

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

**AS No.153 of 1998**

**JUDGMENT:**

This appeal is filed against the judgment and decree dated 19.09.1997 in the suit OS No.187 of 1995 passed by the Sub-ordinate Judge, Avanigadda.

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

3. The suit OS No.187 of 1995, which was originally numbered as OS No.156 of 1992 on the file of the Sub-Court, Machilipatnam, was filed for partition of the plaint schedule property in two equal shares and to allot one share to the plaintiff and the remaining one share to all the defendants together and for costs.

4. The suit is filed by one P. Ratnagiri Rao seeking a partition of the plaint schedule property, which is consisting of two items of land measuring Ac.0.51 cents with rice mill thereon and another bit of land measuring Ac.0.15 cents. The case of the plaintiff before the lower Court is that one Sri P. Gangaiah is the original head of the family. After the death of their father-Gangaiah, the plaintiff, his brother-Balakrishna Rao and their paternal uncle have partitioned the properties.

Item-1 of the plaint schedule property was purchased by the father under the sale deed dated 26.04.1944. A registered partition deed was entered into on 19.09.1957. In the said partition deed, the item which is shown as schedule-I of the plaint schedule property is not mentioned. It is also mentioned that item-2 of the plaint, is a small site jointly purchased by the plaintiff and the deceased brother under a sale deed dated 04.12.1959. In addition, for improvement of the rice mill, they have purchased a mill and machinery under Ex.A.3. The plaintiff and his deceased brother continued business for some time. As the business went into loss, they stopped doing the business. Item Nos.1 and 2 of suit schedule properties were kept jointly. It is stated in the plaint that till the death of Balakrishna Rao on 08.08.1991, everything was going on smoothly, but as the defendants did not agree for partition, the plaintiff was constrained to file the suit. The wife of Balakrishna Rao is shown as third defendant. The sons are shown as defendants 1 and 2 and daughters are shown as defendants 4 to 8. Since they did not agree for partition of the property, the suit is filed for partition.

5. The defendants filed a written statement in which they stated that item No.1 is the joint property of

the plaintiff and late Balakrishna Rao. They also stated that items 1 and 2 are not joint family properties. In addition, the main defence that is taken up by the defendants is that as the business was going into losses and as the plaintiff did not have the money to discharge the debts, it was decided in the presence of certain elders that the third defendant would sell her personal property and repay the debts and for this the plaintiff agreed to relinquish his right's in the property. Accordingly, the third defendant sold her property and discharged the joint debts. Therefore, the contention of the defendants is that the plaintiff has no rights in the property. They point out that from 1964 till the filing of the suit, there is no demand from the plaintiff for partition of the property, which strengthens their contention that the plaintiff agreed to the relinquishment. Defendants also plead adverse possession and perfection of title also.

6. On the basis of these proceedings, the following issues were framed.

1. Whether the plaintiff is entitled for partition of the plaint schedule property into two equal shares and for allotment of one such share as prayed for?
2. Whether the plaint schedule property became the exclusive property of late Balakrishna Rao, as contended in the written statement?

3. Whether the said Balakrishna Rao and the defendants have acquired title to the suit properties by adverse possession, as contended by defendants in their written statement?
4. Whether the value of the property is incorrect and exorbitant?
5. Whether the description of the suit properties is correct?
6. Whether there is cause of action to file the suit?
7. To what relief?

7. For the plaintiff, only one witness was examined viz., the plaintiff himself as PW.1 and he marked Exs.A.1 to A.8. For the defendants, three witnesses were examined and Exs.B.1 and B.2 were marked. After the trial was completed, the impugned judgment and decree was passed by which the plaintiff's suit was decreed and a decree for partition was passed. Questioning the same, the defendants filed the present appeal.

8. This Court has heard Sri K. Sarva Bhouma Rao, learned counsel for the appellants/defendants and Sri G. Pedda Babu, learned counsel for the respondent/plaintiff. They have both reiterated their respective cases.

9. The essential point therefore that arises for consideration (in view of the fact that there is no serious dispute that the plaint schedule property is liable for

partition) is the question whether the plaint schedule property became the exclusive property of late Sri Balakrishna Rao-father of the defendants 1 and 2 and defendants 4 to 8 and husband of the third defendant as the plaintiff gave up his rights in the property. It is the case of the defendants that the plaintiff relinquished his share, pursuant to the understanding reached in the presence of mediators. Pursuant to the said understanding, the third defendant sold her property, through Ex.B.2-sale deed and discharged the debts. This is the crux of the defendants' case.

10. Since the defendants raised this plea of relinquishment by the plaintiff and as there is no written document evidencing the relinquishment, it becomes necessary for this Court to see whether Ex.B.2 sale deed was executed, pursuant to any understanding between the plaintiff and his late brother-Balakrishna Rao and whether the plaintiff by virtue of his conduct has relinquished his right and interest in the property. Both the learned counsel concentrated on this document and its contents, the learned counsel for the appellants/defendants contended that it is common knowledge that the sale consideration in the document is not the real consideration paid. The learned counsel for the

respondent/plaintiff argued that the sale deed shows the true value.

11. The document dated 29.04.1964 is marked as Ex.B.2. The sale consideration mentioned under the said document is only Rs.20,000/-. This document-Ex.B.2 does not disclose that the property was sold for the purpose of discharging the joint debts of late Balakrishna Rao and the plaintiff. It clearly states that the property is being sold for the purpose of purchasing 'other property'.

12. This Court also notices that in the written statement, it is mentioned that the property was sold in April 1964 and some of the joint debts were discharged with the sale consideration. Therefore, a reading of the written statement makes it clear that the sale consideration was not used for discharge of all the debts. In fact, as pointed out by the learned counsel for the respondent, there is no proof filed by the defendants to show the extent of the debt that was discharged. Neither the account books of the parties nor credible oral evidence was introduced to show the extent of the debt or of the discharge of the debts. The witness-DW.1 clearly deposed that she does not know the exact figure of the debts of the mill. According to her, it may be above Rs.40,000/- and below Rs.60,000/-.

13. Apart from this lack of evidence, the other issue that arises for consideration is the date of the meeting in which the plaintiff is supposed to have relinquished his rights by virtue of the understanding reached between the plaintiff and his late brother in the presence of elders. DW.1 states that after the sitting was held with the elders for settlement, the land was sold. In her cross-examination, she states that by the date of sitting for settlement, the land was not sold. The land was sold two or three months after the sitting was held with the elders. Since the date of Ex.B.2-sale deed was April 1964, this meeting according to the deposition of DW.1 was two or three months before April 1964. Therefore, this meeting was in January or in February 1964. The witnesses also admit that only one meeting was held for coming to the conclusion. DW.2 on the other hand states that this meeting was held in the summer of 1964. In the cross-examination, he admits that 2 or 3 months after the settlement, the third defendant sold the land. He also admits that no document was executed evidencing this understanding. In his chief examination, it is mentioned that in 1964 summer season the discussion was held, but in the cross-examination he stated by necessary implication the

date of meeting is in January or February 1964, since the sale deed is of April 1964. The third witness was examined as DW.3. In his cross-examination, he stated that the settlement was effected during May-June 1964. He deposed further that this was the final settlement and after the final settlement, they have to sell the land and to discharge the debts. Thus, there is no clarity about this meeting which preceded Ex.B.2.

14. It is also clear from a reading of the entire evidence that there is no documentary evidence filed to show the extent of the debt or the actual discharge of the debt. In these circumstances, particularly when Ex.B.2 document clearly states that the total sale consideration is Rs.20,000/- and the sale of the land was effected for the purpose of procuring other properties, this Court cannot believe the version that is set up by the defendants. The legal position is also clear that oral evidence contrary to the terms of a written registered document cannot be introduced except for certain limited purposes. The purpose of the sale of land in Ex.B.2 is for purchasing the other properties. The discrepancies in the evidence both oral and documentary make it clear that the sale under Ex.B.2 was not for the purpose of discharging the debts. The pleading is to the effect that

some of the debts are discharged. The oral evidence is to the effect that all the debts were discharged. The names of the elders before whom a settlement was arrived at were also not mentioned in the written statement and DW.1 also agreed that the names are not mentioned. Therefore, from a reading of this evidence as it exists, this Court is of the opinion that the defendants have not proved what is pleaded in their written statement.

15. In addition to this, it is argued by the learned counsel for the appellants/defendants with the great deal of fervor that there is no need for a document to prove the relinquishment. According to the learned counsel, who relied upon a decision of the Bombay High Court in ***Ramdas Chimna v. Pralhad Deorao***<sup>1</sup>, there is nothing in the Registration Act, which requires a document to be executed for other transaction. He argues that only when a transaction is recorded in writing, the same will require registration. Therefore, the abandonment of interest by the plaintiff, according to the learned counsel for the defendants, does not require registration.

16. In reply thereto, the learned counsel for the respondent/plaintiff argues that as there is no written record of relinquishment the conduct of the parties is

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<sup>1</sup> AIR 1965 Bombay 74

also to be examined to prove if there was a relinquishment. It is admitted that the deceased Balakrishna Rao was an advocate. The earlier conduct of the parties is that they divided their joint property through a partition deed. Therefore, the submission of the learned counsel is that if really there was a relinquishment and the plaintiff agreed to give up his rights, there would have been a document evidencing the same. This Court also finds strength in the submission of the respondent. The parties are well educated people. The plaintiff and his deceased brother were in active business. When a third party viz., the third defendant is called upon the discharge of the debts of the brothers and there would be a relinquishment, the normal course of human conduct would be to execute a registered document or at least a document recording the said understanding. In the case on hand, there is no such document. In addition, the discrepancies in the evidence make it clear that the sale under Ex.B.2 is not actually connected to the discharge of the debts. The existence of the debts; proof of payment of the debt etc., are not borne out by record. In these circumstances, this Court is of the opinion that the defendants have not proved the so-called discharge of the debt and the consequent

relinquishment of the same. Issue No.2 therefore should be held against the appellants/defendants. This Court agrees with the finding of the lower Court on issue No.2.

17. Issue No.3 is whether the Balakrishna Rao and the defendants have perfected their title by adverse possession. The property is a joint property and both the plaintiff and the deceased-Balakrishna Rao are joint owners. Adverse possession among joint owners is permissible but the law laid down by the Hon'ble Supreme Court of India in the case of **P. Lakshmi Reddy v. L. Lakshmi Reddy**<sup>2</sup> is very very relevant. Both the learned counsel for the appellants and the respondent relied upon this judgment. The learned counsel for the appellants argues that adverse possession can be inferred from the circumstances. The learned counsel argues that the same need not be expressed by an express denial of title to make out a case of adverse possession. According to the learned counsel, the fact that from 1964 till the exchange of notices preceeding the suit, there was no demand from the plaintiff strengthens the case that he was conscious of the fact that the defendants are the actual owners of the property. He states that as the defendants were aware of the

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<sup>2</sup> AIR 1957 SC 314

relinquishment and the absolute ownership, the plaintiff did not make any demand whatsoever.

18. In reply thereto, the learned counsel for the respondent/plaintiff submits that the defendant's case is inconsistent. On one hand, they claim relinquishment of surrender of the plaintiff's rights and on the other hand they plead adverse possession. They claimed title to the property by a voluntary act of the plaintiff viz., the so-called relinquishment and on the other hand, they are also raising a plea of adverse possession. The learned counsel submits that a person who relies on title cannot raise a plea of adverse possession, as both are opposed one another. According to him, the defendants should give up one plea before taking a plea of other one.

19. The learned counsel for the respondent/plaintiff also relied upon the same in **P. Lakshmi Reddy's** case (2 supra) and argues that as the possession of one co-heir is the possession of all other co-heirs, the quality of evidence should be high to prove adverse possession. The learned counsel relies on this case to argue that the possession of one co-heir is presumed to be of the other joint owners. He relies upon the passages in this case and argues that between coheirs there must be evidence of open assertion of hostile title coupled with exclusive

possession and enjoyment by one to the knowledge of all the others. The learned counsel also argues that there must be a clear pleading and proof of ouster. He also relied upon a judgment of the Hon'ble Supreme Court of India in **Jai Singh v. Gurmej Singh**<sup>3</sup> and places reliance upon the following passage in para-7 of the said judgment.

“7. The principles relating to the inter-se rights and liabilities of co-sharers are as follows:

- (1) A co-owner has an interest in the whole property and also in every parcel of it.
- (2) Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
- (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
- (4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.
- (5) Passage of time does not extinguish the right of the co-owner who has been out of

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<sup>3</sup> (2009) 15 SCC 747

possession of the joint property except in the event of ouster or abandonment.

- (6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.
- (7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.”

Relying upon the above principles, the learned counsel argues that the evidence of ouster and open hostile possession is required to be very clear.

20. This Court after examining the submissions made by both the learned counsel is of the opinion that in this case, a clear case of open hostile possession with the necessary animus is not made out at all. The only two documents filed by the defendants are Exs.B.1 and B.2. No other documents are filed to show their exclusive possession for over the statutory period. There is no clear pleading of an ouster of the plaintiff. The mere passage of time or a long gap does not lead to a conclusion that the necessary ingredients of adverse possession are proved, particularly among co-owners.

21. In addition to this, a Division Bench judgment of this Court reported in **S. Sugunamma v. B. Padmamma**<sup>4</sup> is also very relevant. In paragraph-25 of the said judgment, it is held that a person who claims adverse possession should show the following factors:

“25. To establish adverse possession, a person making the claim should establish a peaceful, open and continuous possession, as engraved in the maxim *nec vi, nec clam and nec precario*. The possession of such a person should actually be an exclusive possession with animus possidendi. A person who claims adverse possession should show – (i) the date on which he came into possession, (ii) the nature of his possession, (iii) whether the factum of possession was known to the other party, (iv) how long the possession continued and (v) whether his possession was open and undisturbed.”

22. An essential element of this is the ‘animus’ of the open hostile possession, which is not at all proved in this case. The animus is not manifested in this case at all. Apart from this, this Court also notices the fact that implicit in the defendants case of adverse possession is the acknowledgement that the opposite party was the owner of the property. Hence, the defendants tacitly admit the title of the plaintiff by pleading adverse possession. However, once the necessary ingredients are

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<sup>4</sup> 2017 (5) ALD 403

proved, the title of the opposite party is deemed to be extinguished. Also as held by the Hon'ble Supreme Court of India in **Karnataka Board of Waqf v. Government of India**<sup>5</sup>, there are no equities in favour of a person who pleads adverse possession.

23. In the light of all of the above, this Court is of the opinion that the respondents have not succeeded in proving that they have perfected their title by adverse possession as contended in their written statement, particularly as this case relates to co-owners. The quality of evidence should be very high and very clear. In the case on hand, the evidence is absolutely silent to justify a finding of adverse possession. Therefore, issue No.3 is also held against the appellants/defendants. In view of the findings of this Court on two critical issues of relinquishment and adverse possession, the rest of the issues do not really survive for consideration. In fact not much argument was advanced on these issues also. This Court confirms the findings of the lower Court on issue No.1 and also issue No.7. Issues 4 to 6 were not actually answered in the lower Court also and no challenge was also mooted in this Court in the appeal. Therefore, after consideration of the entire evidence and the law on the

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<sup>5</sup> (2004) 10 SCC 779

subject, this Court is of the opinion that there are no merits in the appeal.

24. Accordingly, the appeal is dismissed. The judgment and decree dated 19.09.1997 in OS No.187 of 1995 passed by the Sub-ordinate Judge, Avanigadda is confirmed in all respects. In the circumstances of the case, there shall be no order as to costs.

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

Date: 25.10.2018  
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**D.V.S.S. SOMAYAJULU, J**

