

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

A.S.No.890 of 1998

JUDGMENT:

This appeal is filed by the unsuccessful plaintiffs against the judgment and decree dated 14.08.1997 passed in O.S.No.286 of 1993 by the Additional Subordinate Judge, Chittoor.

2. For the sake of convenience, the parties are referred to as the plaintiffs and the defendants only.

3. The suit was initially filed by one Sri V.M. Sridhar against seven defendants for a declaration of title to the property and other reliefs. Later, after the said Sridhar died, his wife and children were added as parties 2, 3 and 4 to the suit. The suit was filed on the basis of oral partition in 1975. According to the plaintiffs, the plaintiff schedule property was allotted to the deceased first plaintiff in the said oral partition. Later, the terms of agreed oral partition were reduced into writing by a partition deed dated 17.11.1975. The plaintiffs also mentioned that Sri V.K. Madhavan, first defendant is the father of deceased first plaintiff and the father-in-law of the second plaintiff. As he was addicted to vices and as he was spoiling the property, the present suit was filed for a declaration based on the partition. The house property which is the subject matter of the present suit was actually sold to the fourth defendant in an earlier suit O.S.No.14 of 1977 filed by defendants 2 & 3 against the first defendant in the present

suit. The suit was decreed and the property was brought to sale. In the said sale, the fourth defendant purchased the same. Stating that first defendant had no right over the suit schedule property and that the debt contracted by him is an immoral or avyavaharika debt, the plaintiffs claim that the same is not binding on them and therefore they filed the suit.

4. The defendants 5, 6 and 7 filed their written statement stating that they are the tenants of fourth defendant. The fourth defendant filed his written statement denying the entire plaint and stating that he is a valid purchaser. He also took a plea that the suit is barred by *res judicata*, in view of the earlier suit O.S.No.6 of 1980 filed by the plaintiffs.

5. Based on the above pleadings, the lower Court framed the following issues for trial:

- i) Whether the plaintiff is entitled for declaration of title to suit property?
- ii) Whether the plaintiff is entitled for possession of the suit property?
- iii) Whether the brothers and mother of the plaintiff are necessary parties to this suit?
- iv) Whether the suit is barred by principles of *res judicata* with reference to the suit O.S.6/80 on the file of the sub court, Chittoor?
- v) Whether the defendants are entitled for compensatory costs U/s.35 (a) of C.P.C.?
- vi) To what relief?

6. For the plaintiffs, PWs.1 & 2 were examined and Exs.A.1 to A.4 were marked. For the defendants, DWs.1 to 3 were examined and Exs.B.1 to B.15 were marked.

7. After considering the oral and documentary evidence, the lower Court dismissed the suit. Challenging the same, the plaintiffs filed the present appeal.

8. This Court has heard Sri P. Govind Reddy, learned counsel for the appellants/plaintiffs. The learned counsel for the respondents/defendants did not argue the matter, despite adequate time being granted by this Court. Hence, the matter was reserved for judgment.

9. The essential points which are urged by the learned counsel for the appellants/plaintiffs are that the lower Court went wrong in assessing the evidence and that the partition deed was overlooked by the Court. It is the contention of the learned counsel that the partition deed was validly entered into and that the plaintiffs are the landlords and that the tenants also supported their case. The learned counsel also argued that the suit is not barred by *res judicata* at all and that the withdrawal of suit O.S.No.6 of 1980 does not affect in any way the present suit. It is his contention that the lower Court totally ignored the evidence of PWs.1 & 2 particularly with regard to shares in the suit property in Ex.A.1-partition list. Therefore, it is the contention of the learned counsel for the appellants that once Ex.A.1 is held to be proved, the plaintiffs have a right to succeed in the suit.

It is also his contention that the withdrawal of earlier O.S.No.6 of 1980 does not debar his clients from filing the present suit and that the plea of *res judicata* is wrongly taken.

10. This Court also notices certain facts which have a bearing on the decision. The first and foremost admission is that the fourth defendant is an auction purchaser of the very same property in an earlier suit filed against the first defendant; where his property was brought to sale in a decree by the defendants 2 & 3. The fourth defendant purchased the property in E.P.No.56 of 1978 and was in possession of the property since 1981. The further steps taken by the plaintiffs therein to set aside that the sale did not yield any result and this Court also did find any reason to set aside the sale in the challenge to the sale that reached the High Court. Exs.B.1, B.2 and B.4 are testimony to this. The defendants 5 & 7 are the tenants in the building, who have given evidence as DWs 2 & 3 in the suit. Both of them stated that they are currently paying rents to the fourth defendant. These admitted facts are being highlighted at the very outset, since the suit is filed for a declaration based on the partition. The presence of the fourth defendant is thus not due to any act of forceful occupation or tenancy etc., but pursuant to a proceeding of a Court.

11. Since the suit is filed based on an oral partition and a subsequently recorded memorandum of partition, this Court examined the contents of Ex.A.1 and the evidence

surrounding the same. This document is the genesis for the suit and the claim of the plaintiffs. Ex.A.1 is the memorandum recording the past partition executed between the deceased first plaintiff and the first defendant and his children. The second plaintiff is also added as a party to this document. This document records that an oral partition took place on 03.09.1975 and because of the lack of a proper document, the contents of the oral partition are being recorded into writing. It is mentioned very clearly that the memorandum is only recording the earlier oral partition dated 03.09.1975. According to this document, the C-schedule property therein was allotted to late Sri V.M. Sridhar, first plaintiff. It is the C-schedule property of this deed that is the subject matter of the present suit.

12. PW.1 is the second plaintiff in the suit. She deposed in her chief examination itself that she does not how the suit house came to her family. She deposed that initially the properties were partitioned in 1993. Later when she was recalled she deposed that an earlier suit was filed by her husband claiming the suit property to be his exclusive property. She stated that the suit was dismissed for default and because the first defendant promised to settle the matter, her husband did not pursue the case to its end. She also admitted that the fourth defendant is the auction purchaser of the suit schedule property. In the cross-examination, she clearly admitted that she has no personal knowledge about

the contents of Ex.A.1. She also admitted that the first defendant got the document prepared; that the orders in suit O.S.No.14 of 1997 were carried in appeal to this Court against the orders passed in execution petition and that the matter ended finally in favour of the fourth defendant (auction purchaser). She also admitted that she has no knowledge of the contents/scribe of Ex.A.1 or to show that the debt is an avyavaharika debt.

13. The next witness examined for the plaintiffs is PW.2, who is an attester of Ex.A.1. In the chief examination, he stated that the earlier partition was affected and to record the contents of the same, the current document of partition was entered into. However, the witness admitted that his signatures were not taken on all the pages. He also stated that a share was allotted to the first defendant and his wife jointly and that is the reason why the signatures of the present PW.1 were obtained on this document. According to this witness, from the date of oral partition, the property was in possession of the plaintiffs only. He deposes that PW.1 was allotted a share which is contrary to the contents of Ex.A.1 also.

14. The fundamental argument of the learned counsel for the appellants on this issue is about the validity of and proof of Ex.A.1. He stressed that it is a validly excused document and that it is proved as per law. This Court is however not inclined to accept his submissions because

a) there are no contemporaneous documents like house tax receipts, municipal mutation proceedings etc. to show that the partition took place in 1975 and that the deceased first plaintiff was enjoying the property after the oral partition. In cases of oral partition, the Courts have looked at the contemporaneous documents to prove the actions taken on the contents of the oral partition. The present suit is filed in 1993 and as per the claim of the plaintiffs, the partition took place in 1975. Absolutely not a piece of paper is filed to prove that the partition was effected and that the property was put in the possession of the deceased first plaintiff. No tax receipts; proceedings of mutation of name etc. are filed. Even the evidence of DWs.2 & 3 shows that they were paying rents to the first defendant only and not to the deceased first plaintiff. Thus, there is no evidence to corroborate the fact that there was a partition amongst the family members; b) in addition to this, all the parties to the suit admitted that the fourth defendant is an auction purchaser of the suit schedule property. The fourth defendant purchased the property in the suit filed against the first defendant by defendants 2 & 3 bearing number O.S.No.14 of 1977. After the decree, E.P.No.56 of 1978 was filed in which he emerged as the successful purchaser of the property. When the sale was challenged by the first defendant and the present second plaintiff, the Division Bench of this Court upheld the sale, vide Ex.B.4-judgment in AAO Nos.1450 and 1451 of 1984 and

dismissed the application by the judgment debtors. A copy of the judgment in AAO Nos.1450 and 1451 of 1984 is filed to prove that the sale was upheld. The judgment in C.M.A.No.1451 of 1984 relates to the fourth defendant herein. In this case, the oral evidence of DWs.1 & 2 also clearly proves that they were evicted and later again inducted into possession by the fourth defendant. Both of them have filed their rent agreements, which are marked as Exs.B.14 & B.15. DW.1 also filed Ex.B.13 note book to show the collection of rents and also other documents like Exs.B.11 & B.12 to show that he is in possession and enjoyment of the property; c) this Court also concurs with the findings of the lower Court that if the present plaintiffs were having a claim on the basis of Ex.A.1, there should have impleaded themselves in the execution proceedings which were admittedly filed in 1978 in E.P.No.56 of 1978. If the partition list is true, they should have agitated their rights immediately thereafter by filing an implead petition in this case; and d) this Court also notices that the lower Court rightly pointed out that in O.S.No.6 of 1980 which was filed for a partition was based on the very same oral partition followed by a memorandum of partition and the fourth defendant got himself impleaded since his rights are being effected. The title of fourth defendant and his claim based on the purchase in the E.P. are in the knowledge of plaintiffs in O.S.No.6 of 1980 also. But no action was taken by the present PW.1.

15. Therefore, for all the above reasons, this Court holds that the plaintiffs did not prove that Ex.A.1 is a genuine document recording a past partition. Admittedly, only a carbon copy of the same is filed. There is no evidence to show that how many partition lists were executed. There is no evidence about the original of this document. The lack of contemporaneous document disproves the partition. The failure of the plaintiffs to take steps after 1975 to safeguard their interest in various proceedings also leads this Court to come to a conclusion that Ex.A.1 is not a genuine document. Consequently the plaintiffs are not entitled any relief based on the partition.

16. Another issue that survives for consideration is about the plea of *res judicata* which is raised. A suit O.S.No.6 of 1980 was filed by the deceased first plaintiff in 1980 based on the very same oral partition. The present fourth defendant was not added as a party to the suit and he got himself impleaded as a party to the said suit. However, the suit was dismissed on 03.08.1981 as the counsel for the plaintiffs endorsed that the suit may be dismissed. Therefore, the suit was dismissed recording the said endorsement and awarding half of the costs to the present fourth defendant. Based on this, the learned counsel for the appellants argued that it is not a decision on merits and that therefore, the plea of *res judicata* is not available.

17. The learned counsel for the appellants also cited a decision reported in **Gottumukkala Sundara Narasaraju v. P. Venkata Narasimharaju**¹ wherein a learned single Judge of this Court held that a law laid down the tests for the concept of *res judicata*. The tests as laid down by this Court are a) the parties must be the same; b) the subject matter of the suit must be the same; c) a Court of competent jurisdiction handled the case; and d) the matter was finally decided. He agreed that therefore the present suit is not barred as there is no decision on merits.

18. The lower Court held that there is no allegation by the plaintiffs or others that the lawyer in the suit O.S.No.6 of 1980 played a fraud or acted contrary to the instructions of his clients in withdrawing the suit. The trial Court also noticed that the plaintiffs did not take any steps against the said advocate for withdrawing the suit. The lower Court also noticed the issues that were framed in O.S.No.6 of 1980 which included an issue if the sale of item No.2 in favour of the fourth defendant in the court auction is not binding on the plaintiffs and first defendant/third defendant (issue No.7 in Ex.B.2). Similarly, issue No.6 is to the effect that the suit is collusive suit between the plaintiffs and the defendants 1 to 3. The lower Court also noticed that the fourth defendant in order to join the suit had to plead that he acquired title to the property and therefore the suit for partition is not valid. The

¹ 2016 (3) ALD 724

issues 6 & 7, which were reproduced earlier, are clearly based upon this sort of pleading only. The plaintiff in O.S.No.6 of 1980 did not take any steps to amend the plaint and seek the relief of recovery of possession from the fourth defendant. The bar in this suit is thus not one of '*res judicata*' in the strict sense of the term but the bar under Order XXIII, Rule (I) (4) of CPC which states that if a party abandons a suit without leave of the Court, he will be liable for costs and also be precluded from filing a fresh suit. In this case, the Court awarded costs and dismissed the suit O.S.No.6 of 1980 (Exs.B.1 and B.2). The action of the plaintiffs in willingly withdrawing the suit clearly indicates that they are aware of the consequences of the same and the pending applications in the High Court etc. Therefore, this Court holds that the present suit is barred by Order XXIII Rule (I) (4) of CPC.

19. For all the above reasons, this Court holds that the judgment and decree of the lower Court is valid and correct and that there are no grounds made out to interfere with the same. The appeal is abated against the fourth defendant and no steps were taken to bring on record his legal representatives, but as the other respondents are on record, judgment is pronounced on merits, since there is a prayer for possession also.

20. The appeal is accordingly dismissed. In the circumstances of the case, there shall be no order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 29.03.2018

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