

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

APPEAL SUIT No. 758 of 1997

JUDGMENT :

This appeal is filed against Judgment and Decree dated 28th October, 1996, passed in Original Suit No. 90 of 1988 by the Subordinate Judge, Narsapur.

The plaintiffs in the lower Court are the children of one P.Elisha Rao. The claim of the plaintiffs before the lower Court is about the property belonging to one Elisha Rao which was sold to defendant No.1. The plaintiffs' claim is that this sale effected by defendant No.2 for himself, 2nd plaintiff, defendant No.3 and 4 is not binding on them. Therefore, they have filed a suit claiming the relief of a partition/division of the property into five equal shares and for allotment of two shares to the plaintiffs, directing the defendants to render a true and correct account of the income; to grant future profits etc.

The plaintiffs' case is that while they were both living in Kuwait the suit schedule land is leased out to the husband of defendant No.1. As the husband of defendant No.1 was not rendering the correct accounts, a legal notice dated 05.05.1988 was issued, to which a reply notice was given on 16.06.1988. Then the plaintiffs realized that there was a sale of the property. Hence, the suit is filed for the reliefs mentioned above.

Defendants No.1 filed a written statement denying the entire claim. They contended that the sale was valid, that it was in the knowledge of the plaintiffs, that they were in open possession, that the widow of a dead brother has a share in the property, that the suit is a collusive suit filed in view of the rise in the market value of the property etc. Defendant Nos.3 and 4 took a plea that they were not aware of the sale deed that was executed or of the contents of the documents. According to them, defendant No.4 was also a minor and was born on 29.08.1959. Therefore, the sale deed is not binding on defendant No.4 also. Basing on the above pleadings, the following issues were framed:

1. Whether the plaintiffs 1 and 2 and the defendants 2 to 4 have each got 1/5th undivided share in the plaint A and B schedule properties as alleged in the plaint or whether the plaintiffs 1 and 2, the defendants 2 to 4 and the widow of Pothuraju Davidraju have got 1/6th share in those properties as contended by the 1st defendant?
2. Whether the 4th defendant was a minor by 22.11.1976?
3. Whether the registered sale deed dated 22.11.1976 in favour of the 1st defendant purporting to have been executed by defendants 2 to 4 and the 2nd plaintiff being a minor represented by his elder brother and guardian, the 2nd defendant, in respect of plaint A and B schedule properties was void and not binding on the plaintiffs and defendants 2 to 4?
4. Whether the plaint A and B schedule properties are liable to be partitioned and if so, into how many shares and who are the persons that are entitled to those shares.

5. Whether the plaintiffs are entitled to the relief of direction to the 1st defendant to render a true and correct account of the income realised from the Plaintiff A and B schedule properties?
6. Whether the 1st defendant is entitled to the equitable relief of directing allotment of the plaintiff B schedule property to the share of 1st defendant in case the plaintiff A and B schedule properties are liable to be partitioned?
7. Whether the plaintiffs are entitled to future profits
8. Whether the suit is barred by limitation?
9. To what relief?

After the issues were framed, the parties went to trial. For the plaintiffs, PWs.1 and 2 were examined and Exs.A.1 to A.3 were marked. For the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.5 were marked. After the trial, the lower Court passed the impugned judgment, granting the relief prayed for. Challenging the impugned judgment, the present appeal is filed by defendant No.1.

This Court has heard Sri Metta Chandrasekhar Rao, learned counsel for the appellants and Sri B. Sheshibhushan Rao learned counsel for the respondent Nos.1 & 2.

The learned counsel for the appellants pointed out that the lower Court committed a series of glaring errors in passing the impugned judgment. He particularly drew the attention of this Court to the grounds urged in the ground of appeal namely ground Nos.3, 8, 9, 10 and 11. Although the

other grounds were also urged briefly during the course of the arguments, the learned counsel essentially concentrated on these five grounds. In addition, he also relied upon the two judgments of Andhra Pradesh High Court in ***Kasireddy Ramayamma v Kasireddy Rama Rao***¹ and ***Habeeba Begum v Gulam Rasool***², wherein a learned single Judge of this Court held that unless the sale deed, which is impugned is challenged and set aside, the plaintiff is not entitled to any relief.

The first and foremost point urged by both the learned counsel and logically so is about issue No.1. This is a comprehensive issue and this Court is also of the opinion that the same should be taken up for decision first. The issue is to the following effect:

Whether the plaintiffs 1 and 2 and the defendants 2 to 4 have each got 1/5th undivided share in the plaint A and B schedule properties as alleged in the plaint or whether the plaintiffs 1 and 2, the defendants 2 to 4 and the widow of Pothuraju Davidraju have got 1/6th share in those properties as contended by the 1st defendant?

Basing on the discussions in paras 9 and 10, the lower Court came to a conclusion that the plaintiffs/defendants Nos.2, 3 and 4 are entitled to 1/5th share each.

¹1999 (4) ALD 491

² 1999 (6) ALD 20

Learned counsel pointed out that the lower Court in Para-10 came to a totally erroneous conclusion that the widow of one brother David Raju married again and that she is living with somebody. According to the learned counsel, the lower Court overlooked the evidence on this issue. On the other hand, the learned counsel for the respondents pointed out that this finding is correct and that the learned counsel for the appellants is only trying to confuse the issue. Admittedly as can be seen from the facts, the widow of a brother David Raju is alive but she is not added as a party to the suit. According to the impugned judgment, she has lost her right in the property because she has married somebody else. In addition to this issue about the non-joinder of the party, the other issue that arose is about the existence of another property, which is not included in the plaint schedule. In the oral evidence it transpired that there is another one acre property in village belonging to the family, which is not added as an item for partition. Therefore, the learned counsel for the appellants argued that the suit for a partial partition cannot be sustained. The respondents argued that the lower Court rightly apportioned the properties.

The first point to be decided is about the correctness of the finding about the widow of David Raju and whether her presence will not really matter as she married somebody else. The lower Court held that in view of her remarriage, she is not entitled to a share and consequently the failure to add her is

of no consequence. The lower Court held that as per the evidence of the plaintiffs and even DWs.1 and 2, she married somebody else.

The examination of the oral evidence shows that PW.1 in her cross-examination dated 11.10.1995, merely stated as “David Raju died after his marriage”. She did not state anything about his widow. PW.2, who is a third party to the litigation deposes as follows:

“The widow of David Raju married another person and her parents village is “Vendra”. It is not true to say that the widow of David Raj is residing at her parents village without any further marriage.”

DW.1, who is defendant No.4 in the suit and is the member of the family, was examined first for the defendants. In his chief-examination on 27.02.1996, he merely states “my brother David Raju also died. After the death of David Raju his undivided 1/5th share in the plaint A & B Schedule properties devolved on the plaintiffs and defendant Nos.2 to 4. Thus, I have a 1/5th undivided share in the plaint schedule properties.” Again in his cross-examination he stated that “I do not remember the date of death of my elder brother David Raju and his wife’s name Kumari. I cannot say where my brother’s wife is residing.” After this witness was examined, DW.2, who is the husband of defendant No.1 was examined and he deposed as follows in this cross-examination on 06.09.1996:

“I do not know the name of the wife of Pothuraju David Raju. I do not know whether she has again married after the death of her husband David Raju. I do not know where the widow of David Raju is living. I came to know she is living in Hyderabad. But I do not know whether she is living with her husband whom she had married after the death of her former husband David Raju.”

This Court notices from a reading of the oral evidence that the parties admit that David Raju has a widow, but there is no clear proof available to show that the widow of David Raju, by name Kumari remarried somebody else. This assumes importance for the reason that all the parties to the proceedings are admittedly Christians. Although, initially there is some amount of confusion when the defendant stated that they are Hindus still after the evidence is introduced and after DW.1 filed his documents, it transpires that the plaintiffs and defendant Nos.2 to 4 are Christians. Learned counsel pointed out that in the written arguments submitted in the lower Court, they have clearly raised the issue of David Raju's wife being alive. According to him, as per Section 33 (b) of the Indian Succession Act, one half of the property of the deceased belongs to the wife. Therefore, reading Sections 33, 41 and 47 of the Indian Succession Act, it is argued that the widow of David Raju has a half share in her husband's estate and other half will go to the brothers and sisters. Learned counsel for the appellants argued that the ratios claimed by the plaintiffs in the property and awarded by the Court below

are thus totally wrong. The counsel pointed out that the witnesses never said that the widow of David Raju lost her right in the property, because of her alleged remarriage. There is no proof of the remarriage also as can be seen from the record. The learned counsel therefore states that the suit is bad for non-joinder of a necessary party. His argument is that the shares cannot be awarded or decided without the presence of the wife of David Raju.

In addition, he points out that in the oral evidence of DW.1 it transpires that there is another family property which is not included. The learned counsel points out that defendant No.4 in the suit gave evidence as DW.1. In his cross-examination on 06.06.1996, he admits that the family is having another one acre of land in Palakamma Cheruvu. Subsequently, in the re-examination and in the re-cross examination he deposed as follows:

“Subsequently filing of the suit I came to know about the land situated in Palakamma Cheruvu. But I have not taken any steps to include the said property in this suit for partition.”

Learned counsel for the appellants argues that a suit for a partial partition does not lie. All the properties which are capable of being partitioned must be included in the suit. Learned counsel points out that this admission is in the evidence of the contesting defendant who is a family member. He argues that the entire suit is a collusive suit and that the fact that the wife of a brother is not included and an equally

valuable item of the property is not included, clearly shows the collusive nature of the suit. He states that the evidence available is enough for this Court to pronounce finally on the matter under order 41 Rule 33 of CPC. He prays that the suit must be dismissed *in toto* as it is a collusive suit.

In reply thereto, learned counsel for the respondents in the appeal argued that the findings are based on an appreciation of the entire evidence. Even if widow of late David Raju is not added, the entire suit cannot be thrown out. He also argues that a stray admission cannot be pressed into service to defeat the genuine rights of the plaintiffs/respondents.

This Court on an examination of what is argued and the record available clearly notices that there is absolutely no proof to show that the widow of David Raju got re-married and there is no proof filed to show that consequent on her remarriage she has lost her rights in the property. There is no basis for the findings of the trial Court Judge on these matters. The wife of David Raju is a necessary and proper party to the proceedings. She has a share in her husband's estate. A decree cannot be passed without her presence. The copy of the written arguments filed shows that this issue was squarely raised in the submissions. The issue framed includes a point about the share of this widow. The lower Court simply ignored the same. This Court holds that the

suit is bad for non-joinder of the necessary party as a widow who has a share was not added as a party.

In addition, this Court also notices that another important item of property, which admittedly belongs to the family, has not been added. Thus, the Court agrees with the submissions of the learned counsel for the appellants that while the present suit is vehemently contested for property measuring the Ac.1.25 cents an equally large and important property measuring Ac.1.00 cents has not been deliberately added.

A suit for a partial partition does not lie is a settled law. The decision of the Hon'ble Supreme Court of India in ***Kenchegowda (Deceased) by Legal representatives v. Siddegowda***³ which held that a suit for partial partition in the absence of other co-sharers is not warranted in law is clearly applicable here. This is a rule based on equity and also convenience. Inclusion of all items will not only bring a quietus to the litigation but also help in equitable adjustments/distribution of assets; facilitate the taking of accounts for mesne profits etc. This rule is meant to prevent multiplicity of proceedings which would arise if separate suits are filed for partition of different parts of a joint property or joint family property. This Court therefore holds that the non

³ (1994) 4 SCC 294

inclusion of another item of property and the failure to add the widow of David Raju are fatal defects to the suit.

In ***K. Bhaskar Rao v. K.A. Rama Rao***⁴, a learned single Judge of this Court relying on earlier judgments held that the defect of non-joinder is fatal and cannot be cured by impleading them in appeal also. Therefore, the finding on issue No.1 has to be reversed.

As far as the issue No.2 is concerned, the Court below held that defendant No.4 is not a minor by 22.11.1976. Ex.B.4 was accepted by the Court below.

Issue No.3 is whether A-4 document, namely the sale deed dated 22.11.1976 was void and non-binding on the plaintiffs 1 and 2 and defendants 2 to 4?

This issue is an important issue and is in fact the crux of the matter. The issue is to the effect that whether the sale deed dated 22.11.1976 in respect of plaint A and B schedule properties is void and not binding on the plaintiffs.

The main basis of the case is that plaintiff No.1 was not a party to the A-4 sale deed although she was major while plaintiff No.2 is a minor on the date of its execution. The sale deed-Ex.A.4 was executed by defendant No.2 on behalf of the minor plaintiff No.2. As plaintiff No.2 was minor, defendant No.2 acted as a guardian and executed the said sale deed.

⁴ 2010 (5) ALD 339

The plea of the plaintiffs in the plaint is that the sale deed is not binding on both of them and is void. Therefore, their contention in the plaint is that they can ignore the same and seek a relief of partition directly without challenging the deed. On the other hand, the contention of the defendant No.1 is that the sale deed is not void *per se*. The defendant No.1 contends that the prayer of the suit is wrong and that the appropriate prayer is not made. It is also urged that the sale deed is executed by defendant No.2 as a Manager of the family and that therefore, the sale deed is not void *per se*. The counsel argued on the basis of the two judgments (1 and 2 supra) that a bare suit for partition does not lie and that the plaintiffs should sue for setting aside the said sale deed and then seek partition.

This Court after hearing both the learned counsels is of the opinion that this Court has to first examine whether the sale deed dated 22.11.1976 is a document that is *per se* void or voidable.

By the date of this sale deed, the first plaintiff was a major. Therefore, the sale deed is not *per se* void as far as she is concerned. She has an option of either accepting the sale deed by which her share was conveyed and ratify the same or to challenge the same. In the case of second plaintiff, admittedly, he was a minor by the date of the sale deed (22.11.1976). A minor does not have the capacity to enter

into a contract. Any contract entered by the minor is void as per Section 11 of the Indian Contract Act. But in this case, the said incapacity does not arise in the strict sense of the term, because defendant No.2 styling himself as the guardian executed the sale deed. Therefore, the sale deed is not *ab initio* void. A minor's incapacity to contract is taken care of by the presence of the guardian. The guardian can in certain circumstances execute a sale deed for and on behalf of the minor. Once the guardian steps in the sale it does not become *per se* void. That defendant No.2 used to manage the property is also clear from para 5 of the plaint itself. The pleading is that he has leased out the entire property to the husband of defendant No.1. Therefore, it is clear from a reading of the plaint that defendant No.2 is managing the properties. Hence, as the guardian/manager of the properties signed Ex.A-4, the sale is not *per se* void as far as the minor plaintiff is concerned.

The conclusion by this Court that the sale deed dated 22.11.1976-Ex.A.4 is not *per se* void is also based upon the following judgments:

***Hiralal Dayaram Patil v. Bhikari Sampat Shinde*⁵.**

In this judgment, in para 15, the Division Bench of the Bombay High Court held as follows:

⁵ 1973 MhLJ 500

“15. Lastly, we may refer to the Full Bench decision of this Court in *Fakirappa Limanna v. Limanna Bin Mahadu* I.L.R. (1919) 44 Bom. 742 :22 Bom. L.R. 680.

..On a further consideration, I am satisfied that the necessity for suing to set aside a sale does not depend so much upon the question whether the onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether the sale is by a person wholly unauthorised or by a person who is authorised only under certain circumstances to alienate the property or in other words whether the sale is null and void or only voidable if the person interested seeks to avoid it. If the latter is the case, the persons concerned should sue to have it set aside if there is any Article of the Limitation Act applicable to such a suit. In the present case Article 44 applies, and therefore the necessity of suing to set aside the sale is established under the circumstances.”

Next decision is a Full Bench decision of this Court in ***Vadakattu Suryaprakasam vs. Ake Gangaraju***⁶, wherein it was held that:

“19. Pausing here for a moment let me restate the principles. A minor has no legal competency to enter into a contract or authorise another to do so on his behalf. A guardian therefore steps in to supplement the minor's defective capacity. Capacity is the creation of law whereas authority is derived from the act of parties. The limit and extent of his capacity are conditioned by Hindu law. He can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor. Even the personal liability arising out of the guardian's contract is the liability of the minor's estate only.

⁶ AIR 1956 AP 33

30. At the stage in 1948 the Judicial Committee gave another decision on the scope of S. 53-A, T. P. Act and though it revolutionized the settled law on the subject, in my view it approached the question from the correct perspective. In MANU/PR/0122/1948 : AIR 1948 PC 95 (B) their Lordships of the Judicial Committee held that a minor was a "transferor" within the meaning of S. 53-A and therefore a transferee from him who was in possession was protected by S. 53-A of the Act.

As much of the discussion at the Bar turned upon the scope of this decision and as there is also some conflict of judicial opinion on the interpretation of the views expressed therein, it is necessary to consider that case in some detail. The facts there were: The respondent, being minor by guardian and mother agreed to sell certain land to the appellants, the purchase price to be applied in discharging a debt owing to the appellants which had been incurred by the respondent's father.

The appellants were let into possession of the land but the provision in the contract that the sale deed was to be executed and registered was never complied with. The minor represented by his mother filed the suit claiming possession of the land contracted to be sold. The defendant relied upon the provisions of S. 53-A, Transfer of Property Act.

31. It will be seen from the aforesaid provisions that "transferor" referred to in that section is the person who entered into a contract to transfer for consideration any immoveable property by writing signed by him or on his behalf. Unless the minor enters into a valid contract to transfer his immoveable property the provisions of S. 53-A cannot obviously be invoked. It therefore became necessary for the Judicial Committee to consider whether it was within the powers of the mother as guardian to enter into a contract and whether the contract so entered into was a valid contract.

32. This is a clear statement recognizing the right of the guardian to

enter into a contract to sell for a purpose binding on the estate. Their Lordships after noticing the provisions of S. 11, Contract Act proceeded to state at page 96:

It is clear that, if the mother and guardian had taken no part at all in the transaction, the respondent could not have entered into a valid contract to sell the land in suit to the appellants but it is equally clear that such a contract could, and did come into existence in the present case.

33. This passage is clear and unambiguous. It shows that such a contract entered into by the guardian on behalf of the minor for a binding purpose is a valid contract.”

In addition, this Court also notices the pleadings and the facts, which are not in dispute. The sale deed was executed on 22.11.1976. Defendant No.1 is in possession and enjoyment of the property since then. The mutation of names of the property in favour of defendant No.1 has already been effected. Lawyer's notices were exchanged prior to the filing of the suit, wherein the title of the defendants was asserted and the mutation of names was clearly mentioned. In the suit, a relief of partition and recovery of possession is sought for. Para 16 clearly states that the suit is filed for partition and separate possession. A prayer also made to appoint a receiver to manage the suit schedule properties during the pendency of the suit.

In the light of these judgments and the facts of this case, the relief of recovery of possession is a necessary prayer because admittedly, defendant No.1 is in actual physical

possession of the property pursuant to Ex.A.4-sale deed. The said sale deed was executed 12 years before the filing of the suit. In the period between 1976 to 1988 defendant No.1 got her name mutated in the municipal records and was openly enjoying the property. The case of the plaintiffs is that initially they were under the impression that the defendant No.1's husband was enjoying a lease of the property and the possession was given to them as a lessee. Later, they claim that after exchange of lawyer notices they realized about the execution of the sale deed. The fact, however, remains that they admit the possession of defendant No.1. Thus by virtue of the sale deed and the clear possession, this Court is of the opinion that there is a serious cloud on the title of the plaintiffs. The defendant No.1 is asserting a right based on a sale deed of 1976 and is claiming possession and enjoyment from 1976 till 1988. Therefore, in the light of this clear and categorical assertion of title and not a mere flippant denial, this Court is of the opinion that the plaintiff is bound to seek a declaration of title to set aside the cloud on the title. The independent parallel title asserted by the defendant makes it mandatory for the plaintiffs to seek a declaration of title and for setting aside the said document. A bare suit for partition does not lie. Unless the sale deed is set aside, the plaintiffs cannot seek the relief of partition. A learned single Judge of this Court in a case reported in **Nade Ali Mirza v. Khalida Mohammed Salim Dawawala** held as follows:

"31. If a sale deed, according to the plaintiff is null and void, and non-est in the eye of law he need not seek to have it set aside. This principle was laid down in Mahadeo Prasad Singh v. Ram Lochan, MANU/SC/0367/1980 : (1980) 4 SCC 354, by the Supreme Court. It held:

"32. Thus considered, the sale of the immovable property ordered by the Munsif in execution of the decree of the Court of Small Causes transferred to him, was wholly without jurisdiction and a nullity.

33. Once we come to the conclusion that the sale in question was totally null and void, the alternative contention of the appellants with regard to the suit being barred by Section 47 of the Code of Civil Procedure, does not survive.

34. This is not a case of an irregular or voidable sale which continues to subsist so long as it is not set aside, but of a sale which was entirely without jurisdiction. It was non est in the eye of law. Such a nullity does not from its very nature, need setting aside."

Although this decision is under the Court Fees Act, still the findings are relevant relief for the purpose of this position.

In this view of the matter, this Court is of the opinion that issue No.3 is to be decided in favour of defendant No.1 and against the plaintiffs. The sale deed is not void. The lower Court committed an error in deciding this issue in favour of the plaintiff. Ignoring the assertion of title and the long possession of the defendant No.1, the Court decided the issue wrongly. The sale deed was voidable and not *per se* void. The frame of the suit is wrong and the prayers made are also wrong.

Therefore, this Court holds that issue No.3 is wrongly decided and the plaintiff, should have filed a suit for cancellation of the sale deed-Ex.A.4 as the said sale deed is not 'void' but is only voidable. It continues to subsist and hold the field till it is set aside.

Issue No.4 is, whether the A and B schedule properties are liable to be partitioned. In view of the fact that the suit is filed for partial partition and a necessary party is not been added, this Court is of the opinion that A and B schedule properties cannot be partitioned. Each party is not entitled to 1/5th share as recorded by the Court Below.

Issue No.5 is a consequential decision. As the plaintiffs are not entitled to any relief, they cannot claim a rendition of accounts.

Issue No.6 was left open by the lower Court to be decided in the final decree. But in view of the judgment being passed today, the preliminary decree is set aside and this issue does not survive.

Issue No.7 is again a consequential relief based on the partition. As partition itself is negative, this issue does not survive.

Limitation is not a point that strictly arises in this case and it is not really argued. The case of the plaintiffs is that they were aware of the execution of this deed only after the reply lawyer's notice etc., in 1986. The suit that is filed in

1988 cannot be said to be barred by time. No documentary evidence is available to attribute any knowledge. No oral evidence is also there on the record to attribute any knowledge. Hence, this Court is of the opinion that the issue of the limitation cannot be really raised in this case.

In view of all of the above, this Court is of the opinion that the suit filed suffers from serious defects which were overlooked by the lower Court. The impugned judgment and decree are set aside. The appeal is allowed. In circumstances of the case no costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.



D.V.S.S.SOMAYAJULU, J

Date: 05 .10.2018

Note: L.R. Copy marked.

JR/KLP