

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

SECOND APPEAL No.1040 of 1999

JUDGMENT:

The sole defendant Shaik Masthan in O.S.No.446 of 1993 on the file of the learned I Additional District Munsiff, Guntur, is appellant in this Second Appeal, that suit was filed by the sole plaintiff Shaik Bikari, who is no other than the brother of defendant. Pending the Second Appeal, the respondent-plaintiff died and his wife and two sons were brought on record as his legal representatives as per the orders in S.A.M.P.No.1917 of 2017 dated 22.09.2017. The suit filed was for the relief of declaration that the plaintiff is the absolute owner with possession of the plot plan A, B, C, D, E, F which is part of the plot schedule mentioned property and for the relief of mandatory injunction directing the defendant to remove the plot plan S, S1, S2, S3 construction in part of A, B, C, D, E, F area in its western side within C, D, E, F portion, and for consequential permanent injunction restraining the defendant and his men from interfering with A, B, C, D, E, F area supra.

2. The trial Court dismissed the suit of plaintiff on 08.07.1996. Aggrieved thereby, the plaintiff filed First Appeal in A.S.No.109 of 1996 and the learned IV Additional District Judge, Guntur, allowed said appeal on 14.10.1999 by setting

aside the dismissal decree and judgment of the trial Court in part and by ordering partition of the plaint plan A, B, C, D, E, F together with plot abutting to south west of it covered by C, C1, D1, D into two equal shares and out of it to allot one share to the plaintiff and the other share to the defendant with preferential allotment of said C, C1, D1, D to the defendant, and the appellant-plaintiff is entitled for mandatory injunction for removal of the structure covered by plaint plan S, S1, S2, S3 supra and each party to born their own costs. Impugning the same, the defendant filed the present Second Appeal.

3. The contentions raised in the grounds of Second Appeal including by the say of involvement of substantial question of law are that the reversal decree and judgment of the lower appellate Court is contrary to law, weight of evidence and probabilities of the case; outcome of misleading on the cause of action and the suit relief in converting the suit for declaration into one for partition against the settled principles of law instead of dismissal of the appeal for trail Court rightly dismissed the suit of plaintiff, who has not proved any title and entitlement to the suit claim, and having found if at all of the property liable for partition, ought not to have allowed the removal of structures by granting mandatory injunction without partition and actual division; leave apart,

in a suit based on the claim of ownership for declaration with possession, the plaintiff must win or lose his case on own strength and not on the defendant's weakness, if any; PW1-plaintiff in his examination deposed of there was already partition deed covered by Ex.B2 and his another brother Sk.John also got property in said partition; for nothing to brush aside the same by the lower appellate Court even said family arrangement covered by Ex.B2 even referred as partition, which is only a list, do not a bar for want of registration, and once that shows as genuine, thereunder the plaintiff has no right over any of the suit property; for the lower appellate Court should not have been reversed the trial Court's reasoned judgment in coming to the decision based on surmises and assumptions without proof, though the trial Court clearly held the plaintiff could not establish title over the suit property in deciding the specific issue in that regard and thereby, the substantial questions of law are involved to entertain the Second Appeal. Therefore, he seeking to set aside the lower appellate Court's reversal judgment.

4. This Court admitted the Second Appeal on 25.11.1999 with reference to the following substantial questions of law referred in the grounds of appeal:

1. Whether the Courts can decide the matter for partition in a suit filed for declaration without proving the entitlement for declaration?

2. Whether the lower appellate Court can decide the issue when plaintiff failed to establish his right as well as possession over the suit schedule property and without even seeking for any partition by amendment of pleadings?

3. Whether the partition list is inadmissible also for want of registration.

4. Whether the lower appellate Court was right having found that "Neither parties could come up with any documentary evidence"?

5. Heard both sides at length and perused the entire material on record.

6. The plaintiff's suit claim in nut shell to the suit relief is that besides the plaintiff and defendant one Shaik John and another Shaik Hassan Bude are all brothers and having three more sisters and all are children of Shaik Imam Saheb and said Shaik John, who is one of the two more brothers of plaintiff and defendant, was taken away and fostered by sister of said Shaik Imam Saheb namely Uulsonhi, W/o. Masum from young age. The defendant is the eldest son and the plaintiff is the youngest son of Shaik Imam Saheb. The plaintiff, defendant and their another brother Shaik Hassan Bude purchased on 11.06.1968 (Ex.B1 = Ex.A1) jointly of 0.6549 square links of site at Medikondur village from one Thumati Vedantam for Rs.500/- as described in the plaint schedule, that is also covered by part of plaint plan. Later, in the year 1978 Shaik Hassan Bude, the other brother of plaintiff and defendant, died leave about the factum of he relinquished his right in his life time in the year 1976 over said property and other

properties of family and their second brother is also party to said agreement of 1976 having taken another property at Kotturu village and relinquished his right in the property of their family and consequently the plaintiff and defendant became the absolute owners of the property. The defendant expressed his intention for partition of the plaint schedule mentioned property into two equal shares viz., in A, B, C, D, E, F of the plaint plan where the plaintiff got half share and thereby, the defendant got C, C1, D1, D to his share for A, B, C, D, E fell to share of the plaintiff. While stood thus, when the plaintiff was away of his personal and domestic work, the defendant trespassed into the plaint plan C, D, E, F portion and raised the construction by raising walls. When the women folk of plaintiff raised an objection for high-handed act of the defendant, the defendant threatened them with dire consequences in preventing their interference to his construction. The plaintiff on that came to know visited the village and found trespass and mischief played by defendant and when questioned the defendant, the defendant replied adamantly and unreasonably unheeding to the request of plaintiff to remove the construction made by the defendant by encroachment of plaintiff's site and faced a threat from him and his bruit force thereby, the plaintiff constrained to file the suit from the cause of action arising, since the joint

purchase of the site in 1968 supra and from the trespass and construction.

7. The written statement and amended written statement of the defendant in opposing the suit claim of plaintiff is with context of the plaintiff has no title or possession over the plaint schedule property, though the plaintiff and defendant are sons of late Imam Saheb, and the plaint schedule property and the property north of it was purchased by them and their another brother under a registered Sale Deed dated 11.06.1968 (Ex.B1=Ex.A1) and subsequently there was a partition of site between the parties the plaint schedule property and the site south of the same were allotted to the defendant and their another brother Hassan Bude and from the rearrangement Hassan Bude was allotted three cents of site purchased from one Anandam and the defendant was allotted the plaint schedule property and the site south of it shown as C, C1, D1, D of the plaint plan, and the defendant also purchased site to the east of the suit site from Konaganti people and came into possession and enjoyment, which is F, C, D, E of the plaint plan and there used to be a tiled house that was assessed to Panchayat tax paying by the defendants for the past more than twenty years, and the defendants perfected right over A, B, D, E including C, D, E, F portion of it and the plaintiff has no manner of right. As the plaintiff

having no right over the site, the defendant filed a suit against the plaintiff in O.S.No.3 of 1989 on the file of the District Munsiff, Sattenapalli and it was decreed for recovery of amount and it was while under execution in E.P.No.21 of 1992 the plaintiff as a judgment debtor therein bore grudge and maintained the present suit frivolously. Though the construction taken place more than four months prior to filing of the suit, the suit is filed only to harass even knowingly that the defendant is the absolute owner of the site including the site covered by the construction maintained in the plaint plan and the contrary averments are untrue and the suit is liable to be dismissed. The averments in the additional written statement are that if purchased on 11.06.1968 and from subsequent rearrangement Hassan Bude allotted the plaint schedule property and the site 'south' of it shown as C, C1, D1, D of the plaint plan, the defendant purchased site to the east of the plaint plan site from Konaganti people and ever since he is in possession and enjoyment with the site A, B, E, D and in F, C, D, E there was a tiled house assessed to the Panchayat tax paying by the defendant and having perfected title over A, B, D, E which includes C, D, E, F site and the plaintiff has no manner of right or claim over the suit plan property and the suit filed is to wreak vengeance and the plaintiff was judgment debtor in money recovery decree,

under execution filed by the defendant, and the suit is liable to be dismissed.

8. The trial Court from the above pleadings framed the following issues:

- (1) Whether the plaintiff is entitled for declaration as prayed for?
- (2) Whether the plaintiff is entitled for the mandatory injunction as prayed for?
- (3) Whether the plaintiff is entitled for the permanent injunction as prayed for?
- (4) Whether the defendant has perfected his title to the suit A, B, C, D site which includes C, D, E, F portion of the plaint plan?
- (5) Whether the schedule property fall to the share of the defendant in partition? and
- (6) To what result?

9. In the course of trial, from the above pleadings and on formulated the issues to be answered, on behalf of the plaintiff besides himself examined as PW1 three more witnesses by name Shaik China John, Korivi Yesobu and Y.Rama Rao were examined and placed reliance on Ex.A1=Ex.B1 Sale Deed dated 11.06.1968. Ex.A2 is the plaint plan and Ex.A3 is the registered Sale Deed, dated 11.06.1957, in the name of plaintiff's father Shaik Imam Saheb, who obtained from Borugadda Anandam. On behalf of the defendants, besides himself examined as DW1 one Pattan Mohd. Ali was examined as DW2 and placed reliance on the exhibits B1 to B9 and X1 to X3. Ex.B1=Ex.A1 Sale Deed dated 11.06.1968 and Ex.B2 is the partition list. Ex.B3 is the Cist

receipt of the year 1969 and exhibits B4 to B6 are the photos of the suit property. Ex.B7 is the Sale Deed, dated 16.07.1987, executed by Shaik John Saheb through the defendant. Ex.B8 is the death certificate of defendant's father. Ex.B9 is the plan approved by the Gram Panchayat. Ex.X1 is the certified copy of the registration extract and Ex.X2 is the passbook of Pattan Mohd. Ali-DW2 and Ex.X3 is the death and birth register of the year 1977.

10. It is from the said evidence the trial Court dismissed the suit and the lower appellate Court reversed the trial Court's findings as referred supra. The findings of trial Court from the said evidence, in answering the above substantial questions of law were that as per the plaintiff's claim the plaint plan A, B, C, D, E fell to his share and C, C1, D1, D fell to the share of defendant and the defendant trespassed into the plaintiff's C, D, E, F site and constructed S, S1, S2, S3. To support that claim, Ex.A3 is the registered Sale Deed, dated 11.06.1957, in favour of the father of plaintiff and defendant and that property is not the subject matter of the suit property admittedly. The defendant's claim is that he purchased the plaint plan B, C, C1, B1 which is to the south of A, B, C, E, F of the plaint plan and so far as the plaintiff's purchase of other property is concerned, it is covered by E, E1, F1, F which is to the north of plaint plan C, D, E, F and the

same are not in dispute as also reflected from the plaint plan description among the exhibits X1 to X3 marked through DW2, those are no way relevant to the subject matter of the *lis* and coming to the core, Ex.B2 is the partition list placed reliance by the defendant, that was marked, subject to objection with regard to the admissibility, and the same can be used for collateral purpose and also for the reasons PW1 admitted this document and the partition effected as referred thereunder. In Ex.B2 partition list, there is reference of Ex.B1=Ex.A1 Sale Deed, dated 11.06.1968, and the three persons mentioned therein are the plaintiff, defendant and their brother Hassan Bude and Ex.B1 property described therein is of Ac.0.03¼ cents with description of Gulli on its north running from east to west and it co-relates to plaint plan as part of A, B, C, D, E, F as per the recitals in the partition list, the plaintiff was not given any site therein, but the defendant and Hassan Bude and their brother. Ex.B7 is the Sale Deed dated 16.07.1987 executed by Shaik John Saheb in favour of the defendant, which refers to an arrangement whereunder Ac.0.01 cent of property was bequeathed to the defendant and the southern boundary recited as the property of defendant and northern boundary was shown as the property of plaintiff i.e., E, E1, F1, F which is clear of the plaintiff has no right and title over the schedule property. Even PW1 in his cross-examination

admitted of Shaik John, the other brother of them, also got property in the partition covered by Ex.B2-Partition list, though the plaintiff's pleading is with claim as if Shaik John was fostered by his maternal aunt. It is therefrom the trial Court held that the plaintiff has failed to establish his title over the suit property for any of the reliefs claimed in the suit for the property covered by the plaint plan.

11. The lower appellate Court in the reversal judgment having formulated the point for consideration as to whether the plaintiff-appellant could establish title over the suit property, observed that under Ex.B1=Ex.A1 Sale Deed, dated 11.06.1968, three brothers including Hassan Bude, the plaintiff and defendant jointly purchased the vacant site of Ac.0.6549 square links, which corresponds to the plaint plan A, B, C, D, E, F as well as C, C1, D1, D. Undisputedly, there was an arrangement among the brothers later. Whereunder Hassan Bude gave up his right having taken another three cents of site somewhere to say the plaintiff and defendant became owners of the said plaint plan property and coming to the partition between the plaintiff and defendant, what the plaintiff claimed of the plaint plan A, B, C, D, E, F fallen to his share and the defendant has been given the plaint plan C, C1, D1, D and it is thereby complained of the unauthorized construction made by the defendant in the plaint plan C, D, E,

F area covered under S, S1, S2 & S3. Even the defendant admitted about the joint purchase by three brothers under Ex.A1=Ex.B1, dated 11.06.1968, and his plea is that the plaintiff plan A, B, C, D, D1, C1 was allotted to him and his brother Hassan Bude, and Hassan Bude give up his right for another three cents somewhere and it is not mentioned as to what property was allotted to the plaintiff under that arrangement. Undisputedly, C, C1, D1, D is in possession of the defendant, though the defendant disputes the allotment of plaintiff plan A, B, C, D, E, F portion to the plaintiff and the defendant in his written statement also silent as to what is the area towards the share of plaintiff given in that partition and what is claimed of E, E1, F1, F portion given to the share of plaintiff, while himself and Hassan Bude were given rest of the plaintiff plan property among A, B, C, D, E, F. DW1-defendant admitted that the plaintiff also has a right in the suit property and according to his evidence, E, E1, F1, F was allotted to plaintiff, though Ex.B2 not so speaks. The plaintiff plan A, B, C, D, E, F is 158 square yards out of what the property purchased in 1968 under Ex.B1 of about 240 square yards and the plot south of it covered by C, C1, D1, D is 124 square yards and total of $158+124 = 282$ square yards as can be seen from the Commissioner report dated 19.07.1993 in I.A.No.520 of 1993 during pendency of the suit, of the measurement so noted. As

per the Commissioner report, E, E1, F1, F is 95 square yards in the possession of the plaintiff (with terrace building). If this extent is also added to the true extent supra, it would come to 377 square yards, but as per Ex.B1 it is only 240 square yards. In the Commissioner's Plan E, E1, F1, F where the plaintiff's building situate is not part of Ex.B1 Sale Deed and as referred supra the property covered under Ex.B1 is 282 square yards covered by A, B, C, D, E, F and C, C1, D1, D the tiled house of the defendant is in B, C, C1, B1 of the Commissioner's plan. The disputed property covered by A, B, C, D, E, F is 158 square yards and the property in the possession of defendant is 124 square yards, which is C, C1, D1, D of the Commissioner's plan and as per Ex.B1 out of the total extent A, B, C, C1, D1, D, E, F of 240 square yards, each entitled to 120 square yards; it is thereby both the parties agreed that. Ultimately it is the plaintiff and defendant got right over the property purchased under Ex.B1 of 240 square yards those they differ in the manner of partition and allotment to each of them and neither party came with documentary evidence. The plaintiff's house is shown as even E, E1, F1, F which is not included in the property covered by Ex.B1, so in the remaining both parties having equal rights. A, B, C, D, E, F and C, C1, D1, D of which C, C1, D1, D is in the possession of defendant and there should be a partition for A,

B, C, D, E, F and C, C1, D1, D, whereunder C, C1, D1, D to be allotted in equity to the share of defendant in the said partition to be effected afresh for equal half to the plaintiff and defendant and thereby, the trial Court's dismissal decree and judgment are set aside in ordering partition and by granting mandatory injunction for removal of S, S1, S2 and S3.

12. In fact, even from the lower appellate Court's judgment, once A, B, C, D, E, F and C, C1, D1, D covered by Ex.B1 Sale Deed requires to be partitioned for Ex.B2 not proved in the so-called Partition list, whereunder the plaintiff was not allotted any share and the plaintiff got another property, that is covered by the plaint plan E, E1, F1, F which is not covered by Ex.B.1 even in ordering partition for equal half to the plaintiff and defendant among 240 square yards out of A, B, C, D, E, F and C, C1, D1, D including by allotment of C, C1, D1, D in the possession of defendant to the defendant under equity, the lower appellate Court should not have been ordered for mandatory injunction for portion of the property covered by S, S1, S2 and S3 construction made by the defendant which is only in part of A, B, C, D, E, F and C, C1, D1, D to say it is strictly between C, D, E, F among the properties that to be partible. So far as the contention of learned counsel for the appellant-plaintiff in the Second Appeal of granting relief of partition beyond the scope is not

correct for the Court can mould the relief within the relief claimed though not got right to grant a higher relief including from the expressions placed reliance in Matha Sunandananda Theertha, Sanyasini, Visakhapatnam v. Ch. Someswara Rao¹. Here once it is the property shown purchased under Ex.B1 dated 11.06.1968 covered by the Commissioner's Plan A, B, C, D, E, F with total or portion of C, C1, D1, D and so far as the oral partition covered by Ex.B2 is concerned, that was marked subject to objection and not proved and not admissible as held, and it is not clear of what extent each the plaintiff and defendant both are entitled equally among it, that could get, to grant any declaratory relief in favour of the plaintiff for the plaint plan A, B, C, D, E, F including for demolition of S, S1, S2 and S3 construction out of C, D, E, F the lower appellate Court was right in granting relief for partition of the extent covered by A, B, C, D, E, F and the remaining partition out of C, C1, D1, D for what is the extent they purchased under Ex.B1 of 240 square yards to divide equally by allotting in that equity the extent covered out of C, C1, D1, D to the defendant and the remaining to allot to the plaintiff out of A, B, C, D, E, F partition. Once such is the case, it is not grant of higher relief, but only moulding of the existing relief in granting for partition declaring each got half undivided interest for 240 square yards out of A, B, C, D, E, F

¹ 2012 (2) ALT 280

of 158 square yards and remaining in part of C, C1, D1, D. Once such is the case as referred supra, if at all the defendant is entitled to claim on equity, what is the construction made at least for part of S, S1, S2 and S3 towards his remaining share of representing 120 square yards out of 240 square yards covered by Ex.B1, for what A, B, C, D, E, F extent as per the Commissioner's Plan is 158 square yards and what the balance 82 square yards is to be drawn only from C, C1, D1, D, the Second Appeal can be allowed in part by setting aside that portion of the mandatory injunction relief for demolition concerned.

Accordingly and in the result, this Second Appeal is partly allowed while confirming the lower appellate Court's reversal judgment and decree modifying the declaratory relief into one for partition between the plaintiff and defendant of each equal half interest having over Ex.B1 property of 240 square yards, which is covered by the Commissioner's Plan A, B, C, D, E, F of 158 square yards and remaining out of C, C1, D1, D in the occupation of defendant and in allotment of that, portion of 82 square yards covered out of C, C1, D1, D site and remaining 38 square yards or more as the case may be to be allotted out of the constructed area covered by S, S1, S2 and S3 and including if at all to admit any portion of the site by fixing value in allotting S, S1, S2, S3 area, since construction

already made by the defendant therein instead of its demolition, for the balance site cost to compensate by defendant to the plaintiff by allotment of remaining to the share of plaintiff in A, B, C, S2, S3, F with the land in between S3, F, E, S for the plaintiff's enjoyment of A, B, C, S2, S3, F and F, E, E1, F1 of the Commissioner's plan respectively by appointing an Advocate Commissioner and to work out the equities as referred supra. No order as to costs.

Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

15.06.2018
MVA

Dr. B. SIVA SANKARA RAO, J

