*** THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI**

+ A.S.No.360 OF 2020

% 29.01.2024

Between:

Tallapelli Kamalamma and another — Appellant

Vs.

Tallapelli @ Jannu Ludia Bloosom — Respondent

! Counsel for Revision Petitioner : Muralidhar Reddy Katram

^ Counsel for Respondents : M. Saleem

<GIST:

> HEAD NOTE:

? Cases referred :

1. Second Appeal No.89 of 2005 decided on 16.03.2023
2. (2014) 13 Supreme Court Cases 468
3. (2016) 13 Supreme Court Cases 124
4. AIR 1963 Supreme Court 1526
5. 2019 (6) ALT 71 (SC)
6. (2022) 7 Supreme Court Cases 247

THE HONOURABLE SMT. JUSTICE M.G. PRIYADARSINI

I.A.No.1 of 2023
IN/AND
A.S.No.360 OF 2020

JUDGMENT:

The present appeal is directed against the judgment and decree dated 27.12.2019 in O.S.No.86 of 2009 on the file of learned VII Additional District Judge, Warangal, whereby the suit of the plaintiff for partition of suit schedule "A" to "C" properties was preliminarily decreed.

2. For the sake of convenience, hereinafter, the parties will be referred as per their array before the learned VII Additional District Judge, Warangal.

3. The brief facts of the case, which necessitated the defendants to file the present appeal, are as follows:

a) The plaintiff is the daughter of defendant No.1 and sister of defendant No.2 and they belong to Christian community. The plaintiff filed suit for partition of suit schedule "A" to "C" properties into three equal shares and allot one such share to her with metes and bounds. During the pendency of the suit, defendant No.1 passed away, as such the plaint was amended and there relief was

also amended to the extent of seeking dividing the plaint schedule properties into two shares and to allot one such share to the plaintiff. Late Tallapelli Corelius Samuel, who was the father of the plaintiff and defendant No.2 and husband of defendant No.1, was the original owner of plaint schedule properties and he died intestate leaving behind him the plaintiff and defendant Nos.1 and 2 as his legal heirs to succeed the plaint schedule properties. After the death of Tallapelli Corelius Samuel, the plaintiff and defendants were in joint and constructive possession of plaint schedule properties. Thereafter, some disputes arose between the parties, as such, the plaintiff approached the defendants for partition of plaint schedule properties but the defendants refused for the same. Despite giving issued legal notice on 13.08.2009, the defendants did not come forward for partition.

b) Defendants filed their separate written statements, however, the sum and substance in both the written statements is one and the same. It was contended that Tallapelli Corelius Samuel executed a Will dated 25.05.1977 bequeathing plaint schedule properties in favour of defendant No.2 as such after the death of Tallapelli Corelius Samuel, defendant No.2 became owner and possessor of the suit schedule properties. It is further alleged that Tallapelli Corelius

Samuel allowed the plaintiff to enjoy the property of Ac.1.10 guntas after his demise and later the plaintiff along with the defendants sold away the said land to one Mathyas Reddy and sale proceeds were taken by the plaintiff. It was further contended that defendant No.2 with his hard earnings, constructed house in plaint "A" schedule property for which Municipal Corporation assigned house bearing No.2-6-1554. At the time of marriage of the plaintiff, considerable amounts were given to her by her father, as such the plaintiff is not entitled for any right or share in the plaint schedule properties and thus, prayed to dismiss the suit.

c) During the course of trial, PWs 1 and 2 were examined and EXs.A1 to A11 were marked on behalf of plaintiff and whereas on behalf of defendants, DWs 1 to 4 were examined, however, no documentary evidence was adduced. After considering the rival contentions, oral and documentary evidence, the trial Court decreed the suit preliminarily. Aggrieved by the same, the defendant No.2 has preferred the present appeal.

4. Heard both sides and perused the record including the grounds of appeal.

5. The first and foremost contention of the appellant/defendant

No.2 is that the plaintiff admitted that she was allowed to enjoy agricultural land admeasuring Ac.1.10 guntas after the demise of Tallapelli Corelius Samuel and thereafter the mesne profits and sale consideration were enjoyed by the plaintiff and thus, it indicates that there was an understanding that plaintiff was given her share at the time of marriage. In **Mrs.Tezinha Martins David v. Mr. Miguel Guarda Rosario Martins @ Michael Rosario Martins**[1] the High Court of Bombay at Goa observed as under:

> *"86. The evidence on record shows that the joint family property was purported to be exclusively usurped by the brothers to exclude the sisters. Merely because one of the sisters deposed in favour of the brothers does not mean that the issue of family arrangement or oral partition was duly proved. There is no evidence about providing a sufficient dowry to the daughters of the house. However, even if it is assumed that some dowry was provided to the daughters, that does not mean that the daughters cease to have any right in the family property. The rights of the daughters could not have been extinguished in the manner in Page 39 of 41 16/03/23 207-SA-89-05.DOC which they have been attempted to be extinguished by the brothers, post the father's demise."*

6. Even in the case on hand, the defendant No.2 has not specifically mentioned as to how much dowry was paid at the time of marriage of the plaintiff. It is not the case of the defendant No.2 that an oral partition took place between the parties prior to filing of the

[1] Second Appeal No.89 of 2005 decided on 16.03.2023

suit. Even assuming for the sake of arguments that the dowry given at the time of the marriage of the plaintiff is deemed to be her share in the property, what prompted the defendant No.2 to allow the plaintiff to receive the sale proceeds received by alleged sale of the property admeasuring Ac. 1.10 guntas. If at all the plaintiff was allotted her share in the family properties at the time of her marriage itself, there is no necessity for the defendant No.2 to permit the plaintiff to retain the sale proceeds received by alleged sale of the property admeasuring Ac. 1.10 guntas. However, as seen from the plaint averments and the chief affidavit of the plaintiff as PW1 it is clearly mentioned that out of the sale proceeds of the above said land the house bearing No.2-6-1554 was constructed. No evidence is adduced by the defendant No.2 to establish that the plaintiff was allowed to retain the sale proceeds received by alleged sale of the property. So, the contention of the defendant No.2 that the plaintiff was allowed to retain the received by alleged sale of the property admeasuring Ac. 1.10 guntas is unsustainable.

7. It is further contention of the appellant/defendant No.2 that as per the claim of the plaintiff the suit schedule properties are ancestral properties, as such she along with defendant No.2 have equal right but plaintiff got marked Ex.A10 i.e., certified copy of

plaint in O.S.No.44 of 2011 on the file of learned III Additional District Judge Court, Warangal, wherein a suit for partition claiming ancestral properties was filed and in the said suit the defendant No.2 is shown as plaintiff No.3, who sought for his share, however, the plaintiff did not come forward to implead herself in the said suit. It is pertinent to note that the plaintiff has not stated in any of her statements in the entire suit proceedings that the suit schedule properties are ancestral properties and in fact, she stated that the suit schedule properties are acquired by the father of plaintiff and defendant No.2. The plaintiff in the pleadings has clearly stated that all the properties were self acquired properties of her deceased father. So far as the contention of the defendant No.2 that the plaintiff did not come forward to implead herself in O.S.No.44 of 2011, it is pertinent to note that in a suit for partition all necessary parties must be impleaded, and no effective order can be passed in the absence of such parties. If at all the plaintiff herein is a necessary and proper party, the defendant No.2 i.e., plaintiff No.3 in O.S.No.44 of 2011 being *'dominus litis'*, ought to have made efforts to implead plaintiff herein as one of the parties to the above mentioned suit, more particularly, when the cardinal principle to file a partition suit is to add all the coparceners/interested persons contesting for a

right in the property. Whether the plaintiff herein is having share in the ancestral property or not is a question that can be decided in the said suit but not in this suit. Even otherwise, the defendant No.2 admitted in his written statement at paragraph No.13 as under:

> *"In fact, as contended by the plaintiff all the schedule properties are self acquisition of late Sri T.C. Samuel, who by dint of hard work earned money and purchased and as such to his domain the deceased allowed the defendant No.2 to enjoy the properties left by him."*

Thus, the above contention of the appellant/defendant No.2 that as per the claim of the plaintiff the suit schedule properties are ancestral properties is untenable. As stated above, in the present suit, the plaintiff is seeking partition of the self acquired properties of her deceased father but not seeking partition of ancestral properties.

8. It is the contention of the defendant No.2 that as per the claim of the plaintiff, a part of plaint "A" schedule property was already sold to a third party, as such, the said third party, who is a necessary party, was not made as party to the suit and the suit ought to have been filed for the remaining properties. A perusal of the plaint discloses that father of the plaintiff during his life time

purchased 700 square yards and out of which 60 square yards was lost under road widening in northern side and 60 square yards in the southern side was sold by defendant No.2 and the remaining land was 620 square yards with six rooms. A perusal of suit schedule discloses that plaint 'A' schedule property is nothing but house constructed on the above said remaining 620 square yards. Thus, the plaintiff has shown the house constructed on the remaining 620 square yards of land as plaint 'A' schedule property.

9. The other contention of the appellant is that the plaintiff approached the court with unclean hands and her intention was only to claim properties owned by her brother by taking advantage of unwritten partition, more particularly when the husband of the plaintiff being a lawyer (PW2). It is to be seen that no where in the written statement the defendant No.2 has stated about the oral partition or unwritten partition and in fact, he is pleading the Court to imagine that there was an oral partition between the parties by contending in the grounds of appeal that permitting the plaintiff to retain the sale proceeds of sale of Ac.1.10 guntas indicates that there was an understanding that plaintiff was given her share at the time of marriage. When the defendant No.2 has not specifically pleaded that there was an oral partition, at any stretch of imagination, the

Court cannot arrive to a conclusion that there was an oral partition between the parties prior to the filing of the suit, more particularly in the absence of any evidence on behalf of defendant No.2 to substantiate his contention.

10. The judgment and decree passed by the lower court with regard to the suit schedule properties are the only properties which are mutated on defendant/appellant's name and the other properties sold to third parties which are not been made part of the suit, as such the partial partition claim as matter of right is not sought but only pursued in order to wreck personal retribution against the defendant. Though defendant No.2 contended that the other properties sold to third parties were not made part of the suit, he failed to furnish the details of any of such properties.

11. During the pendency of this appeal, the defendant No.2 filed I.A.No.1 of 2023 under XLI Rule 27 read with Section 151 of the Code of Civil Procedure to receive Will Deed, dated 21.04.2010 as additional document and thereby remand back the matter to trial Court for further evidence. It is alleged in the application that a person informed him that the mother of defendant No.2 i.e., defendant No.1 executed a registered Will Deed in the year 2010 and

that the said person is one of the witness. It is further contended that he obtained certified copy of the said Will Deed from the Sub Registrar Office, Warangal. It is contended by the learned counsel for the defendant No.2 that the registered Will Deed has been executed by the mother of the appellant vide document No.14/2010 dated 21.04.2010 just a year before to her death and in the said will deed it was stated that plaintiff was given her share at the time of her marriage in the year 1971 itself and further certain sum along with gold and other belongings were given during the time of her marriage and she has no claim over intestate properties left by the T.C. Samuel. The learned counsel for the defendant No.2 contended that he is not having knowledge of the said document during the pendency of the appeal and he came to know through the said witness about the said document. It is surprising to note that the suit was filed in the year 2009 and defendant No.1 alleged to have executed Will Deed in the year 2010 and she passed away in the year 2011 i.e., one year after execution of the alleged Will Deed. It is pertinent to note that initially defendant Nos.1 and 2 filed joint written statement on 17.09.2010 and subsequently, the defendant No.2 was ordered by the trial Court to file separate written statement after allowing the petition under Order IX rule 7 of the Code of Civil

Procedure. If at all the defendant No.1 has executed the above said alleged Will Deed, certainly there could have been a mention in the joint written statement filed by defendant Nos.1 and 2 or in the separate statement filed by the defendant No.1, more particularly, when the alleged Will Deed was dated 21.04.2010 i.e., prior to filing of the joint written statement. A perusal of the certified copy of Will Deed, there are no details of the attesting witnesses to the said Will Deed except the signatures. The defendant No.2 did not mention the name of the said witness, who informed the defendant No.2 about the said alleged Will Deed. Further, the plaintiff did not mention in the affidavit as to when he came to know about the alleged Will Deed.

12. In support of his contentions, the learned counsel for the defendant No.2 relied upon a decision in **State of Karantaka and another v. K.C. Subramanya and others**[2], wherein the Apex Court observed that on perusal of order 41 Rule 27 (1)(aa) CPC, it is unambiguously clear that the party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and

[2] (2014) 13 Supreme Court Cases 468

that the evidence could not be produced as it was not within his knowledge. Similarly, the learned counsel for the defendant No.2 further relied upon decisions in **Union of India v. K.V.Lakshman and others**[3], **K. Venkataramaiah v. A. Seetharama Reddy and others**[4], **Sopanrao and another v. Syed Mehmood and others**[5] and **Sanjay Kumar Singh v. State of Jharkhand**[6] in support of his contention that the alleged Will Deed shall be received as additional evidence in this appeal. Absolutely there is no doubt with regard to the principle laid down in the above said decisions. However, on the other hand, the plaintiff filed detailed counter to I.A.No.1 of 2023 and contended that the defendant No.1 filed written statement on 26.10.2010, wherein she admitted that her late husband Tallepalli Cornelius Samuel passed away in the year 1977 intestate and the properties held by him during his lifetime are liable to be partitioned between his successors. It is specifically contended by the plaintiff that the alleged Will Deed is sham and fabricated document as the same does not form part of the written statement filed by defendant No.1 before the trial Court and that the defendant No.2 did not establish that in spite of his due diligence, he failed to produce the alleged Will Deed before the trial Court.

---

[3] (2016) 13 Supreme Court Cases 124
[4] AIR 1963 Supreme Court 1526
[5] 2019 (6) ALT 71 (SC)
[6] (2022) 7 Supreme Court Cases 247

13. One of the contentions raised by the defendant No.2 before the trial Court is that his father executed a Will dated 25.05.1977 bequeathing plaint schedule properties in his favour and he tried to produce the alleged Will Deed before the trial Court at belated stage but the trial Court dismissed the application. Aggrieved by the same, the defendant No.2 approached High Court, wherein the order passed by the trial Court was dismissed. Thus, the Will Deed alleged to have been executed by father of the plaintiff and defendant No.2, was not marked as the defendant No.2 failed to file the said Will Deed within the time. Moreover, in the impugned order, the learned trial Court observed that the defendant No.2 failed to suggest the witnesses examined on behalf of plaintiff about the execution of the alleged Will Deed by father of the plaintiff and defendant No.2. The Trial Court in the impugned order observed that in spite of interim orders passed in I.A.No.1275 of 2009 restraining defendants from alienating the suit schedule property, the defendant No.2 executed Ex.A11 by settling 100 square yards to his wife in the plaint 'B' schedule property and it attracts doctrine of '*lis pendens*'. Thus, the defendant No.2 was not diligent enough in producing the alleged Will Deeds executed by his parents and thereby, the conduct of the defendant No.2 in producing the documents belatedly before the

Court creates any amount of suspicion to believe the contentions raised by the defendant No.2.

14. As discussed above, if at all the alleged Will Deeds were executed by the parents of the defendant No.2, certainly the reference with regard to those Will Deeds would have been made by either of the parties, more particularly, defendant Nos.1 and 2 in their respective written statements. Moreover, by relying on the additional evidence, the appellant/defendant No.2 is requesting the Court to remand back the matter to trial Court for further evidence. It appears that the appellant/defendant No.2 is intending to drag the proceedings unnecessarily. The defendant No.2 failed to establish that in spite of due diligence, he failed to produce the alleged Will Deed executed by his mother and thereby the interlocutory application filed by the appellant herein vide I.A.No.1 of 2023 is liable to be dismissed and accordingly, the same is dismissed.

15. There is no dispute with regard to the relationship between the parties. The defendant No.2 relied upon oral evidence of DWs 1 to 4 and there is no documentary evidence adduced in support of his contentions. On the other hand, the plaintiff got examined herself and her husband as PWs 1 and 2 apart from exhibiting Exs.A1 to

A11. It is contended by the defendant No.2 that the suit schedule properties are ancestral properties and even as per the alleged Will Deed executed by defendant No.1 and relied upon by the defendant No.2, they are self acquired properties of husband of defendant No.1. Even for the sake of arguments, if we consider the alleged Will Deed to be genuine, in the alleged Will Deed it was clearly mentioned that since plaintiff was having a good financial status, she is not entitled for any share in the self acquired properties of her father. Merely because plaintiff is having good financial status, her right to seek share in the self acquired properties of her father cannot be denied. It is surprising to note that defendant No.2 intended to rely upon the two Will Deeds, which were executed by his father and mother.

16. On one hand, as per the Will Deed executed by husband of defendant No.1, defendant No.2 is entitled for plaint schedule properties and on the other hand, as per the Will Deed executed by defendant No.1, the self acquired properties of husband of defendant No.1 devolve upon defendant Nos.1 and 2 and after the death of defendant No.1, her share will devolve upon defendant No.2. Thus, there are two contradictory versions in the evidence, upon which the defendant No.2 intends to rely upon in support of his contentions.

17. Thus, viewed from any angle, this Court is of the considered view that the learned VII Additional District Judge, Warangal has passed the impugned judgment in proper perspective by considering all the relevant aspects and thereby there is no necessity to interfere with it. Hence, the appeal is devoid of any merits and it is liable to be dismissed.

18. In the result, I.A.No.1 of 2023 as well as the appeal is dismissed. There shall be no order as to costs.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

JUSTICE M.G. PRIYADARSINI

Date: 29.01.2024

Note: LR copy to be marked
B/o.AS