

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH  
AT HYDERABAD  
(Special Original Jurisdiction)

WEDNESDAY, THE THIRTY FIRST DAY OF MARCH  
TWO THOUSAND AND TEN

PRESENT:

THE HON'BLE SRI JUSTICE VILAS V.AFZULPURKAR

SECOND APPEAL No.527 of 1993

Between:

Sistla Butchibabu

... APPELLANT/PLAINTIFF

AND

Sistla Atchutaramalakshmi and others

... RESPONDENTS/DEFENDANTS

JUDGMENT:

This appeal is filed by the plaintiff against the dismissal of the plaintiff's suit for possession of his share in the schedule property as claimed in the suit.

2. The facts in brief are as follows:

One Somajayulu was the father of plaintiffs and defendants. He had four sons, defendant No.1, Pendaiah, plaintiff-Butchibabu, deceased Venkata Ramana represented by his legal representatives defendants 2 to 6 and Chitti Babu – defendant No.7. Pentaiah – the first defendant died and survives by his legal representatives defendants 17 to 22. Defendants 8 to 16 are their tenants in the schedule properties.

3. Since this appeal is by plaintiff parties are referred to as they are arrayed in the suit for the sake of convenience.

4. Plaintiff alleged that his father Sri Somayajulu had partitioned the schedule properties in four equal shares among the four sons and prepared a partition list, dated 24-11-1968 marked as Ex.A-1. The father of plaintiff Sri Somayajulu died on 19-09-1970 and first defendant being the eldest son was managing the properties. The plaintiff demanded separate share as per Ex.A-1 and on denial thereafter file the present suit on 12-03-1982.

5. First defendant has contested the suit and all other defendants have adopted the written statement filed by the first defendant. First defendant claimed that her father had left a registered will Ex.B-30 dated 05-07-1990 bequeathing all the suit schedule properties in favour of the first defendant and defendant No.7 only and they are claimed to in possession of the properties as legatee under the said will.

6. Defendant No.1 also claimed that the document relied upon by the plaintiff styled as partition list was brought up not with any intention of action upon. The same is not valid. It was also pleaded that the first defendant was employee of judicial department from 1950-1983 and working at different places in different times, Sri Somayajulu the father of the first defendant, defendant No.7 managed the properties till his death in 1970. First defendant, therefore, claimed that there is no property of the plaintiff and as such, neither the plaintiff nor defendants 2 to 6 have any right in view of the suit schedule properties. It was also alleged that the suit is barred by limitation.

7. On the basis of the aforesaid pleadings of both sides the trial

court framed the following issues:

1. Whether the plaintiff got the schedule properties in a portion towards his share as pleaded by him ?
2. Whether the partition list is admissible in evidence and if so, whether it is vitiated by force and never intended to be acted upon ?
3. Whether the said partition list is binding on 2<sup>nd</sup> defendant and her sons ?
4. Whether the will dated 05-07-1969 by late Somayajulu is true, valid and binding on the plaintiff ?
5. Whether the plaintiff is entitled for possession of the schedule property ?
6. Whether the plaintiff is entitled for possession of the schedule property ?
7. Whether the plaintiff is entitled for any profits and if so, from whom ?
8. To what reliefs ?

8. The evidence on behalf of plaintiff was the nature of examining himself as PW-1 and marking Exs.A-1 to A-24 whereas first defendant examined himself as DW-1 and 7<sup>th</sup> defendant as DW-2 and two other witnesses as DWs.3 and 4 and marked Exs.B-1 to B-93. Through the witness DW-3 Exs.X1 to X3 were also marked.

9. Regarding Ex.A-1 the trial court found that suit properties are self-acquired properties of the father of the plaintiff and he had right to distribute the properties as he deems fit and though Ex.A-1 is not signed by second defendant the same is held to be binding on his legal representatives and issue No.3 is answered in favour of the plaintiff. Issue No.1 and additional issue were answered in favour of the plaintiff.

10. On issue No.4 relating to the will Ex.B-30 the trial Court found that the said will is already held to be a genuine will in O.P.No.100 of 1973.

11. However, it is held that under Ex.A-1 since Mr.Somayajulu had not left any share for himself and distributed all the properties among four sons it was evident that at the time of execution of will under Ex.B-30 he had no right or title or interest in the suit schedule properties. Consequently, the trial court answered issue No.4 by holding that Ex.B-30 will though true is not binding on the plaintiff.

12. On issue No.5 the trial court proceeded to hold that though Ex.A-11 is dated 24-11-1968 and the suit is filed on 12-03-1982 is barred by time as plaintiff failed to prove his possession right from the date of Ex.A-1 at any time. The suit ultimately was dismissed.

13. On appeal filed by the plaintiff, the lower appellate Court framed the only one point for consideration is to whether the property is of late Somayajulu are the self-acquired properties or ancestral properties and proceed to hold on examination of evidence that "Hence, it cannot be conclude that even though the suit property is said to have been allotted to the appellant/plaintiff under Ex.A-1 he was not in actual possession of the suit lands right from the date of Ex.A-1 till the date of filing of the suit. There is no positive evidence in the testimony of PW-1 that he entrusted the property fell to his share to the first defendant/respondent at any time. .... ."

14. The lower appellate Court also found and concurred with the finding of the trial Court that by the time of execution of the will under Ex.B-30 late Somayajulu has no right, title or interest and therefore, though the will is true is not binding on the appellant/plaintiff.

15. So while considering Ex.A-1 partition list the lower appellate

court found that the father of the appellant continued to be in possession of the joint family property till his death and thereafter first defendant has been managing the properties. But there is no evidence of plaintiff entrusting the management of first defendant so far as his share is concerned. The lower appellate court, therefore, recorded a finding as follows:

"I see no reason whatsoever to differ with the findings of the learned District Magistrate on the issues framed. Therefore, I see no reason to set aside the judgment and decree of the lower court."

16. In the present appeal the learned counsel for the appellant had raised following substantial questions of law in paragraph No.10 of the grounds and while admitting the appeal on 02-05-1994 this court has formulated the questions raised in ground No.10 as the substantial questions of law.

"The substantial question of law that arises for consideration is:

- i. Whether in view of the finding of the lower court that Ex.A-1 partition list is true valid and binding which allots specific items to the parties to the deed, reserving management in the father, till his death and the suit is filed on 12-03-1982, while the father died on 19-09-1970 (within 12 years) can be said to be barred by limitation.
- ii. Whether a manager of property can prescribe adverse possession against his sons in the face of the recitals in Ex.A-1.

17. I have heard learned counsel for the appellant Sri.G.Ramgopal and Sri M. Balasubrahmanyam, M.Rammohan, learned counsel appearing for respondents 1 to 6, 16, 17 and 19 to 21.

18. From the facts it is apparent that among all the defendants

only first defendant is contesting and other defendants are sailing with first defendant and all the defendants have a common defence.

19. Learned counsel for the appellant preliminarily contended that both the courts having found Ex.A-1 as true and having found that Ex.B-30 will though genuine does not bind the appellant. As it is the first defendant himself was left with no right on the property from the date of will, ought to have decreed the suit. The learned counsel contends that the dismissal of the suit on the ground of plaintiff being not in possession of the property prior to the suit is completely vitiated, as it is contrary to the scheme under Article 65 of the Limitation Act, 1963. Learned counsel submits that under Ex.A-1 itself it is recorded in paragraph No.2 that though all the four brothers are given separate share they shall deal with their share through the father. He also points out that even according to the first defendant it is the plaintiff's father who was managing the properties till his death on 19-09-1970. Learned counsel, therefore, submits that the suit filed on 12-03-1982 cannot be said to be barred by time.

20. Learned counsel for the respondent on the contrary contends that the plaintiff has not produced any evidence with any act of ownership over his alleged share which he got under Ex.A-1. Further both the counsel have concurrently found that there is no evidence of entrustment of plaintiffs share of properties to any of the other sharers and as such, plaintiff cannot claim that possession of one is possession of all. Learned counsel also realize upon the circumstances that the defendants 1 and 7 have alienated part of the property to third parties some of whom are not impleaded and submits that the judgments under appeal do not

deserves interference.

21. The question that preliminarily falls for consideration is whether the courts below were justified in not setting from the plaintiff limitation of bar when the nature of the suit is substantially seeking separate possession of his share of the properties defaulting on him under Ex.A-1 partition list.

22. It is very significant to notice that in the written statement filed by the first defendant and adopted by other defendants there is no plea of either ouster or adverse possession as against the plaintiff.

23. In the issues framed by the trial Court there was no issue with regard to the suit being barred by limitation. More importantly the very findings of the both the Courts which are referred to above would show that while both the courts acts that Ex.A-1 partition list. Both the courts also held that on the date of execution of will Ex.B-30 the father of the plaintiff had no right, title or interest in the property and the said will is not binding on the plaintiff. Thus, non-suiting of the plaintiff on the plea of limitation only on the ground that plaintiff has no evidence to show possession on the date of suit is the preliminary question that falls for consideration.

24. A reading of the impugned judgments of both the courts below I had an impression that both the courts below were dealing with the suit as if Articles 142 and 143 of the Limitation Act, 1908 are applicable. Consequently, both the courts below have ignored Article 65 and corresponding Article 64 under the Limitation Act, 1963. The distinction between Articles 142 and 144 of the Limitation Act, 1963 and one now obtaining with reference to

Article 65 of the Limitation Act, 1963 is very clear and apparent and in order to defeat the suit on the ground of limitation bar and under Article 65 of the Limitation Act, the defendant must establish that his possession is adverse to that of the plaintiff for over the statutory period of 12 years.

25. The aforesaid clear distinction is repeatedly pointed out by the Hon'ble Supreme Court and this Court in number of decisions. Unfortunately, the same was not kept in view by both the courts below.

26. It would be suffice if we notice the decision of the Supreme Court in *M. Durai v. Muthu and others*<sup>[1]</sup>, wherein it was held as follows:

“By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years proceeding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

The respondent herein, as noticed hereinbefore, have failed to raise any plea of ouster. No finding has been arrived at by the High Court as to from which date they began to possess adversely against the plaintiff or his predecessors-in-interest. Mere non-payment of rents and taxes may be one of the factors for providing adverse possession but cannot be said to be the sole factor. The High Court has not assigned any reason as to how there had been an open ouster by Prafulla Kalita since 1950.

Possession of a property belonging to several co-sharers by one co-sharer, it is trite, shall be deemed that he possesses the property on behalf

of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that the title of the other co-sharers was denied and disputed. No such finding has been arrived at by the High Court."

27. This changes brought under Article 65 of 1963 Limitation Act having not been kept in mind by the Courts below, their conclusions are vitiated and perverse.

28. It is also evident that it is not necessary for plaintiff to prove entrustment of property to one of the co-owners as possession of one is deemed to be possession of the other co-owners as well. At the cost of repetition we may notice that there is no plea of adverse possession or ouster on the part of the defendants. Therefore, there is no reason why the suit of the plaintiff is to be held as barred by limitation.

29. The findings of both the Courts below on the said aspect are clearly perverse and contrary to Article 65 of the Limitation Act, 1963. The substantial question of law, therefore, deserves to be answered in favour of the appellant and the Second Appeal deserves to be allowed.

30. Appeal accordingly is allowed. However, There shall be no order as to costs.

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VILAS V. AFZULPURKAR

March 31, 2010

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THE HON'BLE SRI JUSTICE **VILAS V. AFZULPURKAR**

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[1] (2007) 3 Supreme Court Cases 114