

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

A.S.No.1324 of 1998

And

A.S.No.450 of 2008

COMMON JUDGMENT:

The appeal No.1324 of 1998 is filed by the first defendant against the judgment and decree dated 06.02.1996 in O.S.No.152 of 1984 by the Subordinate Judge, Machilipatnam. The other appeal No. 450 of 2008 is filed against the final decree passed pursuant to the preliminary decree dated 06.02.1996.

2. For the sake of convenience, as this is a first appeal, the parties are hereinafter referred to as plaintiffs and defendants only.

3. The brief averments of the plaint are that the first plaintiff is the wife of one Parasa Venkateswarlu and the first defendant is their son. The second defendant is the daughter of first defendant. The second plaintiff is the daughter of first plaintiff. The third plaintiff is husband of pre-deceased daughter Peda Nancharamma. The plaintiffs 5 to 7 are the legal representatives of deceased-third plaintiff. The said Parasa Venkateswarlu died intestate in the year 1960 leaving behind the first plaintiff, his wife, first defendant, second plaintiff and Peda Nancharamma. The said Venkateshwarlu possessed Ac.8.14 cents of wet land and house site of an extent of Ac.0.20 cents at Koragantipalem Village, besides other movable properties as shown in Plaint A, B and C

schedules. The plaintiffs 1 to 4 after the death of said Venkateswarlu are in joint possession of plaint schedule properties as co-owners thereof.

4. After the death of said Venkateswarlu, the first plaintiff was looked after properly for some time and later the first defendant started ill-treating her and so she demanded for the partition of suit schedule properties for her share. Thereafter, the first plaintiff issued a legal notice on 22.03.1983 demanding partition. The first defendant did not give any reply, whereas plaintiffs 2 to 4 expressed their willingness for partition. The plaintiffs 1 to 4 felt that it is no safe to be joint with first defendant and decided to file the suit for partition. After filing of the suit, the first defendant alienated a part of schedule properties to his daughter/2nd defendant, which is illegal. The first plaintiff on 30.12.1984 executed a Will in a sound disposing state of mind and out of free will and volition, bequeathed her 1/3rd share in favour of the fourth plaintiff and her 2/3rd share in favour of the second plaintiff. The first plaintiff died on 07.01.1985 and the 3rd plaintiff died on 02.04.1995 during pendency of the suit. The 2nd plaintiff is entitled to 1/6th share in plaint schedule properties, 4th plaintiff is entitled to 1/8th share, 1/3rd of 1/4th share of the first plaintiff. Plaintiffs 4 to 7 are entitled to 1/8th share and also 1/5th share from out of the share of deceased/3rd plaintiff. Therefore, the plaintiffs pray for a preliminary decree for partition of plaint A, B & C

schedule properties and for allotment of their shares and to allot the separate possession of their share of properties to the plaintiffs and to ascertain mesne profits and to award the costs of the suit.

5. The first defendant filed his written statement stating that the allegations that late Parasa Venkateswarlu died possessing the properties for an extent of Ac.8.14 cents of wet land and house site to an extent of Ac.0.02 cents in Koragantipalem village are false and concocted for the purpose of filing of the present suit. Parasa Venkateswarlu and Parasa Subba Reddy are brothers. They are sons of one Parasa Veeraswamy. The plaint schedule property is in the name of Veeraswamy only, but not in the name of Venkateswarlu. Venkateswara Reddy and Subba Reddy partitioned the plaint schedule properties in 1945 orally and the total extent of Ac.5.55 cents fell to the share of Subba Reddy and the total extent of Ac.2.59 cents fell to the share of Venkateswara Reddy. Subbareddy gifted one acre out of Ac.5.55 cents to his daughter, Peddintlamma and the remaining property has been divided into three equal shares. The property which fell to the share of Venkateshwara Reddy in oral partition with his elder brother Subba Reddy has been in possession and enjoyment of the first defendant. Venkateswara Reddy in the said partition got Ac.2.59 cents and Subreddy got Ac.5.55 cents.

6. The following issues were framed by the lower Court on the pleadings filed:

- a) Whether the plaintiffs are entitled for partition as prayed for and if so to what shares?
- b) To what relief?

7. On the basis of the said pleadings, the parties went to trial. On behalf of the plaintiffs, three witnesses were examined as PWs.1 to 3. On behalf of the defendants, five witnesses were examined as DWs.1 to 5. The documentary evidence on behalf of the plaintiffs is confined to only two documents relating the years 1984 and of 1965, which are marked as Exs.A.1 & A.2. No other documentary evidence is filed on behalf of either party.

8. After considering the oral and documentary evidence, the lower Court decreed the suit and granted a decree for partition in favour of the second defendant and plaintiffs 2, 4 to 7. The unsuccessful-first defendant is the appellant before this Court.

9. I have heard Sri Kowturu Pavan Kumar, learned counsel for the appellant/first defendant and Sri Ashok Kumar Avasthi, learned counsel for the respondents/ plaintiffs.

10. The essential ground that is urged in the appeal is that the lower Court wrongly came to the conclusion it did when there is no proof filed for the existence or the location of the plaint schedule properties.

11. The learned counsel for the appellant/first defendant argued that there is no documentary evidence to show that the plaint schedule properties are available on the ground and that the plaintiffs did not file any paper in proof of the same. The learned counsel also argued that the admission said to have been made in IA No.1620 of 1984 is not binding and that it was sufficiently explained later during the course of the trial of the suit.

12. On the other hand, the learned counsel for the respondents/plaintiffs supported the judgment of the lower Court and stated that a simple matter is being blown out of proportion in this case. He argued that in view of the clear admission of the defendants in the counter about the existence of the suit schedule properties and the subsequent events which prove the existence of the properties, the essential defence taken by the defendants is not proved. He also argued that in this case the contesting first defendant did not come before the Court and depose to prove his case. The main evidence according to the plaintiffs/current respondents is that of the first defendant and as he stayed away from the witness box, the lower Court rightly came to the conclusion about the un-tenability of the defendants' case.

13. As noticed by the court below, there is no strict contest about the genealogy or about the relationship between the parties. The question that was examined by the court

below is about the existence of the suit schedule property. The fact that the “plaint schedule” underwent amendments is a factor that is strongly relied upon by the learned counsel for the appellant. He argued that the fact that the plaint schedule was modified/amended more than once makes it clear that the properties do not exist on the ground.

14. On the contrary, the learned counsel for the respondents brought to the notice of this Court the operative portion of the judgment in paras-10 and 11 wherein the admission made in the counter filed in I.A.No.1620 of 1984 by the present appellant/first defendant is highlighted. A reading of this counter in I.A.No.1620 of 1984 (which is filed for appointment of receiver) to take possession of A-schedule land, clearly shows that the first defendant did not deny the existence of the property on the ground it is pointed out that in the counter he admits that the lands belong to one Parasa Venkateshwarlu. He also admits that he is in possession and enjoyment of the plaint schedule properties. Therefore, the learned counsel for the respondents/plaintiffs argued that the existence of the plaint schedule properties is not really in doubt. In addition, he also correctly pointed out that the respondent in IA No.1620 of 1984 made a reservation stating that he will file a detailed written statement. A written statement was filed almost nine months after the counter in the said I.A. was filed. There is no explanation to whatever is stated in the counter filed earlier. It is pointed out that in the

written statement, the first defendant agrees that he is a class-I heir of late Parasa Venkateshwarlu and the first plaintiff and other plaintiffs are having a share along with the defendants in the share of Parasa Venkateshwara Reddy only. There is no averment to the effect that the plaint schedule is incorrect or that the lands do not exist on the ground. In addition, the reservation made in the counter was not explained. The first defendant did not file any document or make any averment that could enable him to explain the admission that is made in the said I.A. As pointed out by the learned counsel, any admission could have been satisfactorily explained. In this case, the written statement is filed by Parasa Venkateshwara Swamy Reddy himself, but, he did not mention anything about the non-existence of the suit schedule lands on the ground nor did he raise any dispute whatsoever about the survey numbers, extents etc. Hence, the counsel submits no issue can be raised about the plaint schedules/extents etc.

15. It is also important to note that Parasa Venkateswara Swamy Reddy did not appear and give evidence as a witness. The son was examined as DW.1. No reasons are forthcoming why he is not examined as a witness. DW.1 merely said that the first defendant was bedridden. No medical certificate or any other document is filed to show that the first defendant was actually bedridden or unable to move. The lower Court also correctly held that if he was

unable to move an Advocate Commissioner could have been appointed to record his evidence, since he is the person who was an author of the written statement. DW.4 on the other hand categorically deposes in his cross-examination as follows:

“Defendant No.1 is doing cultivation. He is hale and hearty.”

In addition, as rightly pointed out by the learned counsel for the respondents, the Court should draw adverse inference for his non-appearance in line with the judgment of the Hon’ble Supreme Court of India in ***Vidhyadhar v. Manikrao & Another***¹, wherein the Supreme Court clearly held that if a party, who dispute the case does not appear in the witness box and does not explain his case, the Court should draw an adverse inference against the witness and disbelieve the case set up by the party. The said judgment applies to the facts of this case. This Court thus agrees with the findings of the lower Court on this issue in view of what is stated above.

16. It is also important to note that the defendants are contending that they are not in possession of the lands which are mentioned as the plaint schedule land. They are only in possession of Ac.2.59 cents of land. The defendants examined DW.4, (the former Village Administrative Officer) and DW.5, (the current Village Administrative Officer). The adangal and the registers which are deposed about by these two witnesses

¹ AIR 1999 SC 1441

are not filed nor is any other evidence filed. Both the witnesses state that they have got certain records, which are not marked, for the reasons best known to the plaintiffs. The oral testimony of these witnesses thus cannot be really trusted or believed. In these circumstances, the lower Court was right in holding that the defendants did not produce any document like cultivating accounts, adangals etc. to show the existence of land in their possession. Therefore, the lower Court was right in rejecting the evidence and the stand taken by the first defendant.

17. In addition to this, the lower Court also considered the Will that was executed by the first plaintiff bequeathing her share in the schedule properties in favour of the plaintiffs 2 and 4. The lower Court noticed that the Will was executed during the pendency of the suit. The Will also has a reference to the suit number. The original Will is not produced and only a certified copy is produced on the ground that the original was lost in a cyclone. The lower Court rightly observed that the documents that are executed during the pendency of the suit are suspicious and are to be treated with caution. The judgments of the Hon'ble Supreme Court reported in ***Murugan v. State of Tamilnadu***² , ***Umesh Chandra v. State of Rajasthan***³ and ***State of Bihar v. Radha Krishna Singh***⁴ are relevant in the present aspect.

² 2011 (6) SCC 111

³ 1982 (2) SCC 202

⁴ 1983 (3) SCC 118

The documents which are executed during the course of litigation are to be viewed later very cautiously by the court, since the element of a bias and interest in the litigation that is pending cannot be ruled out. In addition to this factor, the lower Court also felt that the death of the testator within seven days from the execution of the Will is a suspicious circumstance that is not explained. Therefore, the lower Court rightly rejected Ex.A.1-Will and chose to ignore the same. In the absence of the Will, the shares were apportioned by the lower Court as per law. This Court sees no reason to disagree with the lower Court on these issues.

18. The lower Court also noticed that the second defendant is in possession of one acre of land and that the same was transferred during the pendency of the suit by the first defendant in favour of the second defendant. The lower Court granted leave to the second defendant to work out the equities at the time of partition of the property, because the second defendant did not set up the claim in the court and did not appear. Ultimately, the lower Court decreed the suit granting $5/8^{\text{th}}$ share to the second defendant and the remaining $3/8^{\text{th}}$ share to the plaintiffs 2, 4 to 7. It appears from the record that in IA No.579 of 1996, a final decree was also passed and the Commissioner was appointed to make a partition. After considering the report of the Advocate Commissioner, the lower Court passed the final decree also on 10.06.1997 allotting the shares to the parties as per the

decree. This is impugned in A.S.No.450 of 2008, which is tagged along with this appeal. The main grounds urged are that the identity of property was not established (which is already decided upon) and that a private surveyor was used by the Advocate Commissioner and not a government surveyor. This Court holds that the mere fact that a private surveyor was used by the Advocate Commissioner in this case is not a ground to discredit the report. Actually no serious infirmities are pointed out during the hearing about the final decree passed.

19. This Court thus holds that the orders passed by the lower Court are correct and there are no reasons made out with the same.

20. For all the above reasons, both the appeals are dismissed. The judgment and decree dated 06.02.1996 in O.S.No.152 of 1984 by the Subordinate Judge, Machilipatnam is hereby confirmed. The final decree passed on 10.06.1997 in I.A.No.579 of 1996 in O.S.No.152 of 1984 is also confirmed. There is no order as to costs. Miscellaneous petitions, if any, pending in these appeals shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 04.01.2018
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