

THE HON'BLE DR.JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.879 OF 2013

ORDER:

Heard the learned counsel for the appellants/defendants and the learned counsel for the respondent/plaintiff and perused the record.

2. This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, aggrieved by the judgment and decree dated 16.08.2010 passed in A.S.No.3 of 2009 on the file of the Senior Civil Judge, Atmakur, Kurnool District (for short, 'first appellate court'), wherein the judgment and decree dated 26.03.2007 passed in O.S.No.88 of 2002 on the file of the Junior Civil Judge, Atmakur (for short, 'the trial Court'), were confirmed.

3. The appellant Nos.1 and 2 are the defendants, and the respondent is the sole plaintiff, in the suit. Subsequently, 1st appellant died and appellants 3 and 4 were brought on record as the legal representatives of the deceased 1st appellant and appellant No.5 is added as party in the Appeal Suit.

4. For the sake of convenience, the parties will be referred to as per their array in the suit.

5. This appeal is filed stating that the judgment and decree passed by both the Courts below are contrary to law and erroneous and the Courts below committed serious error in granting decree in favour of the plaintiff and ultimately prayed to set aside the judgment and decree dated 26.03.2007 passed by the trial Court in O.S.No.88 of 2002, which was confirmed by the first appellate Court by judgment and decree dated 16.08.2010 passed in A.S.No.3 of 2009. It is urged that the following

substantial questions of law do arise for consideration in this Second Appeal:

1. Whether the courts below are justified in awarding preliminary decree without going into the aspect of the nature of the properties, whether self acquired or purchased from out of the income derived from the joint family properties, that are, admittedly, possessed by the plaintiff and without bringing the said properties also into the partition?
2. Whether the courts below are justified in entertaining the suit for partition without impleading the daughters of the 1st defendant?

6. The plaintiff filed the suit for partition and separate possession of the joint family properties. Defendant No.1 is his father and defendant No.2 is his younger brother. The plaintiff averred that the suit schedule properties are ancestral properties of joint family of plaintiff and defendants and they enjoyed the same till 2001, even though they are residing separately by constructing own houses with their own earnings. The defendants developed greedy eye towards the plaintiff for last one year and started making false allegations against him. All of a sudden, the plaintiff received a notice from the Court and learnt that the defendants filed caveat petition before the Court with false allegations in order to threaten him. Upon which, the plaintiff demanded for partition and separate possession of plaintiff schedule properties. Then the defendants held a panchayat before an elder, namely, Y.Venkata Swamy Reddy, after verifying the previous accounts maintained by the plaintiff for joint family purpose. But the defendants failed to show the said accounts and earnings from

the suit properties and they have taken time till August, 2001. The defendants tried to create documents. Then the plaintiff got issued legal notice to the defendants on 19.10.2001 demanding for partition and separate possession of suit properties in which he is entitled 1/3rd share. But the defendants got managed to return the said notices with an endorsement "absent". Again, a panchayat was conducted on 30.10.2001 before Y.Venkata Swamy Reddy and others, who advised the defendants for division of suit properties. Then the defendants requested the plaintiff and elders to permit them to cultivate the lands jointly for one year. Then the elders advised the defendants temporarily to allot item No.2 of suit property to the plaintiff and complete partition by May, 2002. So the plaintiff took possession of item No.2 of suit property and was cultivating it. Meantime, the defendants are making serious efforts for alienation and creation of documents in order to defeat the rights of the plaintiff. Hence, the suit.

7. The 1st defendant filed written statement and contested the suit stating that the suit is bad in law and not maintainable either in law or on facts. He admitted the relationship between the parties. He denied the allegation that the suit properties are ancestral and joint family properties of the plaintiff and the defendants and they are enjoying the same jointly. The plaintiff schedule properties are self acquired properties of 1st defendant and neither the plaintiff nor the 2nd defendant has right over the same. The plaintiff separated 15 years back, took Rs.1,00,000/- towards his share and started finance business at Atmakur and continuing the same. The plaintiff earned lakhs of rupees and constructed pakka buildings at Atmakur worth about Rs.3,00,000/-

each and he is having Rs.5,00,000/- cash. The plaintiff was getting Rs.20,000/- per month towards rents and out of his business. Defendant No.1 performed the marriage of his two daughters and sons including the plaintiff. He was depending upon agriculture being supported by defendant No.2. Instead of supporting him in the old age, the plaintiff, being his eldest son, dragged him to the Court with false allegations. The suit properties are rain fed lands and due to lack of proper rains, he is not getting good yielding from the suit properties and contacted several debts to a tune of Rs.2,50,000/- to pull on his family, which are still existing. The creditors are pressing to discharge the debts. The plaintiff knowing fully well about the family affairs filed this suit with an ulterior motive. No panchayats were held between the plaintiff and defendants at any point of time and that item No.2 of suit property was never allotted to the plaintiff and the plaintiff is not in possession and enjoyment of the same. If the plaintiff wants share in the suit properties, he has to necessarily give 2/3 share to the defendants in the property and cash owned by him and he has to share the debts incurred by the defendants. The survey number and boundaries mentioned in the suit schedule are not correct and prayed to dismiss the suit.

8. Basing on the above pleadings, the trial Court framed the following issues:

- 1) Whether the plaintiff is entitled to partition and separate possession of 1/3rd share in the plaint schedule properties by way of preliminary decree or not?

2) To what relief?

9. The trial Court, after considering the oral and documentary evidence, passed preliminary decree for partition and separate possession of 1/3rd share of the plaintiff in the suit properties along with costs. Aggrieved by the said decree and judgment, 1st defendant preferred A.S.No.3 of 2009 before the first appellate court. The first appellate Court, while dealing with the appeal, framed the following points for consideration:

- 1) Whether the schedule mentioned properties are self acquired properties of defendant No.1?
- 2) Whether there are any pre-partition debts to the joint family?
- 3) Whether the earlier partition pleaded by the defendant is true, correct and binding on the plaintiff?
- 4) Whether the court-fee paid by the plaintiff is not correct?
- 5) Whether the plaintiff is entitled for partition of schedule mention properties and to allot 1/3rd share as prayed for?
- 6) To what relief?

10. The first appellate Court, having examined the oral and documentary evidence dismissed the appeal with costs by the impugned judgment dated 16.08.2010.

11. Learned counsel for the appellants/defendants would contend that 15 years prior to the filing of the suit, there was an oral partition between the parties. In that partition, Rs.1,00,000/- was given, towards the share of the plaintiff and the plaintiff started finance business at Atmakur and those properties are also

liable for partition. As there was oral partition, the plaintiff is not entitled for 1/3rd share of the suit schedule property. Both the Courts have erroneously recorded a finding in favour of the plaintiff and the same is liable to be set aside.

12. Learned counsel for the respondent/plaintiff would contend that the plea of oral partition was set up for the purpose of the suit. The contentions that the plaintiff had taken Rs.1,00,000/- towards his share, started business with the said money and purchased huge properties and therefore, those properties are also liable for partition was rejected by both the Courts. There is no substantial question of law to frame as required under Section 100 Cr.P.C. Therefore, the factual findings recorded by both the Courts below are final and ultimately, prayed to dismiss the appeal.

13. Though the learned counsel for the appellant-defendant No.2 contended that the suit schedule property is the self-acquired property of his father (D.1), this contention was rejected by both the Courts below and there are concurrent findings to the effect that the suit schedule property is the ancestral property of the plaintiff and defendants. In the course of the pendency of the first appeal, the 1st defendant passed away. So, defendants 3 and 4 sisters are brought on record. In view of the insertion of Section 29A of the Hindu Succession Act, 1956, and an amendment made under the Act in the year 2005, both the sisters (D.3 and D.4) are coparceners. Since there is no final partition of the suit schedule property by metes and bounds, they are also entitled to share the suit schedule property equally along with the plaintiff and 2nd defendant. This aspect was also dealt with by the first appellate Court. The first appellate Court though held that their interest can

be protected at the time of final decree, there is no infirmity in the said finding. The same finding is given in *S.Sai Reddy v. S.Narayana Reddy and others*¹, wherein the Hon'ble Supreme Court held as follows:

"A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events and the preliminary decree does not bring about any irreversible situations. The concept of partition that the legislature has in mind cannot be equated with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind is a partition completed in all respects and which has brought about an irreversible situation. Unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act. Since the legislation is beneficial and placed on the statute book with the avowed object of benefiting women who are a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it.

Since in the present case the final decree had not been passed and the property had not been divided by metes and bounds, clause (iv) to Section 29-A was not attracted and the respondent-daughters were entitled to their share in the family property."

14. In view of the facts and circumstances of the case, it is appropriate to state that under Section 100 of C.P.C., the jurisdiction of the High Court to interfere with the judgments of the Courts below are confined to substantial question of law. The contentions raised herein are only with regard to the factual aspects of the case. Those findings of facts are not amenable to the jurisdiction of this Court by way of Second Appeal. More so,

¹ (1991) 3 SCC 647

when there is no substantial question of law, the appellants-defendants must show the substantial question of law involved to admit the appeal. Both the Courts gave concurrent finding to the effect that the plaintiff is entitled for a share in the suit ancestral properties. This Court cannot re-appreciate the evidence and arrive at a different conclusion. Neither inadmissible evidence has been considered nor admissible evidence not acted upon. In view of the circumstances of the case, the findings of both the Courts below are not perverse. So no re-appreciation of entire evidence is warranted in this Second Appeal. Therefore, there is no question of law, much less substantial question of law, to admit the Second Appeal. Therefore, the Second Appeal is liable to be dismissed.

15. In the result, the Second Appeal is dismissed confirming the impugned judgment and decree dated 16.08.2010 passed by the first appellate Court in A.S.No.3 of 2009. It is made clear that in view of the decision in *S.Sai Reddy's* case (supra 1) and the facts and circumstances of the case, the plaintiff, defendant No.2 and their sisters (appellants 3 and 4 herein) are entitled for partition and separate possession of 1/4th share each in the suit schedule property.

Miscellaneous Petitions, if any pending, shall stand closed.
There shall be no order as to costs.

DR. SHAMEEM AKTHER, J

Date: 11.07.2018
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