

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA
PRADESH

C.R.P.No.1698 of 2018

Between:

Smt. V.Kavitha Reddy and two others.

.....Petitioners

and

V.Aditya Reddy and another

.....Respondents

Date of Judgment pronounced on : 29-08-2018

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/No
2. Whether the copies of judgment may be marked
to Law Reporters/Journals: : Yes
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/No

THE HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO**C.R.P.No.1698 of 2018**

29-08-2018

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< GIST:**> HEAD NOTE:**

!Counsel for the applicant : Sri Rajagopalan

^Counsel for the 1st respondent : Sri O.Uday Kumar**? Cases referred**¹ (2010) 10 S.C.C. 512² (2005) 2 S.C.C. 217³ (1999) 3 S.C.C. 573⁴ (2007) 12 S.C.C. 27⁵ (2011) 12 S.C.C. 18

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO**C.R.P.No.1698 of 2018****ORDER:**

This Civil Revision Petition is filed assailing order dt.16-02-2018 in I.A.No.29 of 2018 in O.S.No.06 of 2009 of the I Additional District Judge, Chittoor, Andhra Pradesh.

2. The petitioners herein are defendant Nos.1 to 5 in the above suit.

3. The suit was filed by 1st respondent/plaintiff for partition of the plaint schedule properties into 64 equal shares, for allotting 15/64th share to him, and to put him in separate possession thereof and also to direct the petitioners to pay to him a sum of Rs.93,000/- per month towards share of rents from the date of suit till the date of delivery of his share to him.

4. The 1st respondent/plaintiff is a minor. He is represented by his mother P.Lavanya Reddy. The 1st respondent's case is that the plaint A to D schedule properties are the joint family properties of the 1st respondent/plaintiff, the 1st defendant and late V.Raghunatha Reddy.

5. The 2nd petitioner late V.Ravindranath Reddy is the 1st respondent's father, and he was D-1 in the suit. The 3rd petitioner is D-2 and she is the mother of D-1 and is the paternal grandmother of 1st respondent. The petitioners 1 and 4 are the daughters of 3rd

petitioner/D2. Husband of 3rd petitioner/D-2 by name V. Raghunatha Reddy died on 07-12-2003. The 5th Petitioner/D-5 is purchaser of 'A' schedule property on 15-02-2008.

6. There were four schedules mentioned in the plaint i.e "A" to "D" schedules.

7. The 1st petitioner filed Written Statement in the suit which was adopted by petitioners 2 to 4.

8. It is the defence of the petitioners to the claim for partition that there was a divorce between the 1st defendant and the mother of 1st respondent/plaintiff. It is further contended that A-D schedule properties are all self acquired and separate properties of V.Raghunath Reddy, the husband of 3rd petitioner/D-2 and Smt. Rangamma, the mother of the said V. Raghunath Reddy; that there was a suit O.S.No.226 of 1971 filed by certain third parties against V.Raghunatha Reddy, his mother Smt. Rangamma and the 3rd petitioner, in which there was a finding recorded that the properties mentioned in schedules A to D in the instant suit are absolute properties of V.Raghunatha Reddy and the 3rd petitioner. It is therefore contended that the decree dt.04-12-1980 in O.S.No.226 of 1971 having declared that the subject properties belong to V.Raghunatha Reddy and the 3rd petitioner, the 1st respondent/plaintiff is not entitled to any relief.

9. Thereafter, issues were framed and evidence on the side of the 1st respondent/plaintiff was completed.

10. On the side of the petitioners/defendants, the 5th petitioner/D5 was examined as D.W.1 and the 4th petitioner/D-3 was examined as D.W.2. Thereafter, the matter was posted for further evidence of petitioners.

11. On 22-01-2018, the 1st petitioner/D-4 filed I.A.No.29 of 2018 stating that her mother the 3rd petitioner/D-2 is aged 76 years; that she was suffering from diabetes mellitus, hypertension and also transient ischaemic attack and coronary heart disease; that she is also suffering from senile dementia and has severe arthritis; that she has restricted mobility and is unable to walk which is certified by medical certificate dt.07-11-2017 by Dr.A.Latha, Civil Assistant Surgeon, District Head Quarter Hospital, Chittoor; and therefore the 1st petitioner may be permitted to adduce evidence on her own behalf and also on behalf of the 3rd petitioner/D-2.

12. Another I.A.No.22 of 2018 was filed under Order 8 Rule 1 (a) (3) CPC to receive certain documents. I.A.No.22 of 2018 was allowed by the Court below on 16-02-2018.

13. Coming to I.A.No.29 of 2018, an objection was taken on behalf of 1st respondent to the authority of the Court to exempt a party(the 3rd petitioner/D-2) to a suit from entering into a witness box

or not examining her in proceeding and permitting other defendants to the suit to adduce evidence on her behalf.

14. On 16-02-2018 by a separate order, I.A.No.29 of 2018 was rejected by the Court below upholding the objection raised by 1st respondent/plaintiff.

THE ORDER DT. 16-02-2018 IN I.A.No.29 of 2018

15. In the said order, the Court below stated that 1st petitioner/D-4 is entitled to depose on her behalf and also on behalf of her mother about the facts of the case which are within her knowledge, but the 3rd petitioner/D-2, who is ill, needs to depose to facts which are within her knowledge in order to prove her case; in view of the Medical Certificate about her restricted mobility and inability to walk since 2015, she should have better legal advice and should invoke provisions of law in order to place oral and documentary evidence which are required to prove her contention.

16. The Court below further expressed an opinion that 1st respondent/plaintiff has a right to ask the Court to draw an adverse inference if the 3rd petitioner/D-2 did not choose to enter the witness box and such right cannot be restricted by the Court. It opined that if a defendant, who is contesting the suit and filed Written Statement, did not prove his version according to law, the plaintiff is entitled to have adverse inference drawn. It further held that the 1st petitioner/

D-4 has no right to seek grant to her of leave to adduce evidence on behalf of 3rd petitioner/D-2.

17. Assailing the same, this Revision Petition is filed by petitioners.

18. Heard Sri S.Rajagopalan, the learned counsel for the petitioners and Sri O.Uday Kumar, learned counsel for the 1st respondent.

CONTENTIONS OF COUNSEL FOR PETITIONERS

19. Learned counsel for the petitioners contended that the law does not require all defendants to be examined and even one defendant or a witness who is well informed can give evidence, particularly, when the other defendant is infirm and sick and that only when a party has to establish something with reference to state of mind, he is required to give evidence himself. He contended that when all the documents on basis of which title is claimed are registered documents and there are also Court decrees such as O.S.No.226 of 1971, the 1st petitioner, being one of the biological daughters of 3rd petitioner/D-2 and who is conversant and having knowledge of the circumstances, is competent to give evidence on behalf of 3rd petitioner/D-2 who is sick and unable to give evidence. He contended that in these circumstances, there is no question of drawing adverse inference against 3rd petitioner/D-2. He relied on the judgment of the Supreme Court in **Man Kaur (Dead) by LRs. Vs.**

Hartar Singh Sangha¹ and contended that the Supreme Court itself recognized the son or daughter managing affairs of an old and infirm parents to give evidence on their behalf.

CONTENTIONS OF COUNSEL FOR 1ST RESPONDENT

20. Sri O.Uday Kumar, learned counsel, appearing for 1st respondent/plaintiff, however refuted the above contentions and supported the order passed by the Court below.

THE CONSIDERATION BY THE COURT

21. From the facts stated above, it is clear that the 1st petitioner/D-4 and 4th petitioner/D-3 are the daughters of the 3rd petitioner/D-2 and V.Raghunatha Reddy and the 1st respondent is the minor son of the deceased 1st defendant, who was the son of 3rd petitioner and V.Raghunatha Reddy.

22. The 1st respondent's case is that the plaint A to D schedule properties are the joint family properties of the 1st respondent/plaintiff, the 1st defendant and late V.Raghunatha Reddy.

23. The petitioners/Defendants are opposing the same stating that the plaint schedule properties are self acquired properties of V.Raghunatha Reddy and his mother Rangamma and that in O.S.No.26 of 1971, there is a finding recorded that the properties are the self acquired properties of V.Raghunatha Reddy and the 3rd petitioner since Rangamma died pending the suit; and in view of the

¹ (2010) 10 S.C.C. 512

said defence, the 1st respondent/plaintiff is not entitled to the relief of partition. It is the case of the petitioners that the title claim of late V.Raghunatha Reddy and his mother Rangamma is established by registered title deeds and also by the decision in O.S.No.26 of 1971.

24. The fact that the 3rd petitioner/D-2 is unwell is evidenced by medical certificate dt.07-11-2017 produced by the petitioners before the Court below and is sufficient to show that the 3rd petitioner/D-2 would not be in a position to come to Court and give evidence in support of the stand taken by her in the suit. The Court below also did not disagree with the said plea.

25. In these circumstances, the question is whether the 1st petitioner/D-4 can be permitted to adduce evidence on behalf of the 3rd petitioner/D-2, her sick and infirm mother, or not and whether the Court below is entitled to draw an adverse inference because the 3rd petitioner/D-2 did not enter the witness box.

26. Section 118 of the Indian Evidence Act,1872 states that *all persons shall be competent to testify* unless the Court's considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body and mind, or any other cause of the same kind. Thus all persons are competent to testify, if they did not fall under the category mentioned in Section 118. Judged by this, the 1st petitioner is competent to testify.

27. Order III Rule 2 CPC recognizes certain agents through whom parties may act and it include a person holding a power of attorney.

28. As regards power of attorney holders, the Supreme Court considered their capacity to give evidence in relation to the principal who appointed them as their agent in **Janki Vashdeo Bhojwani and others Vs. Indusind Bank Limited and others**².

29. In **Janki Vashdeo Bhojwani and others** (2 supra), the Supreme Court held that if the power of attorney holder has rendered some *acts* in pursuance of power of attorney, he may depose *for the principal* in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. It also held that the power of attorney holder cannot depose for the principal in respect of matters which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross examined.

30. In **Man Kaur (Dead) by LRs.** (1 supra), this decision was followed and further explained. Similar issue had arisen out of a suit for specific performance of contract. The Supreme Court summed up the principles in paras 11 and 12 as under:

“11. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and

² (2005) 2 S.C.C. 217

(c) that he was always ready and willing to perform his part of the obligations in terms of the contract.

If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or

transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

*(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. **Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her***

spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.”(emphasis supplied)

31. Thus, in the above decision, the Court clarified that where the law requires or contemplates that the plaintiff or other party to proceed has to establish or prove something *with reference to his state of mind or conduct*, normally, the person concerned alone has to give evidence and not an attorney holder.

32. But it recognized a situation where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), and held that in such an event it may be possible to accept the evidence of such attorney even with reference to *bona fides* or *readiness and willingness*. It gave illustrations of such powers of attorney holders who are husband/wife, who are *exclusively* managing affairs or his or her spouse, *a son/daughter exclusively managing the affairs or old and infirm parent and mother exclusively managing the affairs of a son/daughter living abroad*.

33. Therefore, it is clear that the law recognizes that even children who are exclusively managing affairs of their old and infirm parents can give evidence on their behalf even with regard to their principal's state of mind or conduct such as regarding *bona fides* or *readiness and willingness*.

34. No doubt there is also a principle of law as laid down in **Vidhyadhar Vs. Manikrao and others**³ that if a party to a suit does not appear in the suit and state his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him was not correct.

35. But the said principle laid down in **Vidhyadhar** (3 supra) has no application in the case of exceptions mentioned in the **Janki Vashdeo Bhojwani and others** (2 supra).

36. It may be in the instant case, the 3rd petitioner/ D-2 has not given a power of attorney to the 1st petitioner/D-4. But being the biological daughter of the 3rd petitioner /D-2, she would naturally be aware of the details of acquisition of title of her mother/D-2, when the same is more importantly reflected in registered documents/ Court orders.

37. In my view, where title to property is in issue, and is based on registered documents and Civil Court decrees as in the instant case, there is nothing wrong, if on behalf of an aged and infirm parent like the 3rd petitioner/D-2, her biological daughter, the 1st petitioner/D-4, gives evidence.

38. It is not as if proof of title is akin to a state of mind or a conduct which is only in the personal knowledge of the title holder and cannot therefore be spoken to by others knowing of it. So it

³ (1999) 3 S.C.C. 573

cannot be said that unless such title holder deposes, the factum of title does not get proved.

39. Further, in law, the non-examination of the title holder cannot confer title on the person disputing his/her title by way of acquiescence, estoppel or silence.

40. As held in **Kamakshi Builders Vs. Ambedkar Educational Society and others**⁴, where title to property is in issue, the finding as to who has got title is an inference of law, arising out of certain set of facts. The Supreme Court held that if in law, a person does not acquire title, the same cannot be vested only by reason of acquiescence or estoppel on the part of the other. It held that the title cannot be vested because a witness or a party is not examined.

41. This principle applies on all fours to the instant case.

42. It cannot also be disputed that there is no mandatory rule that all defendants ought to depose in a suit. In **Saradamani Kandappan and others Vs. S.Rajalakshmi and others**⁵, the Supreme Court held that where the entire transaction was done on behalf of defendant Nos.1, 2 and 3 for the other defendants, it was unnecessary for the other defendants to be examined as witnesses and duplicate the evidence.

43. In this view of the matter, I am of the view that the Court below acted perversely in not permitting the 1st petitioner to depose on

⁴ (2007) 12 S.C.C. 27

⁵ (2011) 12 S.C.C. 18

behalf of 3rd petitioner/D-2 after having accepted the illness of the 3rd petitioner/D-2. It could not have held that D-2 should depose or else adverse inference can be drawn for the benefit of the 1st respondent/plaintiff. It would be a travesty of justice to take such a view in the facts and circumstances of the case.

44. Accordingly, the Civil Revision Petition is allowed; the order dt.16-02-2018 in I.A.No.29 of 2018 in O.S.No.6 of 2009 of the I Additional District Judge, Chittoor, Andhra Pradesh, is set aside; the said I.A.No.29 of 2018 is allowed; it is further directed that no adverse inference shall be drawn by the Court below on the ground of non-examination of 3rd petitioner/D-2 in the suit. No costs.

45. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.



JUSTICE M.S.RAMACHANDRA RAO

Date: 29-08-2018

Note : Mark the LR Copy.

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