
(2008) 09 AP CK 0014

In the Andhra Pradesh High Court

Case No : A.S. No. 2293 of 1988 and A.S.M.P. No. 1521 of 2008

Shabbir Sheriff (died) per L.Rs and Others

APPELLANT

Vs

Pasha Begum and Others

RESPONDENT

Date of Decision : 16-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 5, 151

Citation : (2009) 1 ALD 110 : (2009) 1 ALT 672

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : A. Venkateswara Sarma, for the Appellant; T.S. Anand, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.

Short episode:

1. The appellants herein are defendants 1, 2 and 4 in O.S. No. 212 of 1984 on the file of the Subordinate Judge, Nuzvid. In view of the fact that first appellant died, the legal representatives were brought on record as appellants 4 to 7. Likewise, R-2 and R-3 in the appeal also died and the legal representatives were brought on record.

2. The suit was originally filed as O.S. No. 349 of 1981 on the file of the Subordinate Judge, Vijayawada, which was re-numbered as O.S. No. 212 of 1984 on the file of the Subordinate Judge, Nuzvid. The suit was originally instituted by Pasha Begum praying for the relief of partition and separate possession and the third defendant in the suit Mohammad Shabbir Sheriff was transposed as second plaintiff by virtue of an order made in I.A. No. 294 of 1985, dated 13.11.1985. On the strength of the respective pleadings of the parties, the learned Subordinate Judge, Nuzvid, having settled the issues, recorded the evidence of P.Ws.1 to 4, D.Ws.1 to 4, marked Exs.A-1 to A-7 and Ex.B-1 and ultimately came

to the conclusion that the plaintiffs are entitled to the preliminary decree for partition, except item No. 7 which is not liable for partition.

3. The principal defence, which had been put forward by the contesting defendants, the present appellants, was that the second plaintiff shown as second respondent in the appeal, who is no more, embraced Christianity and, hence, the Muslim law is not applicable and, hence, such party cannot maintain an action for partition. Further inasmuch as he had taken certain amount and had relinquished his rights, if any, in the family and had gone away from the family long long ago, by virtue of abandonment and also ouster he is not entitled to any share whatsoever. The learned Subordinate Judge, Nizvid, on appreciation of evidence available on record, came to the conclusion that there is no acceptable evidence to show that in fact the second plaintiff became a Christian and he continued to embrace or practice Islam only in the light of his subsequent conduct also and further the contesting defendants miserably failed to prove either relinquishment or abandonment or ouster, as the case may be, and ultimately came to the conclusion that the plaintiffs are entitled to the reliefs prayed for as already specified above. It is also stated that the mesne profits enquiry had been further proceeded with in pursuance of the present preliminary decree.

4. Contentions of Sri A. Venkateswara Sarma:

Sri A. Venkateswara Sarma, learned Counsel representing the appellants would maintain that from the evidence available that certain of the parties, inclusive of the second plaintiff, had received their shares by way of receiving certain amounts during the lifetime of the father and this aspect was not properly appreciated by the trial court. The learned Counsel also would maintain that the document dated 05.01.1977 would clearly go to show that these parties received their respective shares. The counsel also would maintain that even as per Ex.A-6, the respondents relinquished their rights and the document executed dated 05.01.1977 was subsequent one and they are complimentary to each other, but however, the trial court had taken the same as contradictory to each other and delivered judgment in favour of the contesting respondents which is contrary to law. The learned Counsel also pointed out how the document dated 05.01.1977 was sent to the Revenue Divisional Officer, for the purpose of impounding and the objections raised and the submissions made in this regard and how erroneous findings had been recorded by the trial court in this context. The learned Counsel also would maintain that the second plaintiff left the family even during the lifetime of his father and became a Christian and such a party, who had abandoned all his rights in the family and left the family once for all embracing a totally different religion, cannot maintain an action for partition claiming to be a Muslim and as though Mahomedan law applies to such party and hence the suit is not maintainable. The learned Counsel made elaborate submissions pointing out certain of the admissions made by the witnesses in general and P.W.1 in particular. The learned Counsel had placed before this Court

a memo filed on behalf of appellants and respondent No. 1 and would maintain that there was partial settlement and this branch representing Mohammad Shabbeer Sheriff alone is not coming forward to amicable settlement. The learned Counsel also pointed out to the contents of the affidavit filed in support of the application in A.S.MP. No. 1521 of 2008 and would maintain that in the facts and circumstances of the case and also in the light of subsequent events, especially, in view of the fact that the second plaintiff, originally the third defendant, was transposed as second plaintiff, these additional issues are to be framed and if necessary the matter to be remanded.

5. Contentions of Sri T.S. Anand:

Sri T.S. Anand, learned Counsel representing the contesting respondents would maintain that it is no doubt true that there is some material to show that this Mohammad Shabbeer Sheriff was with the Christian family for some time. He continued to be a Muslim and he continued to practice only Islam and this fact is well established by the evidence of P.W.4 apart from the evidence of P.W.1. The counsel also had taken this Court through the evidence of P.W.1 and certain portions of the evidence and would maintain that in the light of this clear evidence inasmuch as no acceptable contra evidence had been placed to show that he was baptized and he was became a Christian for all practical purposes and there was conversion of religion and he had pointed out his relinquishment of his rights in the family and in a way he had ousted from the family as such, proper findings had been recorded by the learned Subordinate Judge, Nuzvid, and ultimately a decree was made. The counsel also would maintain that inasmuch as the learned Counsel is not representing those parties, who filed compromise memo before this Court, the counsel made it clear that the counsel was not inclined to make any submissions in relation to the said aspects, but however, the counsel would maintain that inasmuch this branch is not acceptable, their rights may have to be decided in accordance with law. While further elaborating his submissions, the learned Counsel also pointed out to the contents of counter-affidavit filed in this regard opposing A.S.MP. No. 1521 of 2008 and would maintain that the parties were conscious of these questions inclusive of the question of court fee and even after the third defendant was transposed as second plaintiff, no additional written statement had been filed and no specific plea in this regard had been taken even relating to the aspect of conversion into Christian religion. The parties were conscious of the respective stands taken, evidence was adduced and findings had been invited and, hence, the relief prayed for that additional issues are to be framed in this regard just would be a futile exercise and this application had been thought of only to further delay the matter by making a request to have an order of remand, since the contesting parties are enjoying the properties and they do not want any finality to be reached in the pending litigation. The learned Counsel in all fairness had taken this Court through the oral and documentary evidence available on record and would conclude that when acceptable evidence had not been placed relating to conversion into a different religion altogether, the question of non-

maintainability of the suit need not be seriously considered, since such question does not arise at all for consideration in the present appeal. The counsel also placed reliance on certain decisions in this regard.

6. Heard the counsel, perused the oral and documentary evidence available on record and also the findings recorded by the learned Subordinate Judge, Nuzvid.

7. Averments made in the plaint by the first plaintiff:

The averments made in the plaint as amended briefly are as hereunder.

One Shaik Ameer Saheb, father of the plaintiffs and defendants, died intestate in the year 1962 leaving behind his wife late Galib Bibi, two daughters viz., the first plaintiff and the fourth defendant (originally 5th defendant) and four sons namely first defendant, second defendant, third defendant (formerly 4th defendant) and the second plaintiff and he possessed plaint "A" schedule properties except item No. 6. Consequently, the plaintiffs and defendants and late Galib Bibi came into possession of the plaint "A" schedule property, except item No. 6, as tenants in common and inherited the same as per the Mahomedan Law applicable to the Hanifi sect. Galib Bibi died in the year 1975 leaving behind her, her undivided share as well. During the lifetime of Shaik Ameer Saheb, he owned item Nos. 1 to 5 of plaint "A" schedule property. Item No. 6 was purchased out of the income of the said property by the defendants 1 to 3. Subsequent to the death of Shaik Ameer Saheb, first defendant and late Galib Bibi were managing the estate. Thus, the first plaintiff got 1/10th share, 4th defendant got 1/ 10th share and defendants 1 to 3 and the second plaintiff got 2/10th share each in the plaint "A" schedule properties. Since item No. 7 of the plaint schedule property was purchased out of the income and savings of the estate, it can be construed that it was also the property of late Shaik Ameer Saheb.

8. It is also averred that first plaintiff issued a legal notice to the defendants on 06.01.1970 and also to Galib Bibi calling upon them to effect partition of the estate. After receiving the notice on 07.7.1970 the second defendant managed through Moulali, his brother-in-law, to obtain signatures of the first plaintiff on 9.7.1970 on four blank papers with an ulterior motive to create some valuable documents. The husband of first plaintiff sent a report to the police on 14.7.1970 for retrieval of those blank papers to her. The first defendant got issued a reply notice on 23.7.1970 to the first plaintiff's advocate to effect partition of the landed property. On 28.7.1970 the first plaintiff got issued a rejoinder notice which was received and acknowledged by the counsel for the first defendant. Defendants 1,2 and 4 were collecting the rents without showing any accounts, since the defendants did not effect partition of the plaint "A" schedule property. They stopped payment just prior to the issue of the first notice. Defendant No. 4 was managing the affairs of item No. 6 of plaint "A" schedule. It is further averred that D-1 to D-3 purchased item No. 7 of the plaint schedule with the income realized on items 1 to 6 in the name of the second defendant for the

benefit of the family and that even the said item was liable for partition among the sharers.

9. The second plaintiff was originally shown as third defendant and the third defendant was transposed as second plaintiff. Defendants 1, 2 and 4 filed common written statement and defendants 3 and 5 filed separate written statements.

10. Averments made in the written statement of defendants 1, 2 and 4:

Late Shaik Ameer Saheb died in the year 1961, but not in 1962. Late Galib Bibi died on 27.12.1974. Plaint "A" schedule properties were not the properties of late Ameer Saheb. The father late Ameer Saheb did not raise the Lemon garden as now existing and the value of the trees forms major part than the value of the site. Huge amounts were invested for the last 6 or 7 years for planting of Lemon trees by the defendants from their own earnings and not out of the income from the properties held by Ameer Saheb. It is also stated that the first plaintiff had already received an amount of Rs. 15,000/- so far from the defendants and, hence, she was not entitled to claim any further amount. The third defendant (second plaintiff after transposition) left the defendant about 1 1/2 decades ago taking away the properties whatever he was entitled to. D-5 had also received about Rs. 15,000/- from the defendants, who were parties to the written statement, who gave funds for performing the marriages of three daughters of the 5th defendant and thus she was not entitled to anything more. From 1970 till 1976 there was no claim from the defendants 3 and 5. Even the first plaintiff herself was silent from 1960 to 1970 and again from 1970 to 1976 and further from 1976 to the date of filing of the pauper petition i.e., up to 1980. It is also stated that the first plaintiff had received her share fully and filed this suit only to harass these defendants and to knock away whatever that comes by this false litigation. Late Galib Bibi all the while lived with these defendants and the amount which fell to her share was spent in rendering her medical help and other expenses. She had been a cancer patient.

11. The third defendant who was subsequently transposed as second plaintiff filed a separate written statement before transposition and the averments made in the said written statement are just akin to the averments made in the plaint wherein also the second plaintiff, third defendant asserted his rights to have 2/10th share in plaint "A" schedule properties. Hence, the same need not be elaborately repeated again.

12. The fifth defendant filed written statement claiming 1/10th share in the plaint schedule properties. After transposition of third defendant as second plaintiff again defendants 1, 2 and 3, the third defendant being the 4th defendant before transposition filed an additional written statement wherein it was averred as hereunder.

The allegations that defendants 1 to 3 purchased item No. 7 of the plaint schedule with the income realized from item Nos. 1 to 6 in the name of third

defendant for the benefit of the family was totally false. According to them the said item exclusively belongs to the said defendant.

13. Issues settled by the trial court:

- (1) Whether there was partition affected between the plaintiff and defendants 1, 2 and 4 as pleaded by the defendants and received the plaintiff's share?
- (2) Whether the lime garden was developed by the contesting defendants subsequent to the partition as they pleaded?
- (3) Whether the plaintiff is entitled for partition and separate possession?
- (4) To what relief?

14. Evidence available on record:

Witnesses examined For plaintiffs:

P.W.1: Mohammad Shabbeer Shariff P.W.2: Shaik Pasha Begum P.W.3: Syed Hussain P.W.4: Md. Khasim

For defendants:

D.W.1: Md. Shabbir D.W.2: Mazhar Shariff D.W.3: Magiseti Someswara Rao D.W.4: Bandlamudi Joni.

Documents marked For plaintiffs:

Ex. A-1/6.7.1970: True copy of Regd. Notice issued by 1st plaintiff's advocate to defendant. Ex.A-2/23.7.70: Reply issued by 1st defendant to plaintiff No. 1. Ex.A-3/28.7.70: Rejoinder Ex.A-4/25.9.76: Another notice issued by 1st plaintiff to the defendants. Ex.A-5/15.1.69: Notice issued by the 2nd plaintiff Ex.A-6/2.10.76: Regd. Notice issued by Sri K.S. Sankara Rao, Advocate to Sri Syed Hussain, Advocate. Ex.A-7/26.3.76: Registration extract of sale deed in favour of defendants 1 to 3.

For defendants:

Ex.B-1/26.4.1946: Registration extract of sale deed executed by Shaik Mohammad Khasim in favour of Shaik Ameer Saheb.

15. Findings recorded by the trial court:

While answering issue No. 1 the trial court recorded findings commencing from paras 9 to 11 and came to the conclusion that extinguishing of rights in the family properties and the exclusion of the plaintiffs from the family properties had not been established. Further while recording findings on issue No. 2 at para 12 the admissions made by D.W.1 had been referred to and it was observed that the evidence of D.W.1 who also spoke to their taking of loan of Rs. 54,000/- for the purpose of raising Lime garden, that the Lime garden in item No. 1 is as much the joint property and as such the issue is answered in favour of the

plaintiffs and against the defendants. The trial court also while answering issue No. 3 while appreciating the evidence available on record at paras 13, 14, 15, 16 and came to the conclusion that the possession being that of co-owners relating to the family properties, the plea of adverse possession or the other grounds had not been established and the issue was answered in favour of the plaintiffs. While answering issue No. 4 further findings had been recorded at paras 17 and 18 and ultimately a decree was made as already aforesaid.

16. In the light of the respective submissions advanced by the counsel on record, the following points arise for consideration in this appeal.

(1) Whether the findings recorded by the trial court on appreciation of the oral and documentary evidence available on record granting relief of partition in all the items, except item No. 7 of the plaint schedule to be confirmed or to be disturbed in the facts and circumstances of the case?

(2) Whether the findings recorded relating to the plea of conversion into Christian religion of the second plaintiff, relinquishment, abandonment or ouster from the plaint schedule properties to be confirmed or to be disturbed in the facts and circumstances of the case?

(3) Whether the application A.S.M.P. No. 1521 of 2008 to be allowed or liable to be dismissed in the facts and circumstances of the case?

(4) Whether the memo filed on behalf of appellants and respondent Nos. 1, 9 to 13 to be recorded and in the facts and circumstances of the case?

(5) If so, to what relief the parties would be entitled?

17. Point Nos. 1 to 4:

The parties hereinafter, for the purpose of convenience, would be referred as shown in O.S. No. 212 of 1984 on the file of the Subordinate Judge, Nuzvid.

18. As already specified supra since certain parties died, the legal representatives had been brought on record and at present they are prosecuting the present litigation.

19. A.S.M.P. No. 1521 of 2008 is filed praying for framing of additional issues under Order XIV Rule 5 read with Section 151 of the CPC and the said additional issues are as hereunder:

(1) Whether the respondent /plaintiff No. 1 had constructive possession over the suit property?

(2) Whether the court fee paid is proper as required under the Court Fees Act?

(3) Whether the 2nd respondent being converted into Christian and is legal heir or entitled for a share under the Muslim Law?

(4) Whether the suit is maintainable?

20. Certain submissions made in the affidavit filed in support of the application and the same was resisted by filing counter-affidavit in detail. As far as the court fee issue is concerned, the contention advanced is that in the facts and circumstances ad-valorem court fee to be paid and not fixed court fee and, hence, the court fee paid is not sufficient. It is needless to say that normally the issue of court fee is between the court and the party. Even otherwise, after the third defendant transposed as second defendant (sic. plaintiff) and came on record, an additional written statement, no doubt, was filed and this plea was not taken.

21. The averments made in the additional written statement in nut-shell also had been referred to above. As far as the other aspects are concerned i.e., proposed additional issues 1,3 and 4, both the parties were conscious of these questions in controversy relating to the aspect of constructive possession relating to the aspect of conversion into different religion, Christianity, and the legal rights or the legal consequences, if any, which would flow from such conversion and whether the suit for partition would be maintainable or not in the light of the same. The parties being conscious of all these questions, though specific issues as such had not been formulated by the trial court, had gone on trial. It is pertinent to note in relation thereto only it appears apart from the evidence, P.W.1, P.Ws.3 and 4 also had been examined. Hence, this Court is thoroughly satisfied that by virtue of non-framing of these specific issues by the trial court, absolutely no prejudice had been caused to the appellants especially in the light of the fact that the issues which had been answered by the trial court in fact include these issues as well and even otherwise being conscious of these questions in controversy the parties had gone on trial, evidence had been adduced and findings had been invited and, hence, in the light of the peculiar facts and circumstances and also in view of the fact that this appeal itself is of the year 1988, this Court is not inclined to allow this application at this stage and accordingly this application is hereby dismissed.

22. Now, coming to the facts on hand. The respective pleadings of the parties already had been referred to supra. The issues settled, the evidence available on record, the findings recorded by the trial court in brief also had been discussed above. The principal questions in controversy between the parties are that the second plaintiff had left the family once for all having taken away some amount even during the lifetime of the father and in a way he had pointed out or relinquished all his rights, if any, and thus he was ousted from the family properties. Yet another contention was that these aspects are further amply established by the fact that the second plaintiff embraced the Christianity long long ago and left the family once for all and, hence, as a non-Muslim having embraced the religion of Christianity, such party cannot put forth an action for partition under Mahomedan Law.

23. The second plaintiff was examined as P.W.1. This witness deposed about the plaint schedule items and also deposed that he was employed in Railways during

the lifetime of his father and even by the date of examination this witness deposed that he was working as railway employee. His mother and his eldest brother, first defendant, used to managing the properties so long as his mother is alive, as they used to reside in the village and he was away by virtue of employment in Railways and his mother died 14 years ago. This witness also deposed that even after the suit, the first defendant had been managing the properties. The first plaintiff is his younger sister and originally the first plaintiff filed the suit. The plaint allegations are true.

24. It is pertinent to note that this first witness P.W.1 originally was third defendant and on transposition he became second plaintiff. This witness specifically deposed that the plea of the first defendant and other defendants that they paid cash of Rs. 15,000/- for the settlement of plaint schedule properties and she had relinquished her claim. These pleas are not true. The first plaintiff did not execute any relinquishment deed. To his knowledge, cash of Rs. 15,000/- was not paid. This witness also deposed that his share of the property also had not been separated and he was not in separate possession of the plaint schedule property nor any cash was paid to him in view of his share. This witness asserted that all these properties are the family properties and the same is liable for partition. This witness also deposed that the entire plaint schedule properties are in possession and enjoyment of the first defendant.

25. This witness in further chief-examination also deposed that first defendant issued a notice demanding partition of the properties to all the brothers including this witness. The first plaintiff also issued similar notice to all of them for partition. The first defendant gave a reply to the first plaintiff expressing his willingness and readiness to have amicable partition. This witness also deposed that item No. 6 of the schedule properties is a lorry which is worth about Rs. 3.00 lakhs. Originally three Lorries were purchased and they were sold. This witness also deposed about the purchase of tractor and borrowing of Rs. 9,000/- from L.M.B by mortgaging the plaint schedule properties. All the sharers signed the papers in L.M.B. The age of Lime garden is 15 years and it was raised with the income of the joint property.

26. This witness no doubt deposed that he is known as Moses Wilson in R.P.F. records. He represented in R.P.F that his name is Moses Wilson. The said name is a Christian name. But this witness also deposed that he was not baptized as Christian to adopt a name that name. He is a Muslim by religion even now and his service register describes him as Christian.

27. Elaborate submissions were made by the counsel representing the appellants on the strength of these admissions made by P.W.1. This witness also deposed in detail relating to the questions posed on the aspect of his religion being Christianity, but however specific stand had been taken that he continued to embrace Islam. This witness also deposed about the documents which were filed. Several questions posed to him relating to the income and other aspects also had been answered by P.W.1. This witness also deposed that he never issued any

notice demanding partition of the properties. He received Ex.A-1 notice from the first plaintiff through her advocate and he did not give any reply to that notice. This witness specifically deposed that it is not true to say that he was a Christian even by the date of death of the father and that he is not entitled to share in the schedule properties by doctrine of representation.

28. It is pertinent to note that in the chief-examination with permission this witness deposed that his entire family was residing at Mylavaram and he developed intimacy with a Christian lady teacher, Sara Manikya, a widowed Christian, and he did not marry her. She took him to her place Rajahmundry in 1949 and she secured a job in Railways in 1950 for him by describing him as a Christian. This witness also deposed that he stayed with her for six years. He was visiting his family members at Mylavaram. In 1961 he married a Muslim lady. The marriage alliance was secured by his mother and brother. He married the daughter of his "menamama". He got 4 issues through Sara Bi and they are alive. Prior to the suit there was exchange of visits between this witness and his family members. This witness specifically deposed that he was never baptized as a Christian and he was born as Muslim and he continues as Muslim and he was practicing Islam now. Several questions posed to this witness had been answered explaining the facts and circumstances and also several suggestions put to this witness had been specifically denied.

29. The second witness is the first plaintiff who originally instituted the suit for partition and this witness also deposed on the similar lines as that of the evidence of P.W.1 and hence the same need not be dealt in elaboration.

30. P.W.3 deposed that P.W.1 married his sister and this witness was examined for the purpose of showing that the marriage of P.W.1 was celebrated with a Muslim lady and he continued to practise Islam only.

31. The evidence of P.W.4 also is to the same effect.

32. D.W.1 is the first defendant. In the chief-examination D.W.1 deposed that he does not know how much cash was paid to the plaintiff by his father and his mother expired in 1974. The second plaintiff was working in Secunderabad R.P.F. about 10 years ago. This witness no doubt deposed in detail relating to the income from the several items of the family and the other particulars. No doubt, this witness also deposed that these parties are not entitled to their shares since they had left the family; they relinquished their shares by taking some amounts even during the lifetime of the father. D.W.1 was cross-examined at length.

33. It is pertinent to note that this witness admitted during the course of cross-examination that the second plaintiff was not baptized as a Christian as per the procedure of Christianity. But however, several suggestions put to this witness had been specifically denied and specific stand had been taken that the plaintiffs are not entitled to their shares.

34. The second defendant in the suit was examined as D.W.2 and this witness

also deposed on similar lines.

35. The third witness is Magiseti Someswara Rao, a resident of Mylavaram, who deposed about running of an oil mill and previously he used to run a huller rice mill and he knows the parties to the suit. They were also having a huller rice mill. Both the mills were installed at the same time. They were charging Rs. 0-75 ps., for milling a bag of paddy when their mill was run on huller. He was milling 7 to 8 bags of paddy per day on huller. He has no idea as to how many bags of paddy were milled for a day by the defendants. The defendant's rice mill was collapsed in the cyclone and it was not reconstructed since then. In the cross-examination several particulars relating to these aspects had been elicited. The suggestions put to this witness relating to friendship had been denied.

36. D.W.4 deposed that he was working in the rice mill of the second plaintiff at Mylavaram and he had no idea whether the said mill was run on oil first. This witness also deposed about the milling charges and the other aspects.

37. It is needless to say that this evidence of D.Ws.3 and 4 is of only limited views for the purpose of deciding the main questions in controversy. This is the evidence available on record.

38. No doubt, they had relied on Ex.B-1 dated 26.4.1946, registration extract of sale deed executed by Shaik Mohammad Khasim in favour of Shaik Ameer Saheb. The counsel representing the appellants, on the aspect of co-ownership, relinquishment, abandonment, ouster by total exclusion from enjoyment of properties, placed strong reliance on the following decisions and made elaborate submissions.

- (1) Maimoon Bivi and Another Vs. O.A. Khajee Mohideen and Another,
- (2) Velliyottummel Sooppi and Others Vs. Nadukandy Moossa and Others,
- (3) Hassain Bibi and Ors. v. Enayatulla Khan (dead) and Ors. AIR 1977 cal 157
- (4) Aziz Wani v. Director Consolidation, Srinagar and Ors. AIR 1971 J&K 67
- (5) Govind Yadav and Others Vs. Deoki Devi and Others,
- (6) Sk. Aftab Husain and Another Vs. Smt. Tayabba Begam and Another,
- (7) Laxmibai v. Thoreppa AIR 1982 Kar 248
- (8) Nathulal (since deceased) through L.Rs. and Another Vs. Ambaram and Another,
- (9) Chhotelal Babulal and Another Vs. Premlal Girdharilal and Others,
- (10) Mt. Hashihan Vs. Jalaluddin and Others,

39. There cannot be any dispute or quarrel relating to the propositions how a plea of ouster or a plea of adverse possession may have to be established especially in the case of co-sharers or co-owners, as the case may be, in the

context of a partition action. Here is a case where the evidence of P.W.1 is available. No doubt P.W.1 made certain admission that in his service records his religion was shown as Christian, may be, for the purpose of service. There is clear evidence of P.W.1 to the effect that with a Christian widow he lived for some time and he secured a job and subsequent thereto at the instance of the family members, the marriage was arranged with the daughter of his "menamama" and he married a Muslim lady and he continued to embrace the religion of Islam only and he was never baptized and he never converted into Christianity. This is the specific stand taken by P.W.1.

40. It is pertinent to note that D.W.1 in cross-examination also made an admission to the effect that his brother was never baptized and converted into Christianity as per the procedure of the Christianity. In the light of the evidence of P.W.1 coupled with the evidence of P.Ws.3 and 4 and further appreciated the evidence of P.W.2 and certain admissions made by D.W.1 as well, this Court is thoroughly satisfied that the stand taken by the appellants that the plaintiffs are not entitled to the relief of partition by virtue of the fact that second plaintiff embraced the religion of Christianity cannot be sustained. Hence, the findings recorded by the trial court in this regard are hereby confirmed.

41. As far as the plea of ouster is concerned, the evidence available on record is clear and categorical. It is the case of the plaintiffs that no amounts had been paid during the lifetime of the father and they never relinquished their rights in the family properties and during the lifetime of the mother, the mother and the first defendant, the eldest son i.e., eldest brother of the plaintiffs, had been managing the properties. This evidence available on record is just a reasonable and convincing and in the light of the same, unless there is a clear declaration relating to the hostility declaring that the share of the other sharers is being clearly denied, the plea of adverse possession or ouster may not be available in the case of co-owners shares. Unless law specifically prohibits the inheritance to the property, by virtue of conversion of religion such contention advanced needs no serious consideration even otherwise the evidence available on record points otherwise relating to this aspect. In the absence of such evidence the findings recorded by the trial court cannot be found fault and accordingly the same is hereby confirmed.

42. It is no doubt true that certain compromise memos had been placed before this Court. This Court is inclined to record those compromise memos and the parties are at liberty to work out their rights, since on the strength of those compromise memos the appeal as such cannot be disposed of finally. Since at the best, it may be a partial compromise, let the parties work out their remedies at the stage of final decree proceedings in relation to the compromise memos which had been filed before the Court and accordingly the memos are recorded.

43. Certain submissions were made relating to item No. 6. These questions also may be agitated during final decree proceedings. The counsel also are permitted to agitate the question relating to mesne profits.

44. In the light of the findings recorded above, it is needless to say that the appeal is devoid of merit and accordingly the same shall stand dismissed confirming the decree and judgment made by the trial court. Whatever may be the bad weather between the parties, in view of the close relationship between them being the members of the family praying for the relief of partition, let the parties bear their own costs.