

HON'BLE SRI JUSTICE K.C. BHANU

SECOND APPEAL No.334 of 2009

JUDGMENT:

This Second Appeal is directed against the judgment and decree dated 13.10.2008 in A.S. No.72 of 2006 on the file of the III Additional District Judge (FTC), Anantapur, whereunder and whereby the judgment and decree dated 07.09.2006 in O.S. No. 95 of 2003 on the file of the Junior Civil Judge, Rayadurg, were confirmed.

2. The appellant herein is the plaintiff. The respondent herein is the defendant in the suit. The defendant is the father of the plaintiff.

3. The averments of the plaint in brief are as follows:

The plaint schedule properties were the joint family properties of himself, his father, his two brothers viz., Mallikarjuna and Narayana Swamy, who died unmarried, and that of his mother, who died about 10 years prior to the filing of the suit. It is pleaded that, as the defendant had been postponing for partition, the plaintiff filed the suit for partition and other reliefs.

4. In his written statement, the defendant stated that as the disputes arose in the year 1995, he and his other two sons gave Ac.9.77 cents in Sy.Nos.247 and 248 to the plaintiff towards his share, that in proof thereof, partition list dated 31.03.1995 was prepared, that the plaintiff filed the Photostat copy of the partition list dated 31.03.1995 along with the plaint, that the plaintiff sold Ac.5.00 out of Ac.9.77 cents to one Lingamma under a registered sale deed dated 21.08.2000 and delivered possession to her, that the plaintiff had not made one Malleswaramma, the daughter of the defendant, as a party to the suit, that the plaintiff murdered his brother Mallikarujuna and a case in Crime No.15 of 1998 of Kanekal PS was pending against him, that the plaintiff was disqualified to claim for partition, that as the plaintiff tried to

interfere with the defendant's possession, he filed O.S.No.249 of 2001 for permanent injunction and obtained a decree and that as the plaintiff was not in possession of the property neither actual nor constructive, he was not entitled to any relief.

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

1. Whether the suit is bad for non-joinder of necessary parties?
2. Whether the plaintiff is disqualified for claiming the share on the ground that he committed murder of his brother Mallikarjuna?
3. Whether the plaintiff has taken share in partition dated 31.03.1995 and got 9.77 in S.Nos.247 and 248 and sold the same to Lingamma on 21.08.2000?
4. Whether the plaintiff is entitled for partition as prayed for?
5. To what relief?

6. Plaintiff himself was examined as PW.1 but no documents were marked. The defendant himself was examined as DW.1 and got marked Exs.B.1 to B.4

7. The trial Court, after considering the evidence on record, came to the conclusion that all the parties, who were having share in the property, were not added as parties to the suit and that the plaintiff had failed to establish his case and, accordingly, dismissed the suit. On appeal, the said judgment and decree were confirmed holding that the plaintiff was not entitled to have any share in the plaint schedule properties. Aggrieved thereby, this second appeal has been preferred by the plaintiff.

8. Learned Counsel for the appellant-plaintiff contended that the trial Court gave its findings basing on the unmarked partition list dated 31.03.1995 and, as the father of the plaintiff died intestate, the plaintiff is entitled for the said property.

9. On the other hand, learned Counsel for the respondent-defendant contended that the concurrent findings of fact recorded

by both the Courts below need not be interfered with and, hence, there are no grounds to admit the second appeal as there is no substantial question of law involved.

10. Now the point for determination is whether there is any substantial question of law involved in this appeal?

11. In view of amendment to Section 100 of C.P.C., filing of the second appeal is not automatic or routine and there must be a substantial question of law involved in the Second Appeal. The substantial question of law is not defined under Section 100 of C.P.C. but it must mean that it should directly and substantially affect the rights of the parties. In other words, it can be said that the question must be debatable, arguable and not free from doubt. Further it must be shown that the findings of both the Courts below are perverse.

12. The suit was filed for partition of the plaint schedule property on the ground that it was their ancestral property. When the plaintiff demanded for partition, the defendant, who is the father and manager of the family, has been postponing and, therefore, the plaintiff filed the suit. In a suit for partition, all the parties should be added. The plaintiff has, admittedly, not added his younger sister Malleswaramma as a party to the suit. Therefore, she is necessary and proper party in the suit for effective adjudication. With regard to the plea taken by the defendant that the plaintiff was disqualified from claiming for partition on the ground that he committed the murder of his brother, the defendant did not adduce any evidence. Therefore, the trial Court answered the issue against the defendant. Though the defendant admitted that the property liable for partition was the joint family property, he contended that the family partition took place in the year 1995, that Ac.9.77 cents of land in Sy.Nos.247 and 248 was allotted towards plaintiff's share, that

plaintiff sold Ac.5.00 to one Lingamma under a registered sale deed dated 21.08.2000 and that the plaintiff has been in possession and enjoyment of the remaining property. It is specifically mentioned in the sale deed executed by plaintiff in favour of one Lingamma about the partition list dated 31.03.1995. If really no partition had taken place, plaintiff would not have sold Ac.5.00 to third party. The plaintiff even admitted the partition list dated 31.03.1995 and also the entire case of the defendant. So, when partition had taken place between the plaintiff and the defendant, the question of further partition does not arise. Therefore, the contention that the trial Court placing reliance on the unregistered partition list dated 31.03.1995 cannot be accepted as the partition list is not in dispute. Even though the partition list is not registered, it can be looked into for collateral purpose as provided under proviso to Section 49 of the Registration Act. Therefore, the plaintiff miserably failed to establish that the plaint schedule property in existence was the ancestral property and was not divided by metes and bounds. On an earlier occasion, when the defendant had taken a specific plea that part of the property, which fell to the share of the plaintiff, had already been sold, the plaintiff has not filed any material denying the said plea. In the absence of filing any material to substantiate his contention, he is not entitled to the relief sought for. Both the Courts below after proper appreciation of evidence on record rightly dismissed the suit and none of the findings is shown to be perverse or contrary to law so as to call for interference by this Court.

13. Accordingly, the Second Appeal is dismissed at the stage of admission. No costs.

K.C. BHANU,J

Date:02.02.2011
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