio* void and the plaintiff is entitled to ignore the said partition and seek for a fresh partition after getting the alleged partition cancelled. The plaintiff's mother who is defendant No.5 herein played herself into the hands of defendant No.1 and acted detrimentally to the interests of plaintiff. The partition set up by defendant No.1 was brought out by undue influence and fraud. It is unequal and unjust and harmful to the plaintiff. The alleged lease is also false and even if there is any such arrangement, it cannot be valid and binding on plaintiff as it materially affected the interests of the other minor. The plaintiff is, therefore, entitled for partition and separate possession of his 4/18th share in 'A, B and C' schedule properties and also for future profits.

Defendant No.1 filed a written statement contending that the family is possessed of 'C' schedule movable property or that defendant No.5 is a woman of weak intellect or that she has been under the influence of defendant No.1 and defendant No.4 or that the next friend of the plaintiff learnt about the partition in the year 1972 and that the plaintiff's next friend on enquiry came to know that the partition was not just and equitable and that it was not the benefit of the plaintiff. Till 1975, defendant No.5 personally cultivated the land allotted to herself and the plaintiff. Defendant No.5 being the natural guardian represented the plaintiff at the partition. Plaintiff got more than what he is entitled under law in the house and site. It was agreed at the time of partition that the outstanding dues shall be allotted to defendant Nos.1 and 4 with an obligation to discharge the family debts and also as a provision for marriage expenses of defendant No.4. It is also averred that the mother of the plaintiff is a very intelligent woman and still the plaintiff is with her and she is looking after the plaintiff. It is obvious from a reading of registered lawyer notice and plaint that the plaintiff's case is being shifted according to his fancies. In the notice, it is clear admission of the fact that a partition has already taken place and that the respective shares were put in separate possession and enjoyment and that the plaintiff's mother cultivated the lands personally for some years. So the plaintiff is not entitled to file the present suit.

The partition in the year 1972 is acted upon. Defendant No.1 discharged the debts, which were allotted to his share. There is no cause of action for the suit. The suit is therefore liable to be dismissed with costs. Defendant Nos.2, 3 and 6 adopted the written statement filed by defendant No.1.

Basing on the pleadings, the lower Court framed the following issues:

1. whether the plaintiff is entitled to the relief of partition and separate possession as prayed for?
2. whether the suit is bad for non-joinder of the alleged purchasers, creditors and debtors?
3. whether the partition effected in 1972 was not beneficial to the plaintiff and if it is not valid and binding on him?
4. whether there were debts at the time of partition of 1972 and if defendant No.1 discharged the same as alleged in para No.7 of the written statement?
5. to what relief?

The plaintiff filed IA.No.44 of 1986 for amendment of the plaint and the same was allowed. After the amendment of the plaint, defendant No.1 filed an additional written statement contending that the plaintiff is not entitled to pray for cancellation of the partition as it is barred by estoppel. Plaintiff also filed IA.No.928 of 1989 to declare him as major and to discharge the guardian. The said petition was allowed and the plaintiff was declared as major. Subsequently, the plaintiff also filed IA.No.76 of 1989 for amendment of the plaint and the same was allowed. Consequent to the

amendment of the plaint, defendant No.1 again filed additional written statement contending that after the death of defendant No.6, Ac.1.56 cents devolved upon defendant Nos.1, 4 and the widow and the son of late Bujjiah/defendant No.5 and plaintiff or that further the share of deceased defendant No.6 in the rest of properties devolved on her sons defendant Nos.1 and 4 daughters i.e. defendant Nos. 8 to 11. The deceased son's son and wife i.e. the plaintiff and defendant No.5 or that the plaintiff's share increased to 5/18th or that defendant No.6 did not execute any Will or that the said Will is not true and is not valid and binding or that the deceased defendant No.6 has no right to convey and share from out of Ac.1.56 cents covered by Sy.No.962, in which she has only life interest or that defendant No.5 is in the hands of defendant No.1 and acted detrimental to the interests of plaintiff or that the partition set up by this defendant was brought about by under influence by fraud etc., or that the lease set up by this defendant is not true and valid and binding on the plaintiff, that it affected the interest of the minor or that the partition and the lease will not bind the plaintiff are all false.

On the above additional pleadings, lower Court framed the following additional issues:

1. whether the will dated 07.03.1984 is true, valid and binding upon the plaintiff?

2. whether the lease alleged to have been given by defendant No.5 to defendant No.1 is true, valid and binding upon the plaintiff?

On behalf of the plaintiff, PWs-1 to 3 were examined and Exs.A.1 to A.7 were marked. On behalf of the defendants, DWs.1 to 10 were examined and Exs.B.1 to B.22 were marked. The Commissioner's report was marked as Ex.C.1.

After the trial, the lower decreed the suit in favour of the plaintiff and defendant No.5 and against defendant Nos.1 to 4, 7 to 11 by its judgment dated 29.07.1991. The lower Court did not reopen the partition as prayed on the ground of undue influence, fraud etc., and merely granted the relief as per the earlier partition. The plaintiff, who is dissatisfied, has filed this appeal.

Heard Sri T.Rajendra Prasad, learned counsel for the appellant and none appeared for the respondents.

The matter was adjourned on a number of times because there was some confusion as to whether the appellant was alive or not. Sri Rajendra Prasad, learned counsel, made a number of attempts to ascertain the true facts; ultimately he argued the matter by conceding that he has no clear information about the so called death of the appellant. Therefore, it is his submission that the appellant is alive and he argued the matter.

After hearing the arguments of the appellant as there was no representation for the respondents, the matter was reserved for judgment on 10.07.2018.

Learned counsel for the appellant argued that the judgment and decree of the lower Court are totally wrong and he pointed out that the guardian filed the suit within the time and that despite the clear evidence being available on record, the lower Court committed an error in granting a decree as prayed for. According to him, the evidence available is clearly supporting the case of the plaintiff. There is inequitable distribution according to the learned counsel. His client is entitled to an equitable distribution which was not done in this case. The debts are not clearly explained. In addition, the house property allotted to the plaintiff in the so called partition was not fit for habitation as a result of which his mother was compelled to live outside. For all these reasons, the learned counsel argued that the judgment and decree of the lower Court are not correct and that they deserve to be set aside. In fact he concentrated on issues 1 and 3 only which in the opinion of this court are the critical issues.

There was no representation for the respondents as noted earlier. This Court is, therefore, called upon to decide the matter basing on the available evidence and the pleadings.

This Court notices the following: that the plaint underwent a number of amendments and the final prayer is as follows: (a) setting aside the earlier partition said to have been entered into by defendant No.5 and directing the partition of the plaint A, B and C schedule in 18 equal shares according to good and bad qualities after cancelling the earlier partition etc. This prayer did not undergo many changes although the basis of the plaint underwent a couple of amendments.

It is the case of the plaintiffs that the mother of the plaintiff namely defendant No.5 is a woman of weak intellect and is under influence of defendant Nos.1 and 4. After the amendment, they make an allegation of undue influence and fraud in the earlier partition. They also plead that the partition is *ab initio void* and that it should be cancelled.

Needless to say that when such a prayer is made, particularly alleging case of undue influence, fraud etc., in a 1972 partition, which is challenged few years later, the burden is definitely on the plaintiff to plead and prove the same. Undue influence and fraud are terms of great significance which can undue a solemn act. Fraud vitiates every action. This is the reason why Order VI Rule 4 of CPC mandates that the fraud should be clearly and categorically pleaded. It requires clear pleading and also clear proof.

In the case on hand, the evidence will have to be examined against the back drop of the settled law that the burden is squarely upon the plaintiff to prove that the earlier partition of 1972 has been vitiated by fraud, undue influence etc., and also to show that it is inequitable.

In this case, for the plaintiff, three witnesses were examined. Of these three witnesses, PWs.1 and 2 are undoubtedly most important. PW.1 is the next friend and guardian. He is also the maternal grand-father of the plaintiff. His evidence, if examined closely, does not show that the earlier partition of 1972 was vitiated by any fraud or undue influence. He only states that he was not informed of the partition. He also states that defendant No.1 is not worldly wise and she is below the standard of intelligence. He also states that she was always yielding to the dictates of defendant Nos.1 and 4. He further states in his chief examination that in the partition Ac.3 ½ of land was given to the plaintiff and defendant No.5. A portion of the house was also given to defendant No.5, but he states that it is not habitable. He also agrees that after the partition, defendant No.5 personally cultivated her share of the land for more than one year. Thereafter, the cultivation was handed over to defendant No.1. In the cross-examination, he comes up with a new theory that there is an illicit relationship between defendant Nos.1 and 5 and that they colluded with each other. He also admits that this fact was informed to the

counsel before the filing of the suit. The fact also remains that the said illicit intimacy is not mentioned in the plaint.

The second witness examined is the plaintiff who is examined as a witness after he attained majority. In his evidence he states that the total extent of the land owned by the family is Ac.16.00 cents. Besides this they have cash, cattle and other movable properties. He states that he was not given a due share, particularly in the movables and in the cash. He deposes in his chief-examination of the yield that is coming from the property. However, in his cross-examination he clearly admits that he has no knowledge about the types of crops and of the profits which realized from the suit land. He also states that he has no witnesses to speak about the revenue from the lands. Therefore, an examination of the first two witnesses who are the main witnesses do not clearly make out a case of fraud, undue influence or of any inequitable distribution of the properties. There is no clarity from the evidence of these two witnesses of the matters pleaded in the suit.

The third witness examined is defendant No.4 in the suit. He is examined as PW.3. He clearly admits that defendant No.5 and the plaintiff were given Ac.3.50 cents of land. He, however, states that the family had to collect some debts of Rs.14,000/- to Rs.15,000/- and that they also have some cattle and she-buffaloes. He states that they did not

give any share in the cattle and she-buffaloes or in the money receivables to the plaintiff. In the cross-examination, in the very first line, he admits as follows: 'the partition between myself, plaintiff, my brother and mother is equitable regarding the immovable property'. According to him, the movables were not Rs.2,400/- and odd, but of a value of Rs.4,000/-. He also agreed that the plaintiff would be given one or two cattle after he attains majority. Other than this, this witness also did not speak anything about the undue influence on defendant No.5 or that defendant No.5 was not worldly wise and that she succumbed to the pressure/influence exerted by defendant No.1 and agreed to the partition.

The oral evidence clearly does not disclose that the partition was in any way inequitable. It does not disclose that defendant No.5 was under some pressure as a result of which she agreed to an inequitable partition. The lower Court also rightly noticed that without any basis in the pleadings, PW.1 deposed that his daughter has an illicit intimacy with defendant No.1. The lower Court also relied upon ***Ratnam Chettiar and Ors. v. S.M. Kuppuswami Chettiar***¹, wherein the Hon'ble Supreme Court reiterated the salutary principle that a partition between members of a Hindu Undivided Family can be reopened only if it is

¹ AIR 1976 SC 1

obtained by fraud, coercion, misrepresentation or undue influence. The Hon'ble Supreme Court also held that the Court must insist on strict proof of the facts. The lower Court also noticed that Ex.X.1-form which was marked for the admission of the plaintiff in a school contains the thumb mark of his mother only. In addition, the evidence shows that defendant No.5 cultivated the property by herself and later, the property allotted to her was cultivated by defendant No.1. Adequate proof is not filed to show the existence of movables and or of any inequitable distribution. This is a matter of evidence and this court holds that there is no proof of "inequitable" distribution.

On the other hand, the defendant pointed out that the debts due from the family were paid to others. EXs.B.4 to B.7 were filed, which are discharged promissory notes. Therefore, as admitted by defendant No.1, the amounts due to the family are essentially bad debts. There is no evidence to show that these debts have been realized by the family or by defendant No.1 and that they were not passed on to the others. Defendant No.3 who owes money to the family was also adjudged an insolvent. These facts are already noticed by the Court below. Paras 20 and 21 of the impugned judgment deal with these matters.

Therefore, for all these reasons, this Court is of the opinion that the partition that was affected in 1972 cannot

be set aside on the ground that it is induced by fraud, misrepresentation or that it is inequitable. Issue Nos.3 and 4 are also in favour of the respondents and against the appellant. This is the essential issue argued by learned counsel. Issue No.2 was held in favour of the plaintiff. Additional issue No.1 was also held in favour of both plaintiff and other parties to the suit and this was not really questioned in this Court. Even as far as issue No.5 is concerned, the lower Court rightly considered the case law on the subject and directed that the items allotted to the plaintiff and defendant No.5 are to be delivered to them. In para 32, the Court held that the plaintiff is entitled to recover possession of the share that was allotted to him and his mother. Ultimately, in issue No.5, the lower Court came to a conclusion which in the opinion of this Court does not deserve to be upset in any manner whatsoever.

The learned counsel essentially concentrated on issues Nos.3 and 4 and argued that the partition was inequitable and in view of the fact that this Court concurs with the findings of the Court below, the appeal has to be dismissed. No case is made out to interfere with the judgement and decree passed by the lower Court .

In the result, the appeal is dismissed. There shall be no order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date: 06.09.2018

KLP

