

HON'BLE SMT. JUSTICE G. ANUPAMA CHAKRAVARTHY

I.A.No.2 of 2009 (CCCA.MP.No.24 of 2009)

In/and

C.C.C.A.No.10 of 2009

JUDGMENT :

I.A.No.2 of 2009 (CCCA.MP.No.24 of 2009) is filed under Order 41 Rule 27 of CPC, praying the Court to receive additional evidence and to pass such other order or orders as deemed fit and proper in the facts and circumstances of the case.

2. For the sake of convenience, the parties will be referred as arrayed in the suit.

3. Heard learned counsel for the appellants and the respondents.

4. The miscellaneous petition was heard along with the main appeal. Initially, two suits were filed i.e. O.S.No.53 of 2005 for partition of the plaint schedule property and to deliver 1/3rd share to the plaintiffs and another suit i.e. O.S.No.116 of 2005 was also filed for partition of the plaint schedule property into three equal shares and allot one such share to the plaintiffs, also for mesne profits and for perpetual injunction. The appellants are defendants

in both the suits. As joint memo was filed before the trial Court to club the suits and record common evidence, and accordingly, the suits were clubbed and common evidence was recorded.

5. The case of the plaintiffs is that one B. Lingamma who is the wife of Balaiah, was blessed with three daughters and three sons, one Yesaiah i.e. the husband of plaintiff in O.S.No.116 of 2005, Shivarajan, who is the father of defendant Nos.2 to 5 and Kashi Vishwanathan/the 1st defendant are three sons, while Kalavathi and Sarojini/8th Defendant and Anasuya are the daughters of Balaiah. It is the case of the plaintiff that the suit schedule property is an ancestral property and the father-in-law of the plaintiff had six houses. Three houses were being given to three daughters and remaining three houses were sold and out of the income of the said sale, a house was purchased in the name of defendant No.8, and further, a house was constructed during the life time of Balaiah, and in the said house, Lingamma and Balaiah lived. After the death of Lingamma, the 8th defendant/Sarojini executed a settlement deed, dated 13.08.2004 in favour of the 1st

defendant/Kashi Vishwanathan and since then, the disputes arose between the parties.

6. It is the case of the defendants that the suit schedule house is the self-acquired property of the 8th defendant and she purchased the property under registered sale deed in the year 1962 with her own income and constructed the house, and as such, she had absolute right over the property and executed gift deed in favour of the 1st defendant on 13.08.2004. Therefore, prayed to dismiss the suit.

7. Basing on the pleadings in both the suits, issues are framed as under :

O.S.No.116 of 2005

1. Whether the suit schedule property is liable to be partitioned into three equal shares as prayed for ?
2. If so, whether the plaintiff is entitled to one such share ?
3. Whether the plaintiff is entitled for mesne profits as prayed for ?
4. Whether the plaintiff is entitled for permanent injunction as prayed for ?
5. To what relief ?

O.S.No.53 of 2005

1. Whether the court fee paid is correct ?
 2. Whether the plaint schedule properties are undivided joint family properties ?
 3. Whether the plaintiffs are entitled to partition of plaint schedule property by metes and bounds ?
 4. To what share each of the party is entitled to ?
 5. To what relief ?
8. On behalf of plaintiff, PWs.1 and 2 were examined and Exs.A-1 to A-6 were marked. On behalf of the defendants, DWs.1 to 4 were examined and Exs.B-1 to B-12 were marked.
9. On hearing both sides and considering the oral and documentary evidence, the trial Court passed preliminary decree in both the suits as follows:
1. That the plaintiff is entitled to $1/3^{\text{rd}}$ share of suit property.
 2. That the defendant No.1 is entitled to $1/3^{\text{rd}}$ share in the suit property.
 3. Further, the defendants 2 to 7 are entitled to $1/3^{\text{rd}}$ share in the suit property.

4. The 1st defendant is restrained from interfering with the peaceful possession and enjoyment of the plaintiff by way of perpetual injunction till the termination of final decree proceedings.
5. That the mesne profits can be ascertained by a separate application.
6. That each party shall bear their own costs.

Being aggrieved by the aforesaid judgment and decree of the trial Court, the present appeal is filed by defendant Nos.1 and 8.

10. It is urged in the grounds of appeal that the judgment passed by the trial Court is perverse, against law and that the trial Court has not appreciated the facts in proper perspective. Accordingly prayed to set aside the decree passed by the trial Court in both the suits.

11. It is urged by the learned counsel for appellants that in a suit for partition, all the members of the family are to be arrayed as parties, but the daughters of the plaintiff, by name, Anasuya and Kalavathi are not made as parties to the suit. Furthermore, Ex.B-6

clearly disclose that the property was purchased by the 8th defendant from one P.Damodar on 30.11.1962 and by that time, she was an employee of Postal/Telegraphic Department. Further, the recitals of Ex.B-6 clearly disclose that money was paid by the 8th defendant to the vendor P.Damodar. It is also contended by the learned counsel for appellants that the gift settlement deed i.e. Ex.B-7 was executed on 13.08.2004 and the suit was filed by the plaintiff on 02.11.2005 and there is no documentary evidence is adduced before the Court to prove that the suit schedule property as an ancestral property. It is also urged by the learned counsel for appellant that the documentary evidence i.e. Ex.B-6 is corroborated with the oral evidence of DW-4, but the trial Court has not properly appreciated the said fact, and therefore, prayed to allow the interlocutory application filed by them for receiving additional evidence to prove the income and earnings of the 8th defendant in order to prove about the purchase of the suit schedule property covered under Ex.B-6 by the appellant.

12. On the other hand, the learned counsel for the respondents contended that there is no valid ground in the appeal, as the trial Court has determined that the property as an ancestral property, and as such, prayed to dismiss the appeal by confirming the judgment and decree of the trial Court.

13. On perusal of the record, it is evident that except the photographs, corresponding negatives and valuation certificate of the suit house, there is no other documentary evidence filed by the plaintiffs to prove that the suit schedule property was an ancestral property. Exs.A-1 to A-6 do not relate to the title of the suit schedule property. In a suit for perpetual injunction, it is for the plaintiff to establish that he is in possession of the property as on the date of filing of the suit. Admittedly, the plaintiffs in the present case sought for the relief of mesne profits, which clearly establishes that the defendants are in possession of the property as on the date of filing of the suit, and as such, the relief was sought by the plaintiffs for mesne profits.

14. Thus, the trial Court has erred in granting the relief of perpetual injunction to the plaintiffs though they are not in possession of the property. The Xerox copy of the voters list i.e. Ex.A-6 cannot prove that the plaintiffs are in possession of the property.

15. In **Kodeboina Raghavendra Kumar v. Kodeboina Radha Mohana Krishna Rao & others**¹, their Lordships have held as under :

“An application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage, when, after appreciating the evidence on record, the Court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause.

In case, the application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being the product of total and complete non-application of mind as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.”

¹ 2018 LawSuit Hyd 509 = 2018 (6) ALT 622

The above proposition squarely applies to the facts and circumstances of the present case.

16. In order to ascertain whether the suit schedule property is the ancestral property of both the parties or of self-acquired property of 8th defendant, it is necessary to receive additional documents. The documents filed along with the interlocutory application are the transfer certificate of the 8th defendant and the telephone message dated 18.01.1958 issued from Senior Superintendent of Post Offices, Hyderabad to the Post Master, Secunderabad. In the facts and circumstances of the case, this Court is of the considered view that there is every necessity to adduce additional evidence in order to prove the nature of the property.

17. Accordingly, the interlocutory application i.e. I.A.No.2 of 2009 (CCCA.MP.No.24 of 2009) is hereby allowed. The judgment and decree in O.S.Nos.116 of 2005 and 53 of 2005, dated 13.10.2008, are hereby set aside and the matter is remanded to the I Additional Chief Judge, City Civil Court, Secunderabad, with a direction to issue notices to both the parties and to record

additional evidence with respect to the documents accompanied with I.A.No.2 of 2009 (CCCA.MP.No.24 of 2009), and to hear the parties and dispose of the suits afresh, within a period of three months from the date of receipt of this order. While deciding the suits, the trial Court shall not be prejudiced with any of the observations made by this Court in this judgment. C.C.C.A.No.10 of 2009 stands disposed of accordingly. No order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

G.ANUPAMA CHAKRAVARTHY, J

Date: 12.10.2022

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