

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

AS.No. 1585 of 1998

JUDGMENT:

This is an appeal filed against the order and judgment dated 13.04.1998 in O.S.No.2 of 1989 on the file of the Court of the Senior Civil Judge, Machilipatnam.

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

The brief facts of the case are that the suit is filed for partition of plaintiff schedule properties into three equal shares and for allotment of one share to the plaintiffs. The first plaintiff is the mother of plaintiffs 2 and 3; she married one Gangaraju in the year 1975. The second defendant-Boyina Veera Raghavulu and Gangaraju are brothers. First defendant is the father of second defendant and Gangaraju. They were the members of Hindu joint family possessed of plaintiff schedule property. The plaintiff schedule properties are the joint family properties of first defendant and his two sons i.e. second defendant and Gangaraju. Gangaraju died in the year 1983. During the life time of Gangaraju, there was no partition of joint family properties. The plaintiffs are, therefore, entitled for 1/3rd share in joint family properties along with defendants 1 and 2. The plaintiffs issued a registered notice as defendants 1 and 2 did not cooperate for effecting partition of plaintiff schedule properties on

04.09.1988. The defendant gave a reply with false allegations. Hence, this suit is filed for the reliefs claimed.

Defendant No.1-Boyina Kasulu, the father of Gangaraju and second defendant did not file any independent written statement. He adopted the written statement filed by second defendant his son by filing a memo. The second defendant Boyina Veera Raghavulu filed a written statement opposing the claim of the plaintiffs. In the written statement, it is submitted that the first plaintiff has no right to file the suit as she got re-married and stepped into "Vulliboyina" family. As such, it is pleaded that the first plaintiff has no right to represent minor plaintiffs 2 and 3, who belong to Boyina family. The first plaintiff lost her right over minor plaintiffs. It is also pleaded that after the marriage of Gangaraju with the first plaintiff in the year 1975, the joint family properties were divided. Gangaraju went away to the house of his father-in-law as illatum-son-in-law. Gangaraju got Ac.0.74 cents of land to his share in said partition in items 3, 4 and 5 of plaint A-schedule property and he has leased out the same to one Dasari Israil @ Chinnaswamy for a rental of 11 bags of paddy for both sarva and dalva. Gangaraju got 14 sheep and one cow in the partition. Gangaraju sold away his 14 sheep and one cow and went away as illatum-son-in-law. Item 6 of plaint-A schedule and item of plaint-B schedule were purchased after death of Gangaraju. 90 cents covered by

item No.6 of plaint-A schedule is the absolute property of wife of second defendant. 85 cents shown in item No.4 of plaint-B schedule is Gayalu land. The family has no movables as shown in plaint-C schedule. The plaintiffs, therefore, are not entitled to seek partition of plaint schedule properties.

The first defendant died during the pendency of the suit and his legal representatives were brought on record as defendants 4 to 10. Defendants 4 to 6 filed a common written statement and pleaded that the properties originally belonged to first defendant. The first defendant during his lifetime has executed a Will on 09.07.1990. By virtue of said Will, defendants 4 to 6 and defendants 7 to 10 became absolute owners of plaint schedule properties. The plaintiffs, therefore, are not entitled to any share in the self-acquired properties of first defendant.

Defendants 7 to 10 also filed a common written statement. They submitted that by virtue of the Will executed by first defendant, they became absolute owner of plaint schedule properties. The plaintiffs, therefore, have no right to seek partition of the plaint schedule property and the suit is, therefore, not maintainable and is liable to be dismissed.

Based on the pleadings, the following issues were framed:

- 1) whether the partition set up in the written statement is true?
- 2) whether the first plaintiff is not entitled to a share?
- 3) whether the first plaintiff cannot represent the minor plaintiffs 2 and 3?
- 4) what are the properties liable for partition?
- 5) To what relief.

The additional Issues were also framed later:

- 6) whether the third defendant is cultivating tenant?
- 7) whether the Will executed by the first defendant on 09.07.1990 is true, valid and binding on the parties?
- 8) whether the defendants 7, 8, 9 and 10 became absolute owners of plaint schedule property.?
- 9) whether the properties are self-acquired properties of defendant No.1?

On behalf of the plaintiffs, PWs.1 to 3 were examined and Ex.A.1 was marked. On behalf of the defendants, DWs.1 to 6 were examined and EXs.B.1 to B.10 were marked.

The lower Court after considering the evidence/pleadings etc., passed a decree for partition on 13.04.1998. The said order is impugned in the present appeal.

Heard Sri G.Krishna Murthy, learned counsel for the appellants and none appeared for the respondents.

(1) The first issue raised is about the right of the first plaintiff to claim a share and her right to represent plaintiffs 2 and 3 because of her second marriage to Vulliboyina Gangaraju. This issue is no longer open for argument in view of the change in law and the authoritative pronouncements on the subject. The plaintiff is entitled to file this suit and pursue the claim. Her second marriage (after the death of her first husband) will not disentitle her to seek a partition.

Cherotte Sugathan (Died through LR's) and others v. Cherotte Bharathi and others¹ is relevant here. The counsel did not really pursue this line of argument also.

2) The second issue raised is about the partition that took place on 1974-1975 as per the written statements filed. As per the written statement of second defendant, the first plaintiff's husband got a share of Acs.0.74 cents of land (along with some sheep etc.,) which he has leased to one Dasari Israel @ Chinnaswamy. To prove this one Pera Pathulu was examined as DW. 4. This witness states that he took the land on lease from the father-in-law of Gangaraju; the son of first defendant. Prior to this third defendant was the cultivating tenant. In his cross-examination, he however clearly admits that there is no written document evidencing

¹ AIR 2008 SC 1467

the lease; that he cannot state the date or month when the lease was given, that there is no documentary proof available that he is cultivating the land. In the opinion of this Court this oral testimony is not of much value.

It is clear that no documentary proof either in the form of a registered document or any other contemporaneous document is filed to show the actual partition. The partition is supposedly of the year 1974-75 but even when the trial was being conducted, no documentary proof of any nature was filed to prove the same. Hence, this Court is of the opinion that the lower Court rightly did not accept this theory of partition in 1975.

The next issue that is to be decided is about the Will-Ex.B.10 executed by first defendant on 09.07.1990. This Will was marked as Ex.B.10 during the evidence of the main contesting defendant (defendant No.2). The first defendant did not file an independent written statement but adopted the defence of his son. It is an admitted fact that this Will was executed in July 1990, which is after the suit was filed and after first defendant adopted the written statement vide a memo dated 05.06.1989. To prove this Will, DW.1 gave evidence about it and also examined the scribe (DW.5) and one attester (DW.6). Therefore, the legal requirements of proving the Will are fulfilled. The question, however, remains is whether the propounder succeeding in proving that the Will

is a genuine document and is executed freely with a genuine intention to settle the properties on the legatees. The first and foremost issue pointed out as a factor that negates against this is (a) the Will is a post litigation document. It is executed after the written statement was filed by second defendant and adopted by first defendant. In fact, as per DW.1; his father (the testator) gave instructions for preparing the written statement in the suit. It is settled law that *anti litem motam* documents or documents executed after the case is filed are always to be treated with greater caution as the parties may prepare the document with litigation in mind. The law is fairly clear on this aspect ***Murugan @ Settu v. State of Tamil Nadu***²; ***State of Bihar v. Radha Krishna Singh and Others***³ and ***Chakicherla Audilakshamma v. Atmakaru Ramarao and others***⁴. The lower Court also came to the same conclusion about the Will in para 55 of the judgment. (b) The second factor is that the propounder of the Will took a very active role in the execution of Ex.B.10. Both DWs.5 and 6 depose about the presence of DW.1/third defendant at the time of the preparation; execution and registration of the Will. The presence of the propounder of the Will at the time of execution etc., is a suspicious circumstance that should be explained carefully.

² 2011 (6) SCC 111

³ 1983 (3) SCC 118

⁴ AIR 1973 AP 149.

(c) In addition, there are no clear reasons coming forward to exclude the children of Gangaraju (plaintiffs 2 and 3) from the bequests. As per the cross-examination of DW.1 (para 9) there are no disputes between the brothers and the father; no disputes with the children of the deceased brother (plaintiff Nos.2 and 3). The father used to give gifts to the grandchildren (plaintiffs) when they visited him. Despite this, there are no reasons spelt out in the Will to leave out the plaintiffs totally. Therefore, this Court also concurs with the reasoning of the lower Court on all these points and holds that the Will (Ex.B.10) in this case cannot be relied upon.

Issue No.4 and additional Issue No.3 are to the following

effect: What are the properties liable for partition? Whether the properties are self acquired properties of defendant No.1.

According to the plaintiffs, defendants 1 and 2 and late Gangaraju were the members of Hindu undivided joint family and the said the family was possessed of plaintiff-A to C schedule properties. During life time of Gangaraju, the properties were not partitioned. The plaintiffs, therefore, are seeking the partition of the plaintiff schedule properties as late Gangaraju had a share in the joint family properties by birth. According to the plaintiffs, there is joint family house at Kotcherla village covered by item No.7 of plaintiff-A schedule. The joint family of defendants 1 and 2 and Gangaraju maintained sheep, lamps, earned money and acquired plaintiff

schedule properties shown in A to C schedules. The plaintiff schedule properties are thus joint family properties and same are liable to be partitioned. The defendants denied acquisition of properties by joint family. According to the defendants, all the properties are self acquired properties of first defendant. On behalf of the plaintiff apart from the oral testimony only Ex.A.1 registered lawyers notice was filed as a document. Therefore, an analysis of the defendants' documents is necessary to decide this case.

An analysis of the documents is to the following effect: Exs.B.2 and B.3 are the original sale deeds dated 27.06.1964 and 06.09.1965. An extent of Ac.1.10 cents was purchased under Exs.B.2 and B.3 covered by item No.1 of plaintiff B-schedule by first defendant. There is no mention in these documents also that the properties were purchased with the joint family nucleus or for the benefit of the joint family. On the contrary, they show that item 1 of plaintiff-B schedule property is the self-acquired property of the first defendant. Ex.B.5 is the registration extract of sale deed standing in the name of wife of DW.1 (D.2) (item 6 of plaintiff-A schedule). No recital is made in Ex.B.5 to show that with the income from the joint family, the said property was purchased in the name of wife of DW.1. Ex.B.6 is the sale deed dated 02.03.1976 standing in the name of late first defendant-Boyina Kasulu. There is no mention in the sale deed that the property was

purchased with the joint family funds or for the benefit of the joint family. Ex.B.7 is the sale deed dated 18.06.1973 showing the purchase of property by late first defendant. There is no mention in Ex.B.7 also that the said property was purchased with joint family funds or for the benefit of the joint family. Ex.B.8 is the registration extract of sale deed dated 08.07.1976 in respect of the property covered by items 3 to 5 of plaint-A schedule. The sale deed shows that the property was purchased by Gangaraju and second defendant. There is no mention in said sale deed that the property was purchased for the benefit of the joint family or even that there was joint family.

The evidence of PW.1 is also not helpful to show that joint family had properties or that the funds or nucleus from joint family properties was used for purchase of the property. The plaintiffs must discharge the burden that the joint family had joint properties and that the income from those properties was used for purchase of properties at a later date. In view of the documents produced by the defendants and in absence of any other evidence to show that joint family had properties and that those properties were yielding sufficient income which formed the nucleus for purchase of the properties, the lower Court concluded that the plaintiff failed to establish that the plaint schedule property shown in A and B schedule are joint family properties. The Court noticed that

Items 3 to 5 are not joint family properties, but they are joint properties of Gangaraju and DW.1 (D.2) as per Ex.B.8. The said property was thus partitioned in between Gangaraju and second defendant as it is their joint property. Thus, the lower Court concluded that properties that are available for partition during the life time of first defendant are the properties covered by items 3 to 5 of plaint-A schedule only.

The Court also held that if Ex.B.10-Will is excluded from consideration, the provisions of Section 8 of Hindu Succession Act, come into play. The Class-I heirs include son, daughter, son of a pre-deceased son, widow of the pre-deceased son. First defendant got three daughters who are shown as defendants 4 to 6. First defendant got two sons i.e. second defendant and Gangaraju. The plaintiffs are legal heirs of Gangaraju. The properties covered by Ex.B.10 are thus liable to be partitioned into five equal shares. Plaintiffs are entitled to $1/5^{\text{th}}$ share, whereas defendants 4 to 6 each are entitled for $1/5^{\text{th}}$ share and second defendant is entitled for remaining $1/5^{\text{th}}$ share. In so far as items 3 to 5 of plaint-A schedule properties are concerned, it is liable to be partitioned into two equal shares as they are in the joint names. The plaintiffs are entitled for half share whereas second defendant is entitled to other half share. The issues were thus answered in favour of the plaintiffs and against the defendants in the lower Court.

This Court, on an appreciation of the entire material, finds that the order of the lower Court is correct. No reasons are actually made out to interfere with the order of the lower Court. Hence, the appeal is dismissed. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 29.01.2018
KLP

