

THE HON'BLE SRI JUSTICE A.VENKATESHWARA REDDY

CITY CIVIL COURT APPEAL NO.135 OF 2002

JUDGMENT:

This City Civil Court Appeal is filed by the unsuccessful defendant No.1 assailing the judgment and decree dated 22.04.2002 in O.S.No.413 of 1995 on the file of the learned V Senior Civil Judge, City Civil Court at Hyderabad.

2. The plaintiff in O.S.No.413 of 1995 has filed the Original Suit for partition of suit schedule A property house bearing No.19-2-105 and 106 admeasuring 1695.50 Sq.yards and B schedule property house bearing No.19-2-103 admeasuring 80 Sq.yards, both situated at Tadban, Miralam Tank Road, Hyderabad with precise boundaries as mentioned in the schedule of property (hereinafter referred as suit schedule A and B properties for the sake of brevity). Learned Judge of the trial Court has decreed the suit of the plaintiff and a preliminary decree was passed for partition of the suit schedule properties into six equal shares, the plaintiff was allotted one such share, holding that if any one of the co-

sharers gets lesser share of property, he is entitled for equalization of his share on par with the other co-shares either by way of compensation in terms of money or by allotting the leftover place marked as A, B, C and D in Ex.A16 and that the parties have to share the compensation amount paid for the land acquired by Municipal Corporation of Hyderabad, received by the plaintiff and defendant No.5 and for other properties, sale proceeds equally along with the suit property. Further, the plaintiff was also entitled for perpetual injunction, as prayed for. Feeling aggrieved by the said judgment and decree, defendant No.1 has filed this appeal suit.

3. During pendency of the appeal suit respondent No.1/plaintiff died, his legal heirs were brought on record as per order in I.A.No.3 of 2022 as respondent Nos.7 and 8 whereas respondent No.6 Bharat Mercantile Co-operative Urban Bank Limited was brought on record as per orders dated 15.09.2005.

Pleadings in the plaint and written statement:

4. The main averments of the plaint are that the plaintiff and defendant Nos.1 to 5 are the real brothers being sons of late Hanumantha Rao and Smt.Subhadra Bai.

Defendant No.1 is the elder brother of plaintiff. Late Hanumantha Rao was the Kartha and Manager of the Hindu Undivided Family and he died intestate on 02.12.1973. During his life time, late Hanumantha Rao was in-charge of the estate of Salarjung and he was a Patwari, he had succeeded ancestral properties, at the time of his death late Hanumantha Rao left the immovable properties consisting of agricultural lands, residential house at Attapur Village and Tadban, Miralm Tank Road, Hyderabad. After his demise, defendant No.1 being the eldest son was managing the properties and affairs as Kartha. Their mother also died on 04.09.1990. After her death, the plaintiff herein has suggested for partition of properties by metes and bounds to avoid disputes. All the brothers, having sold agricultural land at Attapur Village, received the sale consideration and distributed among themselves. The suit schedule property was not divided and the defendant No.1 has been postponing the division under one pretext or the other. The suit schedule property is being used jointly. Some of the defendants have made constructions over the portions of the property and some portions were let out as mulgies and godowns. While so, the defendant No.1 started excavation in

the portion being used jointly and also in the area abutting to Shiva Temple, located within the joint family property. The approximate area of three houses is about 1775 Sq.yards. Whereas plaintiff's residential portion is over an area of 126.50 Sq.yards and 38 Sq.yards of land was effected by the proposed road widening from Aliabad to Zoo Park on the Northern side of the property. Each party is entitled for 295 Sq.yards of property towards his share. Defendant No.1 has already occupied equivalent area, the proposed work is undertaken by defendant No.1 and if he is allowed to continue the excavation work, he would get more share in the suit schedule property than he is entitled, accordingly, the plaintiff prayed for partition and separate possession of his 1/6th share in the suit schedule properties.

5. Defendant No.1 alone has contested the suit by filing written statement. The main averments of the written statement filed by the defendant No.1 are that the suit is not maintainable, the suit schedule properties are not ancestral, they are the self-acquired property of late Hanumantha Rao and there were no such Hindu Undivided Family properties in existence. Defendant No.1 has separated from his father in the

year 1970 as such, this defendant acting as Kartha after the demise of their father does not arise. The area covered by three houses is not 1775 Sq.Yards as claimed by the plaintiff. In-fact in the 1989 during the lifetime of their mother there was an oral partition of suit schedule properties among the plaintiff and defendants at the instance of their mother and each party has taken possession of their respective shares, made application to the Commissioner MCH for mutation of their names with respect to the property that fell to their respective shares and also for assignment of revised municipal number to each of them. The plaintiff is also one of the signatories to the said application and accordingly, mutation was effected. Thereafter defendant Nos.2, 4 and 5 have constructed their respective houses in the portion of the land in Schedule A and B properties. The plaintiff himself assisted defendant No.5 in the construction work on the site allotted to defendant No.5 in the oral partition. Thus, the suit properties were divided orally long back. Since 1970, after separation from his father defendant No.1 is residing in House No.10-2-105 and the said house is not in existence, it has been demolished since it is an old structure. Still there is one room

and bathroom in the old structure and the defendant No.1 has got constructed a new house on the site of the property bearing No.19-2-103, which fell to his share along with vacant space shown in red colour. Thus, the joint family status came to an end in the year 1989 itself hence the question of partition of suit schedule properties again does not arise. Open space along with the old structure is in possession of the defendant for the last more than 25 years as it was allotted to him in the oral partition in the year 1989. The land allotted to this defendant is approximately 252 Sq.yards and it is split up into four pieces in four different places in fragments covered by Municipal No.19-2-103 & 105. The law of equity operates in favour of this defendant. If the plaintiff succeeds in getting 295 Sq.Yards of site this defendant would be still entitled to 40 Sq.Yards of site leaving the property in his possession to the extent of 252 Sq.Yards including the open place shown in red colour in plan. Accordingly, prayed for dismissal of the suit.

Issues, evidence and findings:

6. On the basis of the above pleadings, the following issues were settled:

- (1) Whether the plaintiff is entitled for the relief of partition and separate possession, as prayed for?
- (2) Whether the plaintiff is entitled for perpetual injunction?
- (3) To what relief?

7. During trial, on behalf of plaintiff, he himself got examined as PW1, Exs.A1 to A16 documents are marked, thereafter, on behalf of contesting defendant No.1, he himself got examined DW1 and Exs.B1 to B17 documents are marked.

8. The trial Court has answered issue Nos.1 to 3 in favour of the plaintiff holding that plaintiff is entitled for partition and separate possession of his share and accordingly, a preliminary decree was passed for partition of suit schedule property into six equal shares and allotment of one such share to the plaintiff and each of the defendant Nos.1 to 5.

9. Feeling aggrieved by the said judgment and decree, defendant No.1 has preferred this appeal suit.

10. As stated above, during pendency of this appeal the 6th respondent Bharat Mercantile Co-operative Urban Bank

Limited is impleaded as per the orders dated 15.09.2005 and in view of death of respondent No.1/plaintiff, his legal heirs were brought on record as respondent Nos.7 and 8 as per the orders dated 11.07.2022.

11. Heard learned counsel for the appellant and respondents. Submissions made on either side have received due consideration of this Court.

12. In the light of rival contentions and material available on record, the following points would arise for consideration:

- (i) Whether the plaintiff is entitled for partition and separate possession of his 1/6th share in the suit schedule properties?
- (ii) Whether the plaintiff is able to establish that the suit schedule properties are their ancestral properties and that they remained undivided even after the demise of their father and mother, as alleged?
- (iii) Whether the judgment and decree is sustainable?

13. For the sake of brevity and convenience, it is proposed to answer all these three points together as under:

14. For the sake of convenience, the parties to this appeal are referred as plaintiff and defendants, as arrayed in the Original Suit.

Point Nos.(i) to (iii):

15. The relationship between the parties inter-se as brothers being the sons of Late Hanumantha Rao and late Sundari Bai is not in dispute. Equally it is pleaded by the plaintiff that immediately after the death of their father the agricultural lands situated at Attapur were sold by them. However, after the death of their mother, all the six brothers started living separately without there being any partition of suit schedule properties, they have occupied separate portions in the suit schedule property and in some portions they have also raised new structures but there was no partition among themselves by metes and bounds.

16. It is the specific case of contesting defendant No.1 that during the lifetime of their father in the year 1970 he started living separately and he never acted as Kartha of their joint family at any point of time much less after the death of late Hanumantha Rao in 1973. During the lifetime of their

mother in the year 1989 suit schedule A and B properties i.e. residential houses were divided among the plaintiff and defendants. Accordingly, they have also submitted required applications to the Municipal Commissioner, mutation was also effected and in the said partition defendant No.1 was allotted 252 Sq.yards of land in four blocks in House Nos.19-2-103 and 105. It is further averred in the written statement filed by defendant No.1 that defendant Nos.2, 4 and 5 have also raised structures and the plaintiff has effectively assisted defendant No.5 for construction of the house. In-fact, plaintiff has also raised construction in the portion of land allotted to him. It is specifically pleaded by the defendant No.1 that the extent of land is not 1775 Sq.Yards, and he is only allotted 252 Sq.Yards of land, equally his other brothers were also allotted similar extent of land apart from common area and the plaintiff is not entitled for 295 Sq.yards of land in Schedules A and B properties.

17. In support of his case, during trial, the plaintiff got examined himself as PW1. In his evidence, in chief-examination, PW1 has reiterated the averments of the plaint. PW1 has categorically stated that before filing the suit in the

year 1987-88 some property in House No.19-2-105, 106 and 103 was effected in road widening and after road widening the land remained therein is 1775 Sq.Yards. Exs.A1 and A2 are the photographs with negatives showing the excavation work near the temple in the common area. Ex.A3 is the certified copy of order in I.A.No.739 of 1992 in O.S.No.2949 of 1992 in the suit filed by him against the Telephone Department. Ex.A4 is notice under Section 9(2) of Andhra Pradesh Survey and Boundaries Act in respect of House No.19-2-105 and 106. Ex.A5 is the plan issued by Town Survey Office in respect of House No.19-2-105 and 106 showing Shiva Temple separately. Ex.A6 is the extract of T.S.Register in respect of House No.19-2-105 and 106. Ex.A7 is the blueprint of the plan, filed before MCH by late Hanumantha Rao in the year 1952 in respect of House bearing No.19-2-105 and 106. Whereas, Exs.A8 to A10 are the notices of non-agricultural tax issued on the name of late Hanumantha Rao. Ex.A11 is the representation given by defendant No.1 to the Deputy Commissioner, MCH, Circle-II, Hyderabad. Exs.A12 to A15 are the Electricity bills issued in the name of late Hanumantha Rao, in respect of House No.19-2-105. The witness has further stated that total area of

Schedules A and B properties is 1775 Sq.Yards, out of which he is in possession of 126.5 Sq.Yards only and that he is entitled for 1/6th share and that defendant No.1 is in possession of more than 126.5 Sq.Yards. Ex.A16 is the rough sketch prepared by him showing Schedule A and B properties. In the cross-examination the witness has stated that on 04.08.1976 he gave a notice to the defendant No.1 for partition of the property bearing No.19-2-105 and 106. In his evidence this notice is marked as Ex.B1. After going through the contents of the notice, the witness has admitted that it was issued through an Advocate and there is no reference of House bearing No.19-2-103 in Ex.B.1. At this stage it is pertinent to note that the defendant No.1 has specifically pleaded in his written statement that even during the lifetime of his father, he started living separately from 1970 onwards in the House bearing No.19-2-103. However, PW1 has explained that there is no such house with No.19-2-103 and it was only an open plot.

18. PW1 admitted that in the year 1985 there was road widening in their locality and in that process 38 Sq.Yards of land in his portion was acquired for road widening similarly, 35

Sq.Yards of land from House No.19-2-106 was acquired. He has explained that some open land was found in the portion of House No.19-2-103 and the same was also acquired and the compensation for the land acquired and for the structures was paid on his name and on the name of other defendants separately by way of cheques and the defendant No.1 has not received any cheque and he does not know the reason for the same. He further admitted that after filing the present suit, he demolished the structures of the house in his possession and constructed a double storied building in it. He also stated that defendant No.5 constructed a building in House No.19-2-106 and explained that during 1988-89 defendant Nos.2 to 4 have constructed separate houses.

19. PW1 further stated that after the death of their father, defendant No.1 has constructed a house in open site in House bearing No.19-2-103 and all these houses were constructed before filing of the suit itself and he has not raised any objection at the time of construction. He also fairly admitted that he did not ask any of the defendants for stopping any of the construction and the defendants have separate water connection and electricity connection on their name and

that he has obtained injunction to his portion of the house when the defendant No.1 was trying to raise construction. He also admitted that there is one old dilapidated room in the existing portion shown in red colour in Ex.A16, belonging to defendant No.1 and he denied all other suggestions given to him.

20. On behalf of defendant No.1, he himself got examined as DW1, in his evidence in chief-examination reiterated the averments of his written statement and stated that Ex.A16 is not the correct plan, after the death of his father in the year 1973 his mother started looking after the affairs of the property, in the year 1989 at the instance of his brothers all the brothers started living separately, residing in separate portions and also approached Municipal Corporation, Hyderabad, filed the gift settlement deeds executed by their mother and their properties were individually assessed, Exs.B2 to B7 are the certified copies of the extracts of Assessment Registers on the name of all the brothers. This witness further stated that in the year 1987 there was road widening in their locality and an extent of 50 to 60 Sq.Yards of land was acquired from the plaintiff and MCH has paid compensation of

Rs.26,000/-, the plaintiff himself has received the said compensation and an extent of 40 Sq.Yards was also acquired from the premises bearing No.19-2-106 in the occupation of defendant No.1 and he got Rs.24,000/- as compensation. The said compensation was not distributed or disbursed among other brothers.

21. DW.1 further stated that defendant No.5 made construction of his house in the premises bearing No.19-2-106. Exs.B8 to B13 are the certified copies of building applications, plans and tax receipt. Defendant Nos.2 to 4 have constructed double storied buildings in the premises bearing No.19-2-105, all the brothers got separate water and electricity meters for their respective portions, at that time their mother was alive and the plaintiff himself supervised the construction of house of defendant No.1 in Municipal No.19-2-106. The plaintiff never obstructed when the construction was going on. In the oral partition in the year 1989 he got towards his share an open space of 55 Sq.Yards in the house bearing No.19-2-103, 120 Sq.Yards shown in red colour in Ex.A16 and two rooms and an extent of 38 Sq.Yards in the backside premises and

mulgi to an extent of 21 Sq.Yards and it was notified by MCH in road widening.

22. DW1 further stated that he constructed three shops in the ground floor, residential house with Municipal No.19-2-103 in first floor and second floor, then he shifted from old portion in 19-2-105 to the new house 19-2-103 and the new house was re-assessed. Exs.B.14 to B17 are the original notices issued by MCH on 18.10.1996 on the name of wife of DW1. At present the plaintiff is in occupation of 160 Sq.Yards in the property and during the oral partition the plaintiff was given additional site of 100 Sq.Yards in Sy.No.257, situated at Falaknuma Road in Tadbun.

23. DW1 has stated that when he was about to demolish red colour portion of Ex.A16 the present suit is filed by the plaintiff and after filing the suit itself the plaintiff has constructed two storied RCC house on a site in his occupation. Since all the brothers have divided the land and raised structures in the year 1989-90 itself it is not possible for partition at this stage and nothing is left for partition. In-fact on 21.08.1976 he received Ex.B1 notice from the plaintiff for

partition and gave a reply as in Ex.B18. In the cross-examination the witness has stated that long after the death of their father, they have sold the lands at Attapur and all the properties only belonged to his father and they are not ancestral properties. The agricultural lands were sold by all the brothers along with their mother and there is no document to show that left-over properties of their father are liable for partition among the plaintiff and defendants. None of their brothers raised any objection when their mother has gifted property in their favour.

24. It is admitted by DW1 that the house of defendant No.2 is located adjacent to the temple, whereas his house is separated by a road. He denied the suggestion that the area claimed by him is larger than any other area in the possession of other brothers and also explained that according to him Ex.B18 is only in respect of money and not in respect of immovable property and denied all other suggestions given to him.

25. Thus, the exchange of notices claiming portion of house bearing No.19-2-105 and 106 situated at Tadbun on

04.08.1976 and the reply notice dated 21.08.1976 is not in dispute. It is also not in dispute that the brothers of plaintiff and defendants have divided the suit schedule property, started living separately in the year 1989-90 itself, they have also obtained permission from the Municipality, separate water and electricity connections are obtained on their individual names, even during pendency of the suit the plaintiff has dismantled the old structures and built a new house. As admitted by the plaintiff, he himself has filed a separate suit against the Telephone Department.

26. That apart, there is unequivocal admission on the part of the plaintiff that in the road widening some extent of land of plaintiff and defendant No.5 and other defendants was acquired and the Municipal Corporation has paid compensation to the respective defendants and it was not shared or disbursed among other brothers. It is further stated by defendant No.1 that in the year 1989 their mother has executed gift deeds in respect of suit houses in favour of her sons i.e. the plaintiff and defendants and accordingly, on the strength of the gift deeds mutation was effected in the Municipal records. As per the record received from the trial

Court photocopies of the gift deeds are found but they are not exhibited. Further, there is no dispute by the plaintiff that their mother has executed any such gift deed. Similarly, there is no dispute that the defendant Nos.2, 4 and 5 have constructed separate buildings in the year 1989 and that the plaintiff has actively assisted defendant No.5 for construction of the house. It is also equally an admitted fact that in the road widening plaintiff and defendant No.5 have lost certain portion of the land and they have received compensation from the Municipal Corporation to that extent and it was not disbursed among all other brothers.

27. It is equally an undisputed fact that the 1st defendant has demolished the house bearing No.19-2-103, constructed a new house, since portion of the house allotted to him in the old house bearing No.19-2-105 was in dilapidated condition and even today one room and bathroom are in existence in the old house, now he intends to proceed with construction, started digging pits and raising construction, at this stage the present suit is filed by the plaintiff alleging that the defendant No.1 is having about 295 Sq.yards and each of the brothers is entitled for such an extent. Whereas, the

specific contention of the defendant is that in all he is only having 252 Sq.yards of land and there is no such excess land in his possession as such the plaintiff is not entitled for any excess land. That apart, the nature of the property is not an ancestral property, it is only self-acquired property of their late father, who died intestate and after his demise, with the consent of their mother, in 1989, all the brothers have approached the municipality, mutation/assessment was effected, they are living in their respective portions having separate water and electricity connections.

28. Though the plaintiff has claimed that it is a Hindu undivided joint family property, no proof is fled to that effect. Further, the plaintiff has claimed that the suit property is still a joint family property, but his oral evidence in cross-examination and the contents of Exs.B2 to B7 certified extracts of Assessment Registers and Exs.B8 to B13 certified copies of building applications, plans and tax receipts, clearly show that way back in the year 1989-90 itself there was an understanding for oral partition among the brothers of plaintiff and defendants and he started living separately, also submitted applications to the Municipal Corporation,

Hyderabad for assessment. Consequently, separate assessments were made, they have also obtained permissions from MCH for construction of separate houses and even when there was an acquisition for road widening, the parties were paid compensation separately, plaintiff and defendant No.5 have received compensation to the extent of 33 Sq.yards and 40 Sq.yards respectively, an amount of Rs.26,000/- and Rs.25,000/-. These are all admitted facts by plaintiff as PW1. Thus, there is inconsistency between the pleadings in the plaint and the evidence of PW1.

29. In a suit for partition, claiming ancestral property, the burden is heavy on the plaintiff to prove that the particular property is the ancestral property and that it was in enjoyment of the joint family but in the case on hand the plaintiff has miserably failed to establish the same. That apart in his evidence, in the cross-examination, plaintiff as PW1, has admitted the contents of Ex.B1 notice dated 04.08.1976 wherein he demanded for partition of houses bearing Nos.19-2-105 and 106 only leaving the house bearing No.19-2-103. At this stage the pleadings in the written statement of defendant No.1 gains importance who stated that even during the lifetime

of their father in the year 1970 itself he started living separately in a portion of the house bearing No.19-2-103 and it is only after the death of their father the property left by him was divided among the brothers and Schedule A and B property was divided in the year 1989-90 and during the relevant period itself along with their mother, they have sold their agricultural lands situated at Attapur Village. In this factual situation, since the plaintiff has claimed that the suit schedule property as the ancestral property or it is in their joint possession and that they are only living separately with an understanding, burden is heavy on him to prove the existence of joint family or ancestral property but he failed to establish the same that the Schedule A and B properties were in joint possession of plaintiff and defendants as on the date of filing of the suit and that they were not partitioned or divided among their brothers. Therefore, in my considered opinion, the plaintiff has failed to discharge the initial burden of establishing that Schedule A and B properties, as claimed by him, are their ancestral properties remained undivided as on the date of filing of the suit as such, the plaintiff is not entitled for partition of suit schedule properties again (**Mudigouda Vs.**

Ramchandra¹, Appalaswamy Vs. Surya Narayana Murthy²
and **Srinivas Vs. Narayana³**).

30. On the other hand, the defendant No.1 with the pleadings in his written statement and with the support of documentary evidence particularly Exs.B2 to B13 is able to establish that there was partition among the brothers in or around the year 1989-90 with the consent of their mother during her lifetime and thereafter mutation was also effected in the Municipal records, they have obtained permissions, dismantled the old structures, built new houses and they were assessed separately, there were separate water and electricity connections on the name of plaintiff and defendants in respect of their respective portions either on their names or on the names of their wives. That apart, if really there was no partition, the plaintiff, who has got issued a notice as in Ex.B1 way back in the year 1976, would not have remained silent till the year 1995 i.e. till the date of filing of the suit for partition. During this interregnum period only, plaintiff and defendants along with their mother have sold their agricultural lands

¹ AIR 1969 SC 1076

² AIR 1947 PC 189

³ AIR 1954 SC 279

situated at Attapur, they started living separately in their respective portions and with the consent of their mother, who executed gift deeds, mutation was also effected, separate assessments were made in respect of their respective shares, plaintiff and defendant No.5 have also received compensation from the concerned authorities in respect of portion of their lands which was acquired by the Municipality in road widening and such compensation amount was not disbursed among other brothers. All these circumstances would lead to the one and only conclusion that there was a partition among the brothers of plaintiff and defendants and nothing is left for partition as on the date of filing of the suit. Therefore, in my considered opinion, the learned Judge of the trial Court has erred in concluding that there was no partition of Schedule A and B properties and passing preliminary decree for partition and allotment of 1/6th share to each of the plaintiff and defendants and the same warrants interference by this Court and liable to be set aside.

31. Therefore, for all the reasons stated above, point Nos.(i) to (iii) are answered in favour of appellant/defendant No.1 and against the plaintiff/respondent. The trial Court has

failed to appreciate the oral and documentary evidence including the admissions of the plaintiff as PW1. The plaintiff has failed to establish that Schedule A and B properties were still available for partition as on the date of filing of the suit.

32. In the result, the appeal filed by the defendant No.1 is allowed by setting aside the impugned judgment and decree dated 22.04.2002 in O.S.No.413 of 1995 on the file of the learned V Senior Civil Judge, City Civil Court at Hyderabad, consequently, the suit in O.S.No.413 of 1995 stands dismissed.

However, in the circumstances of the case, there shall be no order as to the costs. Miscellaneous applications, if any pending, shall stand closed.

A.VENKATESWHARA REDDY, J

Dated :09-01-2023
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