

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

SECOND APPEAL No.248 of 1993

JUDGMENT:

This Second Appeal is preferred by the appellants/plaintiffs aggrieved by the Judgment and Decree dated 22.03.1993 in A.S.No.54 of 1987 passed by the learned District Judge, Ranga Reddy District, whereby and whereunder the learned Judge allowed the appeal filed by the defendant and set aside the Judgment and Decree dated 31.08.1987 in O.S.No.254 of 1977 passed by the Principal District Munsif, East & North, Saroornagar, Hyderabad, filed for partition.

2) The parties in this Second Appeal are referred as they were arrayed before the Trial Court.

3) The factual matrix of the case is thus:

a) The plaintiff and defendant are own brothers. Their father died in the year 1967 leaving behind two houses bearing Nos.9-33 and 1-50 and agricultural land measuring Ac.1.03 gts. in Sy.No.291 at Uppal Kalan.

The plaintiff and defendant though living separately have not partitioned the said properties. Hence, the plaintiff requested for partition, but the defendant avoiding the same on one pretext or other.

Hence the suit.

b) The defendant filed written statement and contended that their father during his life time purchased three plots and gave one plot each to the plaintiff, himself and their sister—Chandrabhaga. The plaintiff sold his plot about 10 years back to one Chakali Jangaiah who in turn sold to

one Vithal Reddy who constructed house and compound wall. He submits, in the plot given by his father, he constructed house bearing No.1-50 with the funds provided by his wife and their family members were residing therein. The plaintiff was in possession of house bearing No.9-33 which was constructed by his father. He also submits that the plaintiff sold all the movable properties without giving any share to him. While so, their mother died on 01.04.1977 and after her death, the plaintiff made unlawful entry into one of the rooms of the house belonging to his wife and residing therein.

c) He further submits that he has no objection to partition the house bearing No.9-33 and landed property in Sy.No.291 situated at Uppal Kalan, but the plaintiff has no right to claim a share in the house bearing No.1-50 which exclusive belongs to him. He thus prayed to dismiss the suit.

d) Basing on the above pleadings, the Trial Court framed the following issues.

- i) *Whether the house bearing gram panchayat No.1-50 at Uppal Kalan forms part of the joint family property?*
- ii) *Whether the whole of the agricultural land bearing Sy.No.291 measuring Ac.1.03 gts. situated in Uppal Kalan forms part of the joint family property?*
- iii) *Whether the plaintiff is entitled to the relief as prayed for?*
- iv) *To what relief?*

e) During trial, PWs.1 to 3 were examined and Exs.A1 to A3 were marked on behalf of plaintiff. DWs.1 to 3 were examined and Exs.B1 to B35 were marked on behalf of defendant.

f) After hearing both sides and basing on the oral and documentary evidence, the Trial Court decreed the suit observing that house bearing No.1-50 situated at Uppal Kalan is also joint family property and the plaintiff and defendant are entitled to half share each and as regards house bearing No.9-33 and agriculture land in Sy.No.291 situated at Uppal Kalan there is no dispute. Hence, preliminary decree for partition was passed in favour of plaintiff.

g) Aggrieved, the defendant preferred A.S.No.54 of 1987. During pendency of appeal, the sole plaintiff/respondent died and his LRs. were brought on record as respondents 2 and 3 vide Court order dated 30.07.1991 in I.A.No.995 of 1988.

h) The lower Appellate Court after hearing both sides and considering the evidence on record allowed the appeal by setting aside the judgment and decree of the Trial Court in O.S.No.254 of 1977.

Hence, the instant Second Appeal by plaintiffs.

i) It is to be noted that this Court by order dated 12.09.2006 closed the Second Appeal granting liberty to the parties and also the counsel to move appropriate applications in the event of LRs. approaching the respective counsel. Thereafter, SAMP Nos.1542, 1543 and 1544 of 2012 were filed to set aside the abatement, condone the delay in filing the

restoration and LR applications and this Court by order dated 03.04.2014 allowed those applications on payment of costs.

j) During pendency of second appeal, the 3rd appellant died and his LRs. were brought on record as appellants 4 to 7 vide Court order dated 22.01.2015 in SAMP No.933 of 2015. Like wise, sole respondent/defendant died and his legal representative was brought on record as 2nd respondent.

k) Pending appeal, the 6th appellant filed SAMP No.1148 of 2015 stating that 2nd respondent—Palakursha Ramesh has alienated the suit lands in favour of father of proposed respondents. Hence, respondents 3 to 6 are proper and necessary parties to the appeal. This Court by order dated 08.08.2017 allowed the said petition. While so, the proposed respondents filed SAMP No.2254 of 2017 praying to delete their names from the array of respondents.

4) The record shows that Second Appeal which is of the year 1993 had a chequered career even without admission. During the year 2006 when it was brought to the notice of the Court that certain of the parties in the appeal are no more, this Court by order dated 12.09.2006 closed the Second Appeal giving liberty to the parties to move appropriate application in the event of legal heirs approached the respective counsel. After long gap objections were filed to bring on record the LRs. of the deceased parties on either side and they were allowed as mentioned supra. Thereafter, the matter came up for hearing.

a) Since the matter is yet to be admitted, the arguments of respective counsel are taken in the context of admissibility of Second Appeal on the following substantial questions of law projected in the grounds of appeal.

- 1) *Whether the lower Appellate Court was justified in law to reverse the judgment of the trial Court.*
- 2) *Whether the lower Appellate Court is justified in reversing the judgment of the trial Court without properly following the principles of law relating to partition.*
- 3) *Whether the lower Appellate Court was justified in accepting Ex.B34 and B35 as filed were secondary evidence.*
- 4) *Whether in the absence of primary evidence, secondary evidence is admissible.*
- 5) *Whether the lower Appellate Court was justified in giving go-bye to the admissions with respect to items 1 and 3 made by the defendant.*
- 6) *Whether the lower Appellate Court was justified in drawing adverse inference without any basis.*
- 7) *Whether the lower Appellate Court is justified in ignoring the well settled principles of partition.*
- 8) *Whether the lower Appellate Court is justified to traverse beyond the pleadings in the suit.*

5) Heard arguments of Sri P.Venugopal, learned counsel for appellants and Sri K.Mahipathi Rao, learned counsel for respondents.

6a) The plaintiff and defendant are brothers. Plaintiff filed the suit for partition of ½ share in plaint A-schedule mentioned two house properties i.e. H.No.9-33 and H.No.1-50 situated in Uppal Kalan and B-schedule mentioned agricultural land measuring Ac.1.03 gts. in Sy.No.291 situated in Uppal Bhaghat on the plea that their father died in the year 1967 leaving behind plaintiff and defendant and movable and immovable

properties and though the plaintiff and defendant have been living separately their joint family properties are still be portioned.

b) The defendant's contention is that their father—Pentaiah and his brother is Laxmaiah who is still alive. The father of Pentaiah and Laxmaiah was Balaiah who had Inam lands and house at Uppal. The house was partitioned and both were residing in different portions.

c) His further case is that the father of parties during his life time purchased three plots and gave one plot each to plaintiff, defendant and their sister—Chandra Bhagha. Plaintiff sold his plot given by his father about 10 years prior to the filing of the suit to Chakali Jangaiah who in turn sold to one Vithal Reddy and he constructed a house on it. Defendant's wife constructed a house on the plot given to defendant and he is residing in the said house bearing No.1-50. The plaintiff has been in possession in house No.9-33 and he sold other immovable properties and not given any share to the defendant. After the death of their mother on 01.04.1977 plaintiff made an unlawful entry in one of the premises in the house No.1-50 and residing therein. Though the defendant lodged complaint the police did not take any action. Thus, ultimately the defendant summed up his contention to the effect he has no objection for partition of house No.9-33 (A-schedule) and land in Sy.No.291 measuring Ac.1.03 gts. (B-schedule) but opposed the plaintiff's claim in respect of house No.1-50. He also contended that the suit is not tenable for non-joinder of parties.

d) The trial Court considering the admission of defendant conceding plaintiff's claim in respect of house No.9-33 and land in Sy.No.291 measuring Ac.1.03 gts. concentrated on the right of the plaintiff in respect of house No.1-50 and framed issue No.1 to the effect whether the said house was part of joint family property. Since there was a slight dispute with regard to actual extent of the land in Sy.No.291, it also framed an issue as to whether whole of the land measuring Ac.1.03 gts. was part of joint family.

e) Issue No.1 is concerned, the trial Court observed that the defendant produced Ex.B34—permission issued by Sarpanch, Uppal Kalan and Ex.B35—plan for construction of house No.1-50 and those documents were disputed by plaintiff and therefore, the burden was on the defendant to call for original permission from the Gram Panchayat but he did not produce the same and hence Exs.B34 and B35 cannot be said to be proved as required under law. The trial Court further observed that defendant claimed that his father purchased three plots and gave one plot to him on which he constructed house in the name of his wife. The proof entirely rests on him to establish the said fact. However, the defendant did not produce any document to show that the said plot was gifted to him. In the absence of the same, it is unknown how the Gram Panchayat gave permission to the wife of the defendant to construct the house. Further, the wife of the defendant was not examined to clear the doubt as to how he got the property from the defendant and how she acquired money to construct house. On these observations, the trial Court held that house plot No.1-50 is a joint family property. The trial Court ultimately decreed

the suit as prayed for and passed a preliminary decree for plaintiff's ½ share.

7) Aggrieved, the defendant preferred A.S.No.54 of 1987 before the District Judge, Ranga Reddy District. The lower appellate Court allowed the appeal and set aside the judgment of the trial Court on two main findings. Firstly, regarding H.No.1-50 in para-14 of its judgment it observed that the plaint was silent as to who constructed H.No.1-50 and it was not alleged in the plaint that the house was constructed by the father of the plaintiff and defendant. It was simply alleged in the plaint H.No.9-33, H.No.1-50 and land in Sy.No.291 are the joint family properties. It was suggested to DW1 that "it was not correct to say that myself and my father have constructed H.No.1-50 with the funds given by father of plaintiff who was an employee in Railways. However, the said suggestion was not supported by any plea in the plaint. When the defendant took a plea in the written statement that H.No.1-50 was constructed by him in the name of his wife, the plaintiff ought to have filed rejoinder as to how H.No.1-50 was constructed. The defendant produced Exs.B34 and B35—permission and plan. He also filed I.A.No.993 of 1987 seeking permission of the Court for summoning the original record pertaining to H.No.1-50 from the Gram Panchayat. The plaintiff opposed the said petition and the same was dismissed by the trial Court. So, it was clear defendant taken steps to produce original record pertaining to Exs.B34 and B35 and therefore no adverse inference can be drawn against defendant. Thus, ultimately the lower appellate Court held that H.No.1-50 cannot be said to be joint family property. The second finding which is more crucial is that

admittedly the parties have a sister by name Chandra Bhagha. According to the plaintiff all the properties were acquired by his father and as per Hindu Succession Act daughter is also sharer along with sons in the property left behind by father. The lower appellate Court further observed that if the properties left behind by Pentaiah (father of the parties) were his self-acquisitions, plaintiff, defendant, their mother and sister would succeed those properties in equal shares under Section 8 of Hindu Succession Act. On the other hand, if the properties left behind by Pentaiah were joint family properties then, 1/3rd share of Pentaiah therein would devolve on the plaintiff, defendant and their mother and sister. Again after the death of their mother her share would be inherited by the plaintiff, defendant and their sister. The lower appellate Court observed plaintiff and defendant cannot have half share each in the properties left behind by their father whether they are self-acquisitions or joint family properties. Merely because the defendant admitted in his written statement that he has no objection for partition of items 1 and 3 of the plaint schedule, no decree can be passed for partition because in a suit for partition all the sharers are necessary parties. Admittedly, the sister of the parties is not added as a party. Hence, the suit is liable to be dismissed. Similarly, when Laxmaiah the uncle of the parties had ½ share in H.No.9-33, the suit would be bad for non-joinder of Laxmaiah also. On the above two findings the lower appellate Court allowed the appeal and dismissed the plaintiff's suit in its entirety.

Hence, the instant Second Appeal.

8) Learned senior counsel Sri P.Venugopal would strenuously argue that judgment of the lower appellate Court is perverse inasmuch as though grievance of the defendant in the appeal was only in respect of item No.2, the appellate Court set aside the entire decree and judgment passed by the trial Court. He would argue that so far as H.No.1-50 is concerned, the trial Court after considering the entire material on record has correctly held that the said house is also a joint family property and plaintiff deserves a share. However, the lower appellate Court went on chimerical and held as if said house is not a joint family property. As against the plaintiff's plea that plaint A and B schedule are joint family properties acquired by their father, defendant while admitting partition of H.No.9-33 and land in Sy.No.291 however, contended in respect of H.No.1-50 as if the father gifted that property plot to him and he constructed the house in the name of his wife. Except producing Exs.B34 and B35—permission and plan for construction of the house, he has not produced the crucial document such as gift deed or any equivalent deed permissible under law to show that the plot on which H.No.1-50 was constructed was gifted to him by their father. In the absence of filing such crucial document, the house property should be deemed to be joint family property. As held by the trial Court, merely permission was obtained in the name of his wife, that will not become the property of the defendant or his wife. However, the lower appellate Court committed a grave error in holding that said property is not a joint family property for the reason that plaintiff failed to prove that the house was constructed with the funds advanced by him as deposed by him in his evidence. Learned counsel would emphasize that though he

failed to prove how the house was constructed the admission of the defendant in his written statement that the plot was purchased by his father stands steadfast in which case the burden will be entirely on him to establish that the said plot was gifted to him by his father. In the absence of such proof, the plot and house constructed thereon must be deemed to be a joint family property. Therefore, the said error in appreciation of evidence shall be deemed to be one of substantial questions of law.

a) Nextly, he would argue that the lower appellate Court erred in holding suit is not maintainable for non-joinder of necessary party. Even accordingly to the defendant, the sister was given one plot and therefore her non-inclusion is not vital to the suit. He thus prayed to allow the appeal.

9) Per contra, learned counsel for respondents Sri K.Mahipathi Rao in support of judgment of the lower appellate Court, would argue that the suit was rightly dismissed for non-joinder of necessary party i.e. sister of the plaintiff and defendant and since non-joinder of co-sharer is fatal to the suit, the same cannot be ignored. He further argued that lower appellate Court also rightly held H.No.1-50 was not a joint family property. He thus prayed to dismiss the appeal.

10) In my considered view, the following substantial questions of law arise for consideration.

1) Whether the finding of the lower appellate Court that H.No.1-50 is not a joint family property is factually and legally correct?

2) *Whether the finding of the lower appellate Court that suit is bad for non-joinder of necessary parties is factually and legally correct?*

11) **Substantial Question No.1:** On a close analysis of pleadings and findings this Court is of the considered view that the finding of the lower appellate Court that H.No.1-50 is not joint family property is factually and legally incorrect.

a) It is the specific plea of plaintiff that all the suit properties including H.No.1-50 are the joint family properties left behind by their father who died in 1967 and they were not partitioned.

b) In oppugnation, the plea of defendant is that items 1 and 3 are joint family properties. However, the plot on which item No.2 i.e. H.No.1-50 was constructed was one of the three plots purchased by their father and gifted to plaintiff, defendant and their sister—Chandra Bhagha. Plaintiff sold away his plot and defendant constructed H.No.1-50 in the name of his wife after obtaining permission from the Gram Panchayat.

c) In the light of above pleadings and since defendant admits that plot on which H.No.1-50 was constructed was purchased by their father, prima facie under law the said property shall be deemed to be joint family property. The burden is heavy on the defendant to establish that plot was gifted to him by his father. As rightly observed by the trial Court, the defendant did not produce any iota of evidence showing his father gifted the said property to him. In the absence of such gift deed, mere construction of house in the name of his wife would not lend the character

to the said house as separate property of defendant or his wife rather, it will be a joint family property amenable for partition.

This question is answered accordingly.

12) **Substantial Question No.2:** As noted supra, the plea of the plaintiff in the plant is that the suit properties are joint family properties acquired by their father who died in 1967. Admittedly, plaintiff and defendant got a sister by name Chandra Bhagha. The plea of the defendant that suit is bad for non-joinder of necessary party. As rightly observed by the lower appellate Court, irrespective of the fact whether the suit properties are joint family properties or self-acquisitions of Pentaiah, in either case, his wife and daughter will have a right therein by virtue of provision of Hindu Succession Act. Since wife is no more, the suit is bad for non-joinder of the other necessary party i.e. sister of plaintiff. Similarly, the suit is bad, also for non-joinder of their paternal uncle—Laxmaiah as he has share in H.No.9-33. It is true that trial Court did not frame an issue regarding non-joinder of necessary parties. However, such a plea was taken in the written statement by the defendant. Therefore, the lower appellate Court was right in dealing with crucial mixed question of fact and law. I endorse the finding given by the lower appellate Court in this regard.

This question is answered accordingly.

13) It is to be noted that respondents 3 to 6 in the appeal filed SAMP No.2254 of 2017 to delete them from the array of respondents. The appellants filed counter and opposed the same. The ground on which the said petition was filed was that the petitioners purchased Ac.0-28 gts and

Ac.0-27 gts in Sy.No.291 from Kammari Ramulu S/o. Pentaiah and Kammari Ramulu S/o. Gopaiah in the year 1991 and the same has nothing to do with the suit lands and hence the petitioners are neither necessary nor proper parties but they were included in the second appeal when they failed to file counter in the implead petition. In view of the finding that the suit is bad for non-joinder of necessary party i.e, the sister of the plaintiff and the defendant, the respective contentions of the petitioners herein and respondents/appellants are not dealt with in this second appeal. However, liberty is granted to the petitioners in SAMP No.2254/2017 to agitate about their right in the lands said to be purchased by them in any future litigation with the present appellants or others to invite the decision of the competent Court. With this observation, SAMP No.2254/2017 is closed.

14) In the result, this Second Appeal is dismissed by confirming the judgment of the lower Appellate Court in A.S.No.54 of 1987. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 01.05.2018
Murthy/Scs