

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

Second Appeal No.550 of 2008

ORDER:

The Second Appeal is preferred by the 1st defendant out of six defendants (for short, 'D.1 to D.6 respectively') in the suit O.S.No.35 of 1997 on the file of the learned Prl.Senior Civil Judge, Nellore, filed by two plaintiffs, the respondents 1 and 2 herein for partition and separate possession of the property described in the plaint schedule into three equal shares and to allot one such share to each of the plaintiffs and to pass preliminary decree with mesne profits, impugning the judgment and decree of lower appellate Court, dt.18.01.2008 in A.S.No.111 of 2004 on the file of the III Addl.District Judge, Nellore, reversing the dismissal judgment and decree of the trial Court dt.01.10.2004.

2. The facts of the case of the plaintiffs in brief are that the plaintiffs and the defendants are children of late Peddanna @ Doraswamy who died intestate on 01.11.1959 leaving behind the parties to the suit and their mother-Daggumati Suseelamma as legal heirs and said Suseelamma died on 06.11.1975. In the year, 1976, partition took place between the plaintiffs and the defendants, in which the wet land of Ac.2.50cents fell to the share of the D.2 and D.3 and the plaint schedule property fell to the share of the plaintiffs and the D.1 jointly. D.4 to D.6 relinquished their rights in all the properties after taking money in favour of the plaintiffs and D.1 to D.3 and D.2 and D.3 partitioned their shares and sold away to others. The plaint schedule property was kept in joint between the plaintiffs and the D.1 in the year 1982. The 1st plaintiff went to Srikalahasti and started business there and the 2nd plaintiff went to Chittoor in the year 1980 and got job in SPMT Limited, Chittoor and subsequently, transferred to Vijayawada and resigned his job on 19.08.1996. The plaintiffs used to come now and

then yearly and lived together as joint family members in the plaint schedule property. Some misunderstandings arose between the plaintiffs and the D.1 and therefore the plaintiffs demanded the D.1 for partition of the plaint schedule property and separate possession through mediators but the D.1 did not cooperate and postponing for partition. Ultimately, the plaintiffs got issued legal notice on 07.10.1996 to the D.1 who received the same on 14.10.1996 and gave reply on 19.11.1996 and again on 22.12.1996 with false allegations.

2-a. On the other hand, the D.1 filed written statement, admitting the facts of relationship between both the parties to the suit, devolvement of the properties of their mother by name Suseelamma on them after her death, partition between both the parties and also allotment of Ac.2.50 cents to D.Venkateswarlu (D.3) and D.Narasimhulu(D.2), D.4 to D.6's relinquishment of their right in the joint family property and also admitting that it was proposed to divide the plaint schedule property into three shares and to allot one such share each to the plaintiffs and the D.1, and the D.1 expressed his desire to take the plaint schedule property in its entirety by paying the value of the other two shares to the plaintiffs and the plaintiffs agreed for the said proposal. On that the plaint schedule property was valued at Rs.39,000/- (Rupees thirty thousand only) and the D.1 paid Rs.26,000/- (Rupees twenty six thousand only) to the plaintiffs i.e. at Rs.13,000/- to each in settlement of their shares in the plaint schedule property and it happened in the month of July, 1997. Since that date, the D.1 became the absolute owner of the entire house and he is in exclusive possession and enjoyment over the plaint schedule property by paying taxes. Hence sought for dismissal of the suit.

2-b. The D.2, D.3 and D.5 filed a separate written statement admitting the relationship between the parties to the suit, partition of the properties among them, falling of plaint schedule property to the share of the plaintiffs and the D.1 jointly in the said partition and also falling of the wet land of about Ac.2.50cents to the share of the D.2 and D.3 but no division of plaint schedule property between the plaintiffs and the D.1 took place and the D.1 never paid money to the plaintiffs towards their share in the plaint schedule property and the plaintiffs never relinquished their right over the plaint schedule property in favour of the D.1 and the plaintiffs have been residing elsewhere due to their avocations. Hence, the D.2, 3 and D.5 are not proper and necessary parties to the suit and unnecessarily impleaded. The D.6 filed a memo adopting the written statement of D.2, 3 and 5. D.4 remained exparte.

2-c. From the above pleadings, the trial Court framed the issues viz; 1) *whether the plaintiffs are entitled for partition of plaint schedule properties into three equal shares and for allotment of one such share to each of the plaintiffs as prayed for?* 2) *Whether the court fee paid is correct,* 3) *whether the defendants 2,3 and 5 are proper and necessary parties and whether the suit is bad for their misjoinder?and 4) to what relief?*

2-d. During trial, the plaintiffs are examined as P.Ws.1 and 2 and marked Exs.A.1 to A.8(Ex.A.1-legal notice,dt.07.10.1996 issued by the plaintiff to the D.1, Ex.A.2-postal acknowledgment, Ex.A.3 reply notice,dt.22.12.1996 issued by the D.1 and Ex.A.4-house tax receipts(5 Nos.) standing in the name of Daggumati Suseelamma). On behalf of the defendants, D.1 examined as D.W.1 and got marked Exs.B.1 to B.7 (Relinquishment letter, dt.04.06.1961 executed by D.4 and one Bonda Narasimhulu, Ex.B.2-Relinquishment letter (Agreement), dt.09.03.1977 executed by the D.1, Ex.B.3-weighment receipt, dt.09.03.1977 issued by Sri Dhanalakshmi Dharma Kata in respect of two bangles weighing 21-500

gms., Ex.B.4 relinquishment continuation letter, dt.05.12.1981, executed by the D.6, Ex.B.5-List written by Settaram Radhakrishnaiah for allotment of moveable property among the joint family of plaintiffs and the defendants, Ex.B.6-Bunch of water tax receipts(42 Nos.) and Ex.B.7-Bunch of House Tax Receipt (50 Nos.) issued in the name of Daggumati Suseelamma).

2-e. After hearing both sides and on perusal of the evidence on record the trial Court held that even prior to the death of the father of the parties, the D.1 was the only earning number in the family of the D.1 and his brothers and he paid Rs.10,000/- to each of the plaintiffs towards their share and Rs.3,000/- each for their marriage expenses and after receiving said amount, both the plaintiffs relinquished their rights over the plaint schedule property and therefore, the plaintiffs were never in joint possession over the plaint schedule property from the date of partition and never established their joint possession, and further they never demanded the D.1 for partition and therefore, the contention of the plaintiffs that they are having share in the plaint schedule property is not tenable and that the plaintiffs are not entitled for partition of the plaint schedule properties as prayed for and therefrom dismissed the suit by judgment dt.01.10.2004.

3. Aggrieved by the judgment and decree of the trial Court, the plaintiffs preferred appeal before the lower appellate Court vide A.S. No.111 of 2004, with the grounds that there is ill-appreciation of the evidence and documents in right perspective and erroneously dismissed the suit. The lower appellate Court after hearing both sides, set aside the dismissal judgment and decree of the trial Court and decreed the suit of the plaintiffs as prayed for.

4. Aggrieved by the judgment and decree, dt.18.01.2008 of the first appellate Court in A.S.No.111 of 2004, the D.1 filed the present Second Appeal with the grounds that the lower appellate Court totally erred in decreeing the suit having concluded that there are no documents proving that Rs.10,000/- each to both the plaintiffs towards their share given by the D.1, later even they executed relinquishment deeds. Further erred in arriving that both the plaintiffs are living outside due to their occupation, therefore, it cannot be said that both have ousted from their possession for and appellant/ D.1 to perfect title to the property. The appellate Court failed to see that there is no explanation in the evidence of plaintiffs as long as 1977 itself, given up their rights, then what made them to keep silent in all these years without going for mutation of the suit schedule property in their name. The contention of the D.1 that the suit schedule property was divided by metes and bounds. In the cross-examination of D.W.1 and P.W.1 it was conformed about the existence of a document reduced into writing. Hence, to set aside the judgment and decree of the lower appellate Court by allowing the Second Appeal as prayed for.

5. This Court though admitted the Second appeal on 08.07.2008, it was by simply saying the appeal grounds 10(a) to (c) raised substantial questions of law, without actual formulation of any involvement of substantial questions of law for admission. Hence, this Court, on 02.04.2018 this Court formulated the following substantial questions of law from the hearing to decide the lis on merits are as follows:-

1. Whether the lower appellate Court's reversal judgment in allowing the appeal decreeing the plaintiff's suit by setting aside the dismissal judgment of the trial Court in O.S.No.35 of 97 is unsustainable and the plaintiffs are entitled to the relief of partition of the plain schedule into three equal shares and for allotment of one each share to the two plaintiffs?

2. Whether there is any relinquishment of rights of the plaintiffs as pleaded by the defendants?
3. Whether there is any ouster from joint possession and enjoyment?
4. Whether there is any prior oral partition disentitling the plaintiffs to the suit claim? and
5. To what relief?

6. Heard both sides and perused the entire material on record.

7. The relationship between the parties is not in dispute and even from the very written statement of the D.1 in disputing plaintiffs' suit claim while admitting the relationship between the parties, it is stated that the property stands in the name of their mother Suseelamma and after her death, there was partition by allotment of Ac.2.50cents to the D.3 and D.2 for D.4 to D.6 relinquished their rights and it was proposed to divide the remaining-the plaint schedule property into three shares and to allot one such share to the plaintiffs and the D.1 each. What he further pleaded is however the D.1 expressed his desire to take the entire plaint schedule property by paying the value to the other two shares to the plaintiffs and the plaintiffs agreed for said proposal and it was valued for Rs.39,000/- and the D.1 paid Rs.26,000/- to the plaintiffs at Rs.13,000/- each towards their $2/3^{\text{rd}}$ share for remaining $1/3^{\text{rd}}$ share belongs to him in settlement that was in July, 1997 and since then the D.1 is in exclusive possession and enjoyment by paying tax to the suit property by seeking dismissal of the suit claim. Thus what the D.1 pleaded is not the ouster but while recognizing the plaintiffs' $2/3^{\text{rd}}$ undivided share in the plaint schedule property set up as purchased by payment of money for their relinquishing their joint rights in his favour the remaining to the exclusive entitlement of the plaint schedule property. Undisputedly, there is no deed of relinquishment much less

registered document by law for the property worth of Rs.100/- and above for conveying or relinquishing that too in the immovable property there is no letter of relinquishment even much less acknowledging the receipt of so called amount. So far as the joint property liable for partition under the management of one or the other and even otherwise one of the family members looking after even not partitioned and kept joint for long time will constitute ouster, for what is to be established under the doctrine of ouster among the co-sharers or co-parceners as the case may be, is the exclusive possession and enjoyment with knowledge of the other co-parceners for the statutory period of more than 12 years in setting up adverse title against the true owner recognizing true owners' right, there is no adverse title set up but so called oral purchase or oral relinquishment by taking consideration for no plea of ouster and the burden is thereby heavy on the D.1 to plead and prove the purchase of the undivided interest of the 1/3rd each of the two plaintiffs in his favour out of the plaint schedule property, that too but for his *ipsy dipsy* oral testimony in this regard there is no any scrap of paper much less for anything raised about payment of said amounts to the plaintiffs 1 and 2 of Rs.13,000/-each and there is no date even mentioned but vaguely saying as in July,1997, the so called amounts paid under the so called settlement for their relinquishment and his purchase of their undivided interest in the plaint schedule immovable property. The trial court, in this regard, particularly from paras-8 and 9 of the judgment what was observed of the contention of the D.1 of subsequent to the partition, the plaint schedule house was divided into three shares with boundaries with value of each at Rs.10,000/- having so fixed and the D.1 paid to the plaintiffs 1 and 2 Rs.10,000/- each for sale of their shares and they were earlier unemployed and having received

the same, the 1st plaintiff started business in provisional stores and 2nd plaintiff in medicines in 1977 and in saying by closure of the medical business, the 2nd plaintiff joined in SPMT, Chittoor in 1978, from said evidence of D.W.1. In fact, from the written statement plea of the D.1-D.W.1, what he claimed of value of plaint schedule property was Rs.39,000/- and paid Rs.13,000/- each to the plaintiffs in July, 1997 (for sic 77 if any), there is a variation in the said alleged payment of consideration to the written statement pleading of D.1 vis-à-vis the evidence of the D.W.1. Though the changed convenient version for that is Rs.10,000/- each for the value of Rs.3,000/- each to the marriage expenses to the plaintiffs that is not the plea borne by written statement of D.1 much less by Ex.A.3 reply notice. In fact, the D.2,3 and 5 in their separate written statements admitted the plaintiffs' suit claim in entirety and disputed plea of the D.1 if any payment of amount to relinquish the rights by the plaintiffs in favour of D.1 or D.1's oral purchase by payment of the said amount and leave about there is an additional written statement of the D.2,3 and D.5 adopted by D.6, D.1 could not dispute their version much less by calling as Court witness by cross-examination. Otherwise their very plea supports the case of the plaintiff by putting burden heavily on the D.1 and for said payment for an alleged purchase much less in relinquishment even taking said amount from D.1, there is no any no scrap of paper and evidence and the trial Court thereby not right in dismissal of the suit of the plaintiffs on surmises by ill-appreciation of evidence, as rightly concluded in the reversal judgment of the 1st appellate Court. What the trial Court observed on issue No.1 on the entitlement of relief of partition sought by plaintiffs from the oral partition and relinquishment set up by the D.1, the plaintiffs were never in joint possession later and their plea of

joint possession and sharing of income is untenable thereby not entitled. It is not even with any observation of any cogent evidence of any ouster and perfecting of title by adverse possession by D.1 against the plaintiffs for their undivided interest, having admittedly they got in the plaint schedule property of 2/3rds, that too the trial Court in answering on issue No.2 of sufficiency of fixed court fees from the plea of joint possession and enjoyment upheld and not observed of liable to pay ad-volerem court fee with a direction to pay deficit court fees. Insofar as issue No.3, it is academic for there is no mis-joinder and the D.2,3,5 and 6 impleadment no way fatal to the suit as rightly concluded even by the trial Court. It is thereby the lower appellate Court in its judgment stated that even mother by name Suseelamma of plaintiffs and the defendants died on 06.11.1975 long after their father died on 01.11.1959 and there was partial partition taken place in 1976 wherein Ac.2.50cents wet land fell to the share of D.2, 3 and D.4 to D.6 relinquished their rights from the pleadings of both parties not in dispute in this regard including keeping joint the plaint schedule property between the plaintiffs 1 and 2 and D.1 but for so far as the plea of D.1 of purchase of the undivided interest of the plaintiffs 2/3rds of the plaint schedule by payment by D.1 in claiming exclusive right and not partible having admitted the property originally belongs to Suseelamma. The D.W.1-D.1 in his chief examination stated the house was divided into three shares with boundaries and value of each fixed at Rs.10,000/- and para-6 of his written statement speaks originally there was a proposal by the mediation stated supra to divide the plaint schedule property into three shares of 1/3rd each to the D.1 and plaintiffs 1 and 2 and from D.1 expressed desire to take the house by one of them alone in entirety by paying value to the remaining to other shares and it was mutually

agreed, therefrom there is no dispute on the plaintiffs' entitlement of the undivided 2/3rd share in the plaint schedule property. Even in the cross-examination of D.1 as D.W.1, it is admitted of plaint schedule property fell to the share of himself and plaintiffs in the oral partition of 1976 with other members for Ac.2.50cents wet land fell to the share of D.2 and 3, and D.4 to D.6 relinquished their rights by taking money and evidenced by receipts. However, for any plea of so called payment to the plaintiffs later for alleged relinquishment in July 1977 not only no date mentioned, but also no receipt obtained if at all true having earlier obtained from D.4 to D.6 covered by Exs.B.4 of D.6 and B.1 of D.4, that too Ex.B.4 was dated 05.12.1981 and Ex.B.1, dt.04.06.1961 and D.W.1 himself in his cross-examination admitted as rightly observed by the lower appellate Court in para-18 of there is no any proof or documents evidencing sale or relinquishment of plaintiffs' shares in favour of D.1 over the plaint schedule property and suffice to say, D.1 miserably failed to prove what he pleaded of payment of amounts to plaintiffs for relinquishing their 2/3rd share in his favour or for his purchase of their 2/3rd share in the plaint schedule orally and the lower appellate Court was also right in so observing of there is a practise of getting documents of any alleged relinquishment including covered by Exs.B.2 and B.4. While that was so, is it believable of no such document obtained by D.1 from the plaintiffs if at all so paid. It is also right in its conclusion by lower appellate Court in its reversal appeal judgment in paras-18 to 20 of the judgment of what D.6 relinquished is by taking Rs.15,000/- under Ex.B.4. Could it be believed of for Rs.10,000/- by plaintiffs each as another improbability for said version of D.1. The P.W.2 is one of the defendants supported the case of the plaintiffs and there is nothing to discredit the P.W.2-D.Narasimhulu, the brother of the plaintiffs and

defendants from his cross-examination by D.1 much less anything worth elicited to probablise said version of D.1.

8. Having regard to the above, the lower appellate Court's reversal judgment is sound and supported by reasons in its setting aside the findings of the trial Court's dismissal of the suit claim for partition of the plaintiffs and in decreeing the same by its reversal judgment for this Court while sitting in Second Appeal there is nothing to interfere and as such the lower appellate Court's reversal judgment is sustainable for there is no proof of any relinquishment of the plaintiffs' rights in favour of D.1 by taking any amount and there is no ouster of the plaintiffs' joint rights in the suit property by D.1 and the plaintiffs are thereby entitled to the relief of partition and separate possession of their shares.

9. Accordingly and in the result, the Second Appeal is dismissed confirming the lower appellate Court's reversal judgment by setting aside the trial Court's dismissal judgment and decreeing the plaintiffs partition suit first granting preliminary decree for the plaintiffs to work out their rights by applying for final decree before the trial Court pursuant thereto. No costs.

10. Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Date:04.06.2018
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Dr. B.SIVA SANKARA RAO J,