

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

APPEAL SUIT No.724 of 1997

JUDGMENT:

This Appeal Suit, under Section 96 of the Code of Civil Procedure, 1908, by the unsuccessful plaintiffs, is directed against the decree and judgment, dated 30.12.1996, of the learned III Additional District Judge, Visakhapatnam, made in O.S.No.39 of 1995 (Old O.S.No.154 of 1987).

2. I have heard the submissions of Sri *T.S Anand*, learned counsel appearing for the appellants, and of Sri *M.Bala Subrahmanyam*, learned counsel appearing for the 8th respondent. The 6th respondent died. Respondents 1 to 5 & 7 have not entered appearance.

3. The parties in this Appeal Suit shall hereinafter be referred to as the plaintiffs and the defendants as arrayed in the suit for convenience and clarity.

4. Before proceeding further, it is necessary to refer to the pleadings of the parties.

5. The averments in the plaint, in brief, are as follows:-

Originally, one Chavakula Venkataswamy, purchased the plaint schedule property, viz., (i) a cement sheeted thatched house bearing Door no.13-22-1; and, (ii) a small thatched house situated at Dandu Bazar, Maharanipet, Visakhapatnam, under a registered Sale Deed, dated 23.10.1923. He was in possession and enjoyment of the said plaint schedule property till his intestate death in the year 1942. He left behind the plaint schedule property and his five sons, namely, (1) Chavakula Satyanarayana, (2) Chavakula Rama Rao, (3) Chavakula Jagannadha Rao, (4) Chavakula Kanna Rao (6th defendant) and (5) Chavakula Narayana Rao, and two married daughters, by names Venkata Narasamma and Chittemma. Since the daughters were married prior to the death of the said Venkataswamy, the five sons have succeeded to the plaint

schedule property with equal rights and they have been in possession and enjoyment of the same without any division or partition, even though some of them and their children went out on commands of their jobs. Out of the five sons, who succeeded to the plaint schedule property of the said Venkataswamy, the eldest son-Chavakula Satyanarayana died intestate in the year 1950, as a member of joint Hindu family, leaving behind two sons, namely, Chandra Rao and Venkata Rao (1st defendant). The said Chandra Rao, who is unmarried, also died intestate in the year 1969, as a member of joint Hindu family. The 5th son-Chavakula Narayana Rao also died intestate in the year 1970, as a member of joint Hindu family, leaving behind five sons, namely, (1) Maheswara Rao, (2) Venkateswara Rao (2nd defendant), (3) Srinivasa Rao, (4) Ramesh (3rd defendant), (5) Suresh (4th defendant). Out of them, Maheswara Rao and Srinivasa Rao died unmarried and intestate in the year 1976, as members of joint Hindu family. The 3rd son-Chavakula Jagannadha Rao died intestate in the year 1972, as a member of joint Hindu family, leaving only one son by name Venkata Rao as his sole legal heir. The said Venkata Rao also died intestate in the year 1979, as a member of joint Hindu family, leaving behind his wife-Ramanamma (1st plaintiff), a son-Srinivasa Rao (2nd plaintiff) and a daughter-Nagamani (3rd plaintiff). The 2nd son – Chavakula Rama Rao also died intestate, as a member of joint Hindu family, leaving behind only son-Appa Rao (5th defendant). The 4th son – Chavakula Kanna Rao is the only surviving son of the said Chavakula Venkataswamy (6th defendant). Thus, the plaintiffs as heirs of Chavakula Jagannadha Rao, the 3rd son of the said Venkataswamy, the 1st defendant as the sole heir of Satyanarayana, the 1st son of the said Venkataswamy, the defendants 2 to 4 as the sole heirs of Narayana Rao, the 5th son of the said Venkataswamy, the 5th defendant as the sole heir of Rama Rao, the 2nd son of the said Venkataswamy and the 6th defendant, who is the 4th son of the said Venkataswamy, have been in possession and enjoyment of the plaint schedule property, as members of

the joint Hindu family, having 1/5th share each. The plaintiffs, are, therefore, entitled for 1/5th share as the heirs of Jagannadha Rao in the plaint schedule property. After the death of the said Venkataswamy's eldest son, the 6th defendant, as the eldest male member of the joint family, was managing the property. After the marriage of his daughter, he has completely neglected to look after the repairs and re-construction of the plaint schedule property, which is already in a dilapidated condition. The plaintiffs, therefore, no longer desire to live jointly and keep the plaint schedule property joint. Therefore, they demanded for partition by metes and bounds and separate possession of their 1/5th share. But, none of the defendants, especially the 6th defendant, who is the Manager of the joint Hindu family, cared for the request; and, he even refused to partition the plaint schedule property by metes and bounds and allot the plaintiffs' 1/5th separate share to them. Hence, they have no alternative, except to file the suit for partition of the plaint schedule property into five equal shares by metes and bounds and for allotment of possession of one such separated share to them.

6. The 1st defendant filed a written statement supporting the case of the plaintiffs by admitting that all the averments made by the plaintiffs in the plaint are correct and that he and the plaintiffs are entitled to 1/5th share each in the plaint schedule property and stating that he has no objection for the partition of plaint schedule property and allotment of share to the plaintiffs.

7. The defendants 2 to 5 adopted the written statement filed by the 1st defendant.

8. The 6th defendant filed a separate written statement. The averments therein, in brief, are as follows: -

It is true that originally the plaint schedule property was purchased by late Chavakula Venkataswamy under a registered Sale Deed, dated 23.10.1923,

and he was in possession and enjoyment of the property till his death in the year 1942. It is also true that he died intestate. But it is not correct to state that he left behind five sons and two married daughters. Two more sons, namely Suryanarayana and Appa Rao, of Venkata Swamy were also alive. The contention that as the daughters were married prior to the death of Sri Venkataswamy and that they are not entitled to a share in his properties is untenable. The further allegations that the five sons of late Venkataswamy have been in possession and enjoyment of the property since the time of the death of late Venkataswamy without any division, even though some of them and their children went out on commands of their jobs are false. The said allegations are made only for the purpose of the suit. It is true that Satyanarayana, Narayana Rao, Jagannadha Rao and Rama Rao died intestate leaving behind their children. The allegation that they died as members of joint Hindu family is absolutely false and untenable. The other two brothers, namely Suryanarayana and Appa Rao, also died about 25 years and 30 years ago. Out of the remaining five brothers, Satyanarayana went away to Kharagpur having deserted his wife, who is the mother of the 1st defendant. Having married once again, he met with an untimely death at that place. Rama Rao, who is the father of the 5th defendant, also went away to Kharagpur. He later returned to Visakhapatnam and lived in his own house at Allipuram and died there. Jagannadha Rao, who is the paternal grand father of the plaintiffs, worked in Girijan Corporation and settled in K.D.Peta and died there. Narayana Rao, the other brother, died in the year 1970. During his life time, he was running taxis under the name and style of 'CITY MOTOR TAXIES' and earned substantially. Immediately after the demise of late Venkataswamy, all the brothers, who are very affectionate and close to each other, sat together and discussed regarding the partition of the plaint schedule property. As it was not of much value in those days and as it was not conveniently constructed for enjoyment of all the brothers and as it was insufficient to

accommodate all of them and further, as Satyanarayana, Rama Rao and Jagannadha Rao were away from Visakhapatnam and Narayana Rao was doing his own business living separately and as this defendant was staying in the plaint schedule property along with his father, it was agreed that this defendant should pay Rs.150/- to each one of the brothers and take the suit schedule property absolutely for himself. Accordingly, this defendant paid the amounts and started enjoying the property as absolute owner since then. As all the brothers were sufficiently grown up and were in a position to decide for themselves regarding the sharing of the property and as there were no disputes amongst the brothers, they never had the necessity of reducing the terms of partition into writing or seek the assistance of any third party for the purpose of settling the terms of partition. While so, the 1st defendant, who has a propensity for litigation, out of greed for money instigated the plaintiffs to file the present misconceived suit only in order to harass this defendant in his old age and extract some money from him, if possible. Neither the plaintiffs nor the defendants 1 to 5 have any right in the suit schedule property and they cannot claim any share in it. After the death of late Venkataswamy, this defendant, as eldest male member of the joint family, was managing the property and that after the marriage of his daughter, he completely neglected to look after the repairs and reconstruction of the plaint schedule property are all false and untenable allegations. Therefore, the further question of the plaintiffs desiring not to live jointly and demanding for partition of the property does not arise and the allegations in the plaint to the contra are all false and untenable. Late Venkataswamy died more than 45 years ago. The fact that the suit is filed at a highly belated stage, would itself go to show that the suit is filed only to extract money from this defendant even though the partition was affected long time ago and the same is evident from the long usage of the property exclusively by this defendant as the absolute owner. This defendant is not the second eldest son of his father and Satyanarayana.

Pama Rao and Jagannadha Rao are elder to him. This defendant has been enjoying the plaint schedule property as absolute owner openly to the knowledge of everyone including the plaintiffs and the remaining defendants till he alienated the same and, therefore, the suit for partition is not maintainable. The defendants 2 to 5 are also sailing with the plaintiffs. The 1st defendant and all the others are hand-in-glove. This defendant, therefore, prays to dismiss the suit with costs.

9. Taking into consideration the above pleadings, the trial Court settled the following issues for trial:

1. Whether the plaintiffs are entitled for the partition of the plaint schedule property?
 2. Whether the plaint schedule properties are the absolute properties of the 6th defendant, and is not liable for partition?
 3. Whether the plaintiff is entitled for 1/5th share?
 4. To what relief?
- [Reproduced Verbatim]

10. During the pendency of the suit, the 6th defendant died and his legal representatives, i.e., his daughters were brought on record as defendants 7 and 8 as per the orders, dated 21.12.1995 in I.A.No.759 of 1995. The 7th defendant remained *ex parte*. The 8th defendant filed a separate written, however, in line with the defence of the 6th defendant. She further stated in her written statement as follows: 'The said property was sold by the 6th defendant to her husband, M.Srihari Rao, under two registered Sale Deeds, dated 23.09.1981, bearing Document Nos.7752/ 81 and 775/ 81 registered at the Joint Sub-Registrar's Office, Visakhapatnam. Subsequently, the property was assessed in the name of her husband. He is paying the taxes since then in his name. Her husband has been enjoying the plaint schedule properties openly to the knowledge of everyone including the plaintiffs. Her husband mortgaged the said property in favour of State Bank of India, SIB Division, in

the year 1984, for availing a term loan and duly discharged the same. Late Venkataswamy died more than 45 years ago. The fact that the suit is filed at a belated stage would itself go to show that the suit is only filed to harass the father of this defendant with an oblique motive and to extract money from this defendant and her husband. This defendant, therefore, prays to dismiss the suit with costs.'

11. After filing the written statement by the 8th defendant, the trial Court settled the following additional issues:

- 1) Whether the 6th defendant sold the plaint schedule property to the husband of the defendant M. Sihari Rao under two separate registered sale deeds dt. 23.9.81 with document Nos. 7752/ 81 & 7753/ 81 of Joint Sub-Registrar, Visakhapatnam and he is the absolute owner of the same?
- 2) Whether the suit is barred by limitation?
- 3) Whether the plaintiff and defendants 1 to 5 and 7 have no right to the plaint schedule property?

[Reproduced Verbatim]

12. At trial, the first plaintiff and his supporting witness were examined as PWs 1 & 2 and exhibit A1 was marked on the side of the plaintiffs. DW1 was examined and exhibits B1 to B4 were marked on the side of the defendants.

13. On merits and by the judgment impugned in this first Appeal, the trial Court dismissed the suit of the plaintiffs. Therefore, the plaintiffs preferred this instant Appeal Suit.

14. Learned counsel for the plaintiffs/appellants while reiterating the pleaded case of the plaintiffs contended as follows:

The Court below failed to consider the evidence on record in proper perspective and in the light of the principles laid down in the decided cases. Hence its judgment is thereby vitiated. It failed to see that the case put

forward by the 6th defendant is unbelievable and untenable and that the plaintiffs are entitled to the relief. The Court below failed to see that the oral partition and the relinquishment of shares of all brothers in favour of the 6th defendant without a registered document cannot be accepted as conferring absolute title on the 6th defendant. The Court below failed to see that it is the case of the 6th defendant that he purchased the shares of his brothers paying Rs.150/-to each and the alleged oral sales do not convey any title to the 4th defendant. The Court below failed to see that even assuming that the 6th defendant and his family was residing in the suit schedule property for a long time, he cannot acquire absolute rights to the exclusion of his other brothers, who are admittedly coparceners and the question of adverse possession does not arise at all. The Court below failed to see that the alleged sale by the 6th defendant in favour of Srihari Rao (husband of the 8th defendant) is nominal and inoperative. The Court below failed to see that the 6th defendant did not plead in his written statement that he sold away the suit schedule property in favour of Srihari Rao and that he is in possession thereof. The Court below failed to see that Srihari Rao is not a necessary party to the suit and that the suit cannot be dismissed for non-joinder of Srihari Rao. The Court below failed to see that even after the 8th defendant filed her written statement stating that the 8th defendant sold the suit property to her husband, no issue is framed as regards the non-joinder of Srihari Rao and in the absence of such an issue, the suit cannot be dismissed. The Court below erred materially in holding that the suit is barred by law of limitation. The reasoning of the Court below is erroneous, unsound and unsustainable and its judgment is wholly vitiated.

15. Learned counsel for the 8th defendant supported the decree and judgment of the trial Court and contended as follows: 'The 6th defendant is the 4th son of Venkataswamy. His specific defence is that immediately after the death of Venkataswamy all his sons sat and discussed with regard to

partition of the property and that as the small extent property was not convenient and suited for partition it was decided to allot the same exclusively to the 6th defendant, who is staying in it, on payment of Rs.150/- each to each of the other sharers/brothers and that accordingly the 6th defendant paid as overty, the said amounts to his brothers in lieu of their respective sharers and thus under the said oral partition the property fell to the exclusive share of the 6th defendant. There is no relinquishment or transfer of shares of other sharers as being misunderstood and being falsely contended by the plaintiffs and the 1st defendant. There was only prior oral partition more than 42 years back, that is, immediately after the death of Venkataswamy in the year 1942. The brothers are aware of the same. Hence, the brothers of the 6th defendant did not sue for partition during their life times nor disputed the exclusive possession and enjoyment of the 6th defendant as absolute owner thereof. The trial Court appreciated the facts correctly and the oral evidence in proper perspective and correctly decided the issues. The well considered judgment of the trial Court does not warrant interference. The first appeal which is devoid of merit is liable for dismissal.

16. The points that arise for determination in this appeal suit are as under:

1. Whether the plaintiffs are entitled to seek partition of the plaint schedule properties into five equal shares by metes and bounds and allotment of one such separated share to them?
2. Whether the partition pleaded by the 6th defendant is true?
3. Whether the 6th defendant sold the plaint schedule property to the husband of the 8th defendant M. Sihari Rao, under two separate registered sale deeds, dated 23.09.1981 bearing document Nos. 7752/ 81 & 7753/ 81 registered at the office of the Joint Sub-Registrar, Visakhapatnam?
4. Whether the decree and judgment of the trial Court are unsustainable under facts and in law?
5. To what relief?

17. I have perused the entire record except the deposition of DW1, which is not available on record as it was some how lost and is not traceable. The examination of the 8th defendant as DW1 before the trial Court is not disputed. The judgment of the trial Court and the appendix at the foot of the judgment evidence the fact that DW1 was examined. Learned counsel for both the sides stated that they too do not have a copy of the deposition of the said witness. Hence, reconstruction of the same is not possible. However, both the learned counsel requested to dispose of the appeal on merits with the available record as this appeal is of the year 1997.

18. POINTS NOs.1 to 3:

18.1 The relationship is admitted. The plaint schedule property was originally acquired by Venkataswamy is admitted. On his intestate death in the year 1942, the property devolved upon all his sons is admitted. The plaintiffs who are the daughters of late Jagannadha Rao, the 3rd son of late Venkataswamy, brought the suit for partition by impleading the surviving son of Venkataswamy, that is, the 6th defendant and the legal heirs of the deceased sons of late Venkataswamy. He resisted the suit for partition by filing a written statement. On his death, during the pendency of the suit, his daughters are impleaded as defendants 7 and 8. The 8th defendant filed a written statement in line with the pleadings in the written statement of her father, the 6th defendant. During trial, the 1st plaintiff was examined as PW1 and the 1st defendant who is sailing with the plaintiffs was examined as PW2. The 8th defendant was examined as DW1.

18.2 The plaintiffs case is that after the death of Venkataswamy, the plaint schedule property remained joint without partition and that the 6th defendant being the male member and son of late Venkataswamy was in management of the property and that he did not take proper care of the property and hence, the property further dilapidated and that, therefore, the plaintiffs desired to

seek partition and that their demand for partition was not acceded to by the other sharers and that the 6th defendant refused to partition the property and give a 1/5th share to the plaintiffs, and hence, the suit is filed. The 8th defendant was examined as DW1. The specific common defence of the 6th & 8th defendants is as under: 'Immediately after the intestate death of Venkataswamy in the year 1942, all the brothers who are affectionate and close to each other sat together and discussed regarding partition of the plaint schedule property. As it was not of much value and was not conveniently constructed for joint enjoyment of all the brothers and as Satyanarayana, Rama Rao and Jagannadha Rao, who are the sons of late Venkataswamy were away from Visakhapatnam and as Narayana Rao, another son of late Venkataswamy was doing his own business and was living separately and as the 6th defendant who is also one of the sons of late Venkataswamy was staying in the plaint schedule property along with his father, it was decided that he should pay Rs.150/- to each one of his brothers and take the suit schedule property absolutely for himself. Accordingly, the 6th defendant paid the said amounts and started enjoying the property absolutely since then. As the brothers were sufficiently grown up and were in a position to decide for themselves regarding the sharing of the property and as there were no disputes between the brothers they never had any necessity to reduce the terms of partition into writing or seek the assistance of any third party for the purpose of settling the terms of partition. The 6th defendant who is the father of the 8th defendant sold the plaint schedule property to the husband of the 8th defendant under two registered sale deeds, dated 23.09.1981, bearing document nos.7752/81 and 7753/81 registered at the office of the Joint Sub Registrar, Visakhapatnam. Subsequently, the property was assessed in the name of M.Sihari Rao, the husband of the 8th defendant, and he has been enjoying the property openly to the knowledge of everyone including the plaintiffs. He mortgaged the said property with the State Bank of India, SIB Division and availed term loan in the

year 1984 and discharged the same. The suit is got filed by the 1st defendant, who has propensity for litigation and greed for money. He instigated the plaintiffs to file the suit to extract money from the 6th and 8th defendants.' During the evidence of DW1, the registration extracts of the two sale deeds are marked as exhibits B1 and B2 and the rectification deeds were marked as exhibits B3 and B4. No documents were marked on the side of the plaintiffs.

18.3 The plaint schedule property admittedly consists of one thatched cement sheet shed and one thatched house in a small extent. The 6th defendant pleaded prior oral partition and urged that as the property was not convenient and not suited for partition and for convenient enjoyment of all the sharers, he was allotted the property to his share on payment of Rs.150/- each to the other sharers in lieu of their shares in the property. Hence, the initial onus is on the 6th defendant and his daughter, the 8th defendant, who supported him and adopted his defence on his demise. Venkataswamy died in the year 1942 is not in dispute. The evidence brought on record shows that the 6th defendant, who is one of the sons of Venkataswamy, lived in the property along with Venkataswamy till the death of late Venkataswamy. His specific defence is that immediately after the death of Venkataswamy, the brothers sat and discussed the issue of partition and that at that time, the plaint schedule property which is not suited for partition was allotted to him and that he paid Rs.150/- each to the other sharers as at that time the property was not much of a value. What is to be noted is that though Venkataswamy died in the year 1942, none of the other sons of Venkataswamy, that is, the brothers of the 6th defendant, disputed his exclusive possession and did not file a suit for partition or demand for partition. The 3rd son of Venkataswamy, that is, one of the brothers of the 6th defendant passed away in 1972. All the others pre-deceased him. Thus from 1942 till 1972 there was neither a demand for partition by any of the brothers of the 6th defendant nor did they dispute the enjoyment of the

property by the 6th defendant as absolute exclusive owner thereof. The legal heirs of the other brothers of the 6th defendant also did no demand for partition or sue for partition till this suit is filed in the year 1987. They all kept quiet from 1972 till 1987. Even PW1 stated that she never demanded for partition and that her mother-in-law demanded for partition. There is no evidence to show that any of the brothers or legal heirs of the deceased brothers contributed for payment of taxes over the plaint schedule property. PW1 was not even born by the date of the death of his grandfather, Venkataswamy. PW1 admitted that Narayana Rao, who used to reside in the plaint schedule property, shifted 20 years back to his house and that Narayana Rao is no more. Admittedly, item no.2 of plaint schedule property was given on rent and the 6th defendant received rents from that property. It is not the case of the plaintiffs that the rents realized were shared among the sharers. The evidence brought on record when harmoniously read and on application of the test of preponderance of probability does not lend support to the case of the plaintiffs. There is absolutely no evidence of reliable character to show that the plaintiffs or others were ever in joint possession of the plaint schedule property after the death of late Venkataswamy, who died in the year 1942. The plaintiffs to explain away the long exclusive possession of the enjoyment of the property by the 6th defendant and to get over the probable plea of prior oral partition urged that the 6th defendant was in such possession and enjoyment not because of the oral partition pleaded by him but because he was eldest male member and surviving son of Venkataswamy. However, it is to be re stated that none of the brothers of the 6th defendant, during their respective life times, never either sued for partition or questioned the exclusive possession and enjoyment of the plaint schedule property by the 6th defendant. The said conduct of the brothers of the 6th defendant would fortify the contention that there was partition immediately after the death of Venkataswamy. All the brothers were alive by then. The first son of

Venkataswamy died in the year 1950; his 2nd son died thereafter; his 3rd son Jagannadha Rao died in the year 1972; his 4th son is the 6th defendant; and, his 5th son-Narayana Rao died in the year 1970. The plaintiffs, to explain away the long exclusive possession of the enjoyment of the property by the 6th defendant and to get over the probable plea of prior oral partition urged that the 6th defendant was in such possession and enjoyment not because of the oral partition pleaded by him but because he was eldest male member and surviving son of Venkataswamy. However, it is to be restated that none of the brothers of the 6th defendant never either sued for partition or questioned the exclusive possession and enjoyment of the plaint schedule property by the 6th defendant during their respective life times. The said conduct of the brothers of the 6th defendant would fortify the contention that there was partition immediately after the death of Venkataswamy. As noted, one elder brother of the 6th defendant was alive till the year 1972. Therefore, the question of the 6th defendant being in management as eldest male member does not arise. Therefore, the contention of the plaintiffs that the 6th defendant being the eldest male member was in management of the property does not merit consideration. As a sequel it is possible to hold that he was in exclusive possession and enjoyment in view of the oral partition that took place immediately after the death of Venkatswamy in the year 1942. Further, there is also non-participation of the brothers in the profits through out and till one of the brothers of the 6th defendant last died in the year 1972. Even the persons of the next generation also have not participated in the profits. For the aforesaid reasons and for this non-participation in the profits for a long period of time effecting generations can be taken as sufficient circumstances for accepting the defence that there was a prior partition and allotment of the plaint schedule property to the 6th defendant in that partition on payment of the value of the money to the other sharers, that is, the brothers of the 6th defendant. Such a view is permissible under law is fortified by the decisions in

Peeran Sahib and Another v. Pedda Jamaluddin Sahib and Others¹ and Ibramsa Rowther (minor) and others v. S.K.Meerasa Rowther and others². Admittedly, the suit was brought in the year 1987, that is, about 45 years after the death of late Venkataswamy. In fact, admittedly, the 6th defendant sold the plaint schedule property to his son-in-law, that is, the husband of the 8th defendant by virtue of two registered sale deeds, in the year 1981 and also executed two rectification deeds in the year 1983 for rectification of survey numbers wrongly mentioned and thus asserted his exclusive right, title and interest over the plaint schedule property. In fact, PW2 admitted in his cross-examination that even by the date of filing of the suit, he knew that the property was purchased by the 8th defendant. However, the said fact was not mentioned in the plaint and the husband of the 8th defendant was not impleaded as a party to the suit. No reason much less any valid reason is not forthcoming for bringing the suit about 42 years after the death of Venkataswamy. The plaintiffs also could not explain as to why the brothers of the 6th defendant kept quiet and allowed the 6th defendant to enjoy the property exclusively during their life times. All the circumstances cumulatively would fortify the defence that there was prior partition immediately after the death of Venkataswamy and that property was allotted to the 6th defendant as stated in the defence. The oral evidence of PWs 1 and 2 wherein they merely asserted the pleading does not advance the case of the plaintiff in the light of the fact that there are no circumstances which lend credence to their statements made on oath; on the other hand there are sufficient circumstances which lend support to the defence and probablise the defence.

18.4 Now I shall deal with the contention of the plaintiffs that in the absence of registered relinquishment deeds or deeds of transfer by the other brothers in favour of the 6th defendant, the plea of oral partition and allotment of the

¹ AIR 1958 AP 48

² AIR 1972 MADRAS 467

property to the 6th defendant on payment of values of other brothers in lieu of their shares has no legal validity and cannot be accepted. Be it first noted that the legal position that there can be oral partition is not in dispute. Therefore, there need not be any document evidencing partition when the plea of the 6th defendant is that there was oral partition immediately on the death of late Venkataswamy. There need not also be document even subsequently evidencing the oral partition. As noted the circumstances and events probablise the defence. In the considered view of this Court, when a property is not convenient for partition and such property is allotted to one of the sharers on payment of money equivalent to the shares of other sharers, such a course adopted during partition of the family properties cannot be viewed as relinquishment or transfer of shares. The said mode of allotment of one property exclusively to one sharer on payment of the value of the shares of the other sharers as ovelty or otherwise shall only be deemed as partition and not as relinquishment of shares by other sharers in favour of the sharer to whom the property which is not suited for partition is exclusively allotted. Such allotment of property which is not fit/suited for partition to one of the sharers on payment of value of the shares of the other sharers shall be deemed as oral partition and not as transfer of property or relinquishment of shares of the other sharers in favour of the sharer to whom the property is allotted. Therefore, no document much less a registered document need not be there in such instances of partition. Hence, the contention that the property is still liable for partition as the brother of the 6th defendant did not execute deeds of relinquishment or transfer has no merit. Even otherwise, the fact that the brothers of the 6th defendant had kept quiet during their life times and their legal heirs including the plaintiffs kept quiet for over several decades after such oral partition, which appears to be true in the facts and circumstances of the case is sufficient to non suit the plaintiffs on the plea of bar of limitation. No doubt, the law is well settled that the possession of one co-owner is the

possession of all the co-owners and to constitute bar of limitation or adverse possession amongst co-owners, it must be coupled with ouster and adverse possession coupled with ouster must be established. As already noted, in the case on hand, there is sufficient evidence to show that the 6th defendant was in exclusive enjoyment of the plaint schedule property for over the statutory period by virtue of his claim of oral partition referred to supra; and, the evidence also reflects that there is non-participation in profits derived from the property for a long period of time effecting different generations; therefore, a presumption that the plea of the 6th defendant in the defence as spoken to by the 8th defendant is probable and can be accepted by applying the test of preponderance of probabilities; and, on the same basis, a presumption of ouster can be inferred and it can be held that the 6th defendant perfected title by adverse possession and ouster. If one co-owner/co-sharer is in exclusive possession and if the other co-owners/co-sharers remained inactive and failed to assert their rights for a considerable length of time and by such lapse of time, the evidence in support of the co-owner in exclusive possession disappears and he becomes handicapped from proving by direct evidence that his exclusive possession is by virtue of prior oral partition and that leaves him or his legal heir to rely upon the circumstances, then the other co-owners who remained inactive for a long time and are responsible for the long delay and its consequences must take the consequences as it is well settled that delay defeats justice and that the Courts come to the rescue of the litigants who are diligent and not who are indolent. If by lapse of time and disappearance of evidence, the person in exclusive possession is handicapped from proving that his exclusive possession was coupled with open denial and open repudiation of the title of the other co-owner either at the inception or subsequently, the co-owner who has been inactive must take the consequences for the long delay in bringing the suit which has prejudiced the other side and occasioned in the loss of evidence by lapse of time. This settled position is reiterated in the decision

in Ibramsa Rowther (2nd supra). Even in the absence of establishing the plea of limitation or adverse possession coupled with ouster, the plaintiffs are not entitled to succeed as in the case on hand, in the considered view of this Court, there is no need to go into the issue of bar of limitation or the issue of adverse possession as the evidence on record sufficiently established a prior oral partition and exclusive allotment of the plaint schedule property to the 6th defendant, who is the 4th son of late Venkataswamy, on payment of Rs.150/- each as ovelty to his brothers in lieu of their respective shares in the said property exclusively allotted to the 6th defendant. The said well established plea is sufficient to non suit the plaintiffs on the ground that there cannot be a partition once again.

18.5 On the above detailed analysis and for all the reasons, and as it is possible to hold that the evidence on record sufficiently established the plea of oral partition immediately on the death of Venkataswamy, the suit filed by the plaintiffs for partition about 42 years after the said oral partition is devoid of merit and is liable for dismissal. All the points 1 to 3 are accordingly answered against the appellants.

19. POINT NO.4:

In the light of the aforestated findings of this Court on points 1 to 3 supra, it is to be held that the contention of the appellants/ plaintiffs that the decree and judgment of the trial court are unsustainable under facts and in law is without merit and is liable for rejection. On carefully evaluating the oral and documentary evidence and after going through the judgment of the trial Court, this Court, for the reasons assigned in this judgment, finds itself in agreement with the findings recorded by the trial Court on the issues settled and accordingly holds that the trial Court is justified in dismissing the suit of the plaintiffs. In that view of the matter, the well considered judgment of the

trial Court brooks no interference. On the above analysis and for the aforestated reasoned findings recorded on the points supra, this Court holds that the appeal suit is without merit and is liable for dismissal. The point is accordingly answered against the appellants/ plaintiffs.

20. POINT NO.5:

In the result, the first appeal suit is dismissed.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

12.04.2018
KL/ RAR



M. SEETHARAMA MURTI, J