

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1023 OF 2016

JUDGMENT:

This Second Appeal is filed, by defendant Nos.1 and 2, under Section 100 of C.P.C., assailing the judgment and decree dated 26.09.2016 passed in A.S.No.368 of 2011 on the file of the Court of IX Additional District Judge, West Godavari at Kovvur, wherein and whereby the judgment and decree dated 29.09.2009 passed in O.S.No.55 of 2008 on the file of the Court of the Junior Civil Judge at Nidadavolu, passing the preliminary decree for partition of the suit schedule property into ten equal shares and allotted seven contiguous shares to the plaintiffs, was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the second appeal, in nutshell, are as follows:

The plaintiffs and defendant Nos.1 to 3 are children of Varigeti China Veerayya and Amarjyothi. The suit schedule property is the ancestral property of plaintiffs and defendants. Item No.1 of the suit schedule property was purchased by the plaintiffs and defendants mother with her own money. Item No.2 of the suit schedule property was purchased by the father of the plaintiffs and defendants. The plaintiffs and defendants have been in joint and constructive possession of the suit schedule property. After the death of the parents, the plaintiffs requested the defendants to partition the suit schedule property. For one reason

or other, the defendants postponing the partition of the suit schedule property. Hence, the suit.

4. Defendant Nos.1 and 2 filed the written statement denying all the averments made in the plaint, while admitting the *inter se* relationship between the parties, *inter alia* contending that they used to attend the toddy tapping work from their childhood and purchased the suit schedule property in the name of their parents. It is further contended that item Nos.2 and 3 of suit schedule property were partitioned between defendant Nos.1 and 2 during the lifetime of their parents. Defendant Nos.1 and 2 have been in possession and enjoyment of an extent of Ac.0.50 cents of land each. Out of love and affection, their mother executed a Will on 02.04.2002 bequeathing the suit schedule property in favour of defendant Nos.1 and 2. In pursuance of the Will, defendant Nos.1 and 2 have discharged the family debts. Hence, the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiffs are entitled for the relief of partition of the plaint schedule property into ten equal shares and put the plaintiffs in possession of seven contiguous shares?
2. To what relief?

6. To substantiate the case, before the trial Court, plaintiff No.3 examined herself as PW.1 and got marked Exs.A.1 to A.4. To demolish the case of the plaintiffs, defendant No.1 examined himself as DW.1. DWs.2 to 5 were examined to prove the factum of previous partition.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court passed the preliminary decree for partition of the suit schedule property into ten equal shares and allotted seven contiguous shares to the plaintiffs.

8. Feeling aggrieved by the judgment and decree of the trial Court, defendant Nos.1 and 2 preferred A.S.No.368 of 2011 on the file of the Court of IX Additional District Judge, West Godavari at Kovvur. The first appellate Court, after reappraising the oral, documentary evidence and other material available on record, arrived at a conclusion that the plaintiffs are entitled for the relief of partition of the suit schedule property, while confirming the judgment and decree of the trial Court, and consequently, dismissed the appeal. Hence, defendant Nos.1 and 2 preferred this appeal.

9. Heard the learned counsel for the appellants and perused the material available on record.

10. The questions of law urged by the learned counsel for the appellants are as follows:

1. Whether the Courts below have properly appreciated the factum of previous partition?
2. Whether the Courts below have considered Ex.B.3-Will in the light of the provisions of Indian Evidence Act? and
3. Whether the findings recorded by the Courts below are perverse?

Point Nos.1 and 2:

11. Point Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

12. The following admitted facts can be culled out from the pleadings and evidence of both parties:

Varigeti Amarjyothi is the wife of China Veerayya. The plaintiffs and third defendant are daughters and defendant Nos.1 and 2 are sons of late China Veerayya and Amarjyothi. Item No.1 of the suit schedule property stands in the name of late Amarjyothi. Item No.2 stands in the name of late China Veerayya. It is the contention of the plaintiffs that late China Veerayya and Amarjyothi purchased the suit schedule property; therefore, they are entitled for share in it along with defendant Nos.1 and 2. It is the case of defendant Nos.1 and 2 that Late China Veerayya and Amarjyothi purchased the suit schedule property with their income.

13. Unless and until a contrary is proved, the properties of the joint family can be treated as joint family properties. The burden of proof lies on defendant Nos.1 and 2 to establish that they purchased the suit schedule property in the name of their parents. Ex.A.3 is the sale deed dated 17.09.1994 stands in the name of late Amarjyothi. Both parties are admitting that the suit schedule property stands in the name of their parents. Except the self served testimony of DW.1, there is no other convincing evidence to establish that they purchased the property in the name of their parents. The oral testimony of DWs.2 to 5 is also no way helpful to defendant Nos.1 and 2 to establish the above said fact. Defendant Nos.1 and 2 have taken a specific plea in the written statement that they have partitioned the suit schedule property long back. There is no mention in the written statement that they have given

something to the plaintiffs at the time of partition of the suit schedule property. Basing on the recitals of Ex.A.3, the Court can safely arrive at a conclusion that the property belongs to Amarjyothi. Defendant Nos.1 and 2 failed to prove the factum of previous partition.

14. It is the case of defendant Nos.1 and 2 that their mother executed Ex.B.3-Will in their favour on 02.04.2002. Defendant Nos.1 and 2 are also placing much reliance on Exs.B.6 and B.7 to establish their title. Exs.B.6 and B.7 are the photostat copies of the title deed and pattadar passbook. Ex.B.8 is the pattadar passbook produced by defendant Nos.1 and 2. The name of the second defendant is not mentioned in Ex.B.8. The recitals of Ex.B.8 negate the contention of defendant Nos.1 and 2 so far as the factum of previous partition is concerned. If really defendant Nos.1 and 2 got the property by virtue of the Will dated 02.04.2002, how their names are mentioned as owners in Exs.B.6 and B.7. It is needless to say that a defendant is entitled to take any number of inconsistent pleas. It is a settled principle of law that the defendant is not entitled to take mutually self destructive pleas. If the recitals of Exs.B.6 and B.7 are taken into consideration, the factum of execution of Will by late Amarjyothi in favour of defendant Nos.1 and 2 is very much doubtful. If the recitals of Ex.B.3 are true and correct, the possibility of issuing pattadar passbooks in the name of defendant Nos.1 and 2 during the lifetime of their mother is somewhat improbable and unbelievable. It is needless to say that a duty is cast on the propounder of the Will to dispel the suspicious circumstances

surrounding the execution of the Will. Defendant Nos.1 and 2 have failed to prove the recitals of Ex.B.3-Will by examining at least one of the attestors; in case death of attestors, at least by examining the persons, who are acquaintance with the handwriting of the attestors. An irresistible conclusion that can be drawn basing on the facts pleaded and proved is that defendant Nos.1 and 2 failed to prove Ex.B.3-Will. Defendant Nos.1 and 2 failed to prove the factum of previous partition as well as Ex.B.3-Will.

Point No.3:

15. The plaintiffs clearly established that the suit schedule property was purchased by their parents. The plaintiffs and defendants, being the children of late Veerayya and Amarjyothi, are equally entitled to the suit schedule property. The Courts below have considered the oral and documentary evidence available on record and arrived at a conclusion that the plaintiffs are entitled for the relief of partition of the suit schedule property. The Courts below have assigned reasons much less cogent and valid reasons to its findings. I am fully endorsing with the findings recorded by the Courts below. Therefore, I am unable to accede to the contention of the learned counsel for the appellants/defendant Nos.1 and 2 that the findings recorded by the Courts below are not based on evidence much less legally admissible evidence and therefore, liable to be set aside.

16. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

"16. ... A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC."

17. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, this Court is of the considered view that there is no question of law much less substantial question of law involved in this appeal. Hence, the appeal is liable to be dismissed.

18. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs.

19. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 16.11.2018
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¹ (2010) 13 SCC 216