

HONOURABLE SRI JUSTICE P. NAVEEN RAO

CIVIL REVISION PETITION No. 5861 of 2017

Date : 15.02.2018

Between :

Boda Vignesh S/o late Hari
17 years, rep by his natural mother
and guardian Boda Sridevi and another.

....Petitioners/defendants

And

Boda Balakrishna S/o late Raju
51 years, occu: Gangman in South
Central Railway, R/o Kakatiya Colony,
Near Church, Mahabubabad village
and mandal, Warangal.

....Respondent/plaintiff



The Court made the following:

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ORAL ORDER:

Heard learned counsel for petitioners' Sri Nadipally Ananda Rao and learned counsel for respondent Sri Namavarapu Rajeshwara Rao. For the sake of convenience, parties are referred to as they are arrayed before the Court below.

2. Plaintiff instituted O.S.No.109 of 2009 on the file of Senior Civil Judge Court at Mahabubabad praying to declare the registered gift settlement deed dated 4.8.2009 executed by the second defendant in favour of first defendant in respect of the suit schedule property as sham, nominal, bogus, fraud and void *ab initio*; grant preliminary decree; appoint advocate commissioner for partition of the suit schedule property as per the preliminary decree and to pass final decree.

3. Plaintiff and late Hari are brothers. Suit schedule property is house property bearing No.2-1-55, Gram Panchayat Mahabubabad with RCC roof and tin sheets with appurtenant land to an extent of 210 square yards. According to plaintiff said property is his ancestral property and be partitioned. According to defendants there were two houses. There was earlier partition and suit schedule property has fallen to the share of late Sri Hari, husband of second defendant and father of first defendant. In the written statement filed by defendants, plea taken was that panchayat was held by elders to resolve internal dispute and there was oral partition and in terms of said oral partition subject property has fallen to their share.

4. Examination of P.Ws 1 to 3 was completed. On behalf of defendants D.Ws 1 and 2 were examined. Third defendant filed evidence affidavit. When matter was coming up for recording of evidence of D.W.3, defendants filed I A No. 17 of 2017 under Order VII Rule 1 read with Section 151 of CPC praying to receive original documents as shown in the petition. According to defendants, evidencing partition, written partition deed was signed by the plaintiff and late Hari in the presence of elders and in terms thereof suit schedule property has fallen to their share. Only recently when defendants were searching their house, this document was traced and therefore prayed trial Court to allow them to mark said document.

5. Plea of defendants was opposed by plaintiff claiming that there was no plea raised earlier with reference to existence of 'Teermanam' signed by plaintiff and late Hari as now contended. A story is now created at the stage of recording of deposition of D.W.3.

6. The trial Court found that there was no averment in the written statement about written 'Teermanam' signed by both parties and on the contrary defendants specifically asserted of an oral 'Teermanam'; that even when cross examination of PW1 was conducted, no suggestion was given. Trial Court observed that only to cover up lacuna in their evidence this document is sought to be introduced. According to trial Court this is nothing but create legal hurdles and prolong the litigation. In other words, trial Court found no *bona fides* in the claim of defendants to permit presentation of document on their behalf at the time of filing of chief examination affidavit of D.W.3 in a suit instituted in the year 2009, therefore dismissed.

7. While reiterating the contentions urged before the trial Court, learned counsel for defendants, by placing reliance on depositions which are now filed, submitted that consistently defendants have been pleading that family dispute was resolved in the presence of elders and in terms of said resolution, suit schedule property has fallen to their share and therefore there is no question of a further partition of very same property. He would submit that defense witnesses who are elders of the community clearly depose of written settlement. Thus, document defendants intend to present is valid and crucial to the issue, the trial Court erred in not marking the said document. According to learned counsel earlier defendants were not aware of the written document in evidence of partition though defendants were asserting all along existence of partition, therefore, it is not a case of introducing a new plea at a belated stage and trial Court erred in not allowing leave sought by the defendants to present and mark the document.

8. Learned counsel for plaintiff submits that as seen from depositions, including deposition of second defendant no where it was stated that there was a written partition deed. All along, vague statement was made about existence of oral settlement of property disputes in the presence of elders of family and only for the first time DW-3 sought to contend existence of written document. According to learned counsel this is invented only to fill gaps in evidence and this application having been made at a belated stage, the trial Court rightly rejected the application and do not call for interference.

9. Basic facts are not in dispute. The Court is not examining merits of rival claims with reference to partition of suit

schedule property in the presence of elders. Only issue requires consideration at this stage is whether any justification is shown by defendants in seeking to present alleged written partition deed at a stage of examination of defense witness no.3.

10. Perusal of the written statement filed by second defendant and her deposition would show that she was only emphasizing on oral partition made in the presence of elders of the family. Deposition of DW2 was recorded on 2.2.2016 and her cross-examination was concluded on 17.10.2016. Chief-examination affidavit of Dw.2, who is elder member of the community, was presented on 18.11.2016. He has also not stated about written document evidencing partition. His cross-examination was completed on 14.12.2016. At this stage also, no effort was made by defendants to present so called written deed of partition, as rightly noticed by the trial Court. Though, first plaintiff was extensively cross examined, no suggestion was made on existence of a written document. Only on 17.1.2017 this application was moved, day on which chief-examination affidavit of DW-3 was presented. In the cross-examination, DW-3 admits that he is illiterate and does not remember names of elders appearing on behalf of plaintiff during so-called deliberations; he does not remember name of scribe who has written partition deed. It is also appropriate to note that chief examination affidavit of D.W.4 was presented on 12.10.2017, but he also does not depose of existence of written partition in the presence of elders of the community. His deposition would only high-light an oral settlement.

11. In the affidavit filed in support of I.A., it is stated that original document was handed over to late Boda Hari and same was misplaced and traced last week when deponent was cleaning

the house. In the light of discussion of various depositions and averments, it is seen that averments in the affidavit filed in support of I.A. are vague and in conflict with earlier stand of defendants. No reasons are forthcoming as to how the document was missing, when it was missing and when it was traced. Further missing of the document is one aspect and not making averments with reference to existence of written document is another issue. As noted above, at no point of time till 17.1.2017 there was an averment/deposition stating existence of a written settlement deed between plaintiff and late Hari evidencing partition of suit schedule property and falling to the share of defendants. Thus, in the absence of earlier pleadings or depositions, I do not see any error in the assessment made by the trial Court in rejecting the plea and dismissing the I.A.

12. The revision fails and accordingly dismissed. It is made clear that discussion on evidence is only for limited purpose of assessing whether trial Court erred in not granting relief to defendants and there is no expression of opinion on merits. Parties are at liberty to rely on evidence on record in support of respective claims. The trial Court shall assess evidence on record uninfluenced by the observations made herein above. All pending miscellaneous petitions stand closed. No costs.

JUSTICE P.NAVEEN RAO

DATE: 15 -02-2018
TVK

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