

**HON'BLE SRI JUSTICE M. SATYANARAYANA
MURTHY**

APPEAL SUIT No.609 of 1995

JUDGMENT:

The unsuccessful plaintiff in O.S.No.109 of 1987 on the file of Subordinate Court at Tanuku, preferred this appeal against the judgment and decree dated 20th day of January, 1994.

2. During pendency of the appeal, 5th respondent died and his legal representatives were brought on record as respondent Nos. 14 to 18 and 4th respondent, who is already on record, vide orders dated 26.06.2006 in A.S.M.P.No.12602 of 2004.

3. For the sake of convenience, the parties hereinafter called as plaintiff and defendants as arrayed in the Trial Court.

4. The plaintiff filed a suit for partition of 'A' schedule property and allotment of 2/5th share therein, partition of 'B' schedule property and allotment of 3 shares out of four shares, partition of 'C' schedule property and allotment of 3/4th share therein and for past and future profits, alleging that the plaintiff is the son of Badeti Sreerama Murthy born through his first wife and defendant Nos.1 to 3 are the children of Sreerama Murthy born through his second wife. Mother of the plaintiff died during the childhood of

the plaintiff, whereas the mother of the defendant Nos.1 to 3 pre-deceased of their father.

5. Late Sreerama Murthy possessed the schedule properties, who died intestate on 23.05.1985, at Attili, West Godavari District. During the life time of late Sreerama Murthy, the plaintiff and defendants were co-parceners in the Hindu joint family and hence they are entitled to $\frac{1}{3}^{\text{rd}}$ share in the schedule properties. After the death of Sreerama Murthy, the defendant Nos.1 to 3, defendant No.5, who is the mother of the deceased Sreerama Murthy, and the plaintiff succeeded the estate of Sreerama Murthy, as Class-I heirs, as per the rules under the Hindu Succession Act. Thus, each of the heirs of late Sreerama Murthy are entitled to $\frac{1}{5}^{\text{th}}$ share in the share of Sreerama Murthy. Thus, the plaintiff became entitled to $\frac{2}{5}^{\text{th}}$ share in the schedule property.

6. After the death of late Sreerama Murthy, the 4^{th} defendant was looking after the children of late Sreerama Murthy i.e., defendant Nos.1 to 3 as there was no other person to look after them. The respondent No.4 is a close relative and paternal uncle of the plaintiff, who assured the plaintiff that, he would collect rent for house and shop rooms and rent for the tenants while managing the affairs. He also assured that he would discharge the loan due to the Cooperative Society, Attili.

7. Defendant Nos.6 to 9 are the tenants of 'B' schedule property, defendant Nos.10 to 13 are the tenants, who are in possession of 'A' and 'C' schedule property. The tenants are paying maktha at the rate of 25 bags per acre for the agricultural property. The plaintiff and defendant Nos. 1 to 3, represented by 4th defendant, are enjoying rent or maktha jointly. When the plaintiff requested the 4th defendant for rendering account of the income derived from the property and questioned about the failure to discharge the debt due to the Cooperative Society, he did not respond to his request. Thereupon, the plaintiff got issued a notice dated 05.06.1987 calling upon defendant Nos.6 to 13 to disclose about the particulars of the amount paid by them to the 4th defendant and also to 4th respondent for rendering account by him. Having received the said notice, none of them responded and did not comply the legitimate demand of the plaintiff.

8. Defendant Nos.6 to 13, who are in possession of 'A' schedule property in different capacities as tenants are under obligation to pay rent to the plaintiff and defendant Nos.1 to 3 as they are entitled to equal shares. If they did not pay rent for the period prior to the death of plaintiff's father, they are liable to pay atleast due share of the plaintiff out of the amount payable towards rent. As the defendant Nos.1 to 4 did not cooperate for partition of the

schedule property and failed to render the account of amount derived from the schedule property, the plaintiff filed the suit for partition and other reliefs.

9. Defendant Nos.1 to 4 filed written statement contending that late Sreerama Murthy did not possess Item Nos.4 and 5 of the 'A' schedule property but possessed only 1 to 3 of the 'A' schedule and Ac.0.19 cents in R.S.No.176/1 and Ac.0.22 cents in R.S.No.139/1 of Attili by the date of his death. The 'C' schedule property of the plaint, originally belonged to Smt Tummalapalli Sakuntala. Later Sreerama Murthy purchased 'C' schedule property under an agreement of sale from Sakuntala and had been in possession and enjoyment till 03.04.1984 and thereafter he executed agreement of sale in favour of Badeti Ramakrishna and delivered vacant possession of 'C' schedule property to the said Ramakrishna. The said Ramakrishna agreed to obtain registered Sale deed from Sakuntala, the original registered owner of the property since then he is in exclusive possession and enjoyment of 'C' schedule property. Late Sreerama Murthy or his family members have no right or title over the 'C' schedule property.

10. The plaintiff, defendants and their father Sreerama Murthy constituted undivided Hindu Joint Family and hence, they are entitled to 1/5th share in Hindu Joint Family property. Late Sreerama Murthy executed a Will

dated 15.04.1985 under Ex.B.4 bequeathing his share in the schedule property and his wife's property to the defendant Nos.1 to 3. Thereby, the defendants Nos.1 to 3 and 5 became entitled to equal shares in the share of Sreerama Murthy as legatees under the Will.

11. First wife of late Sreerama Murthy died intestate in 1965 leaving behind the plaintiff and Sreerama Murthy i.e., son and husband respectively as her legal heir and she own and possessed gold chain and Arvanki weighed about 20 sovereigns. Second wife of Sreerama Murthy died intestate in 1981 leaving behind, her husband and defendant Nos.1 to 3 as Class-I heirs. She own and possessed Ac.1.50 cents of land at Attili. Out of the said land, the plaintiff is entitled to $1/20^{\text{th}}$ share as one of the heirs of his father.

12. Late Sreerama Murthy indebted to Attili Cooperative Society to a tune of Rs.20,000/- and the same was discharged with the income from the joint family property.

13. The plaintiff is in possession and enjoyment of the western Ac.1.00 of land to first item of the 'A' schedule and second item of 'B' schedule, as per temporary arrangement that took place on the date of obsequies of late Sreerama Murthy. He has been exclusively realizing the profits from those two items and other agricultural land since the date of death of Sreerama Murthy and that the

agricultural land is not in possession of any tenants. However, defendant Nos.1 to 3 paid Rs.275/- by way of Demand Draft for the second item of 'B' schedule and the plaintiff is now realizing the rent at the rate of Rs.200/- from the tenant. Whereas, the 4th defendant collecting rent at the rate of Rs.50/- per month from two shops since the date of death of Sreerama Murthy till end of 1996. The other two shops are vacant from the date of the death of Sreerama Murthy till the end of 1986. The other four shops, except item No.2, are in possession of the tenants. Defendant Nos.6 to 9 are paying rent (maktha) at the rate of Rs.50/- since January, 1987.

14. The 4th defendant incurred Rs.10,000/- to perform obsequies of late Sreerama Murthy and realised crop in December, 1985, March, 1986, March, 1987 and December, 1987 only. But, the crop relating to October, 1986 was completely washed off due to Godavari floods.

4th respondent has no objection for partition of the properties belonging to late Sreerama Murthy including the gold ornaments of his first wife shown in the schedule annexed to the Written Statement and finally prayed to dismiss the suit.

15. The 5th respondent remained *ex parte*.

16. Defendant Nos.6 to 9 filed their Written Statement admitting that 6th defendant is the tenant of western shop

of 3rd item of 'B' schedule property on a monthly rent of Rs.50/- initially and paying rent at Rs.60/- per month from January, 1987 only. The 7th defendant is in possession of 2nd shop on the eastern side on monthly rent of Rs.60/- since 1987. The eastern shop and the 3rd shop from the east are vacant prior to January, 1987. Defendant Nos.8 and 9 are in occupation of the shops and paying rent at Rs.60/- per month to the 4th defendant. Hence, the suit against the defendant Nos.6 to 9 is liable to be dismissed as they already paid the rent for the premises in their occupation. Therefore, they prayed to dismiss the suit.

17. Defendant Nos.10 to 12 filed separate written statements contending that they were not in possession of 'A' schedule property as tenants, thereby the question of payment of maktha at 25 bags per acre to the 4th defendant does not arise. The plaintiff and his maternal grand father used to realize crop in the western Ac.1.00 of land in item No.1 of 'A' schedule property. 10th defendant used to assist them. Thus, the suit against defendant Nos.10 to 12 is liable to be dismissed and they prayed to dismiss the suit.

18. 13th Defendant filed Written Statement contending that the 'C' schedule property was leased out by the father of the plaintiff to him and after his death, the plaintiff and the junior paternal uncle of plaintiff i.e., B.Surya Narayana

is looking after the affairs of the family and used to receive maktha from the 13th defendant and that he never committed any default in payment of maktha for 'C' schedule property. 13th defendant filed A.T.C.No.91/1987 on the file of Tenancy Tribunal and obtained interim injunction against the 4th defendant. The 4th defendant set up his brother Ramakrishna as owner of 'C' schedule property under a forged document of sale obtained from the father of the plaintiff and he got filed O.S.No.347 of 1987 on the file of the Principal District Munsif Magistrate, Tanuku, obtained interim injunction in I.A.No.2366 of 1987 against the 13th defendant. While the matter is pending, the 4th defendant with the help of his henchmen cut and carried away the first crop high handedly.

19. Badeti Ramakrishna, the junior paternal uncle of the plaintiff, is a necessary party to the suit as he claimed to have been in possession of 'C' schedule property under an agreement of sale dated 03.04.1984 alleged to have been executed by the father of the plaintiff and that 13th defendant has no objection for partition of the suit schedule property and finally prayed to dismiss the suit against him.

20. Based on the above pleadings, the trial court framed the following issues:

- 1) ***Whether the plaintiff is entitled for partition ?***
- 2) ***Whether the plaintiff is entitled for possession ?***
- 3) ***Whether the plaintiff is entitled for any past profits, if so***

to what amounts ?

4) *To what relief ?*

On 01.12.1992, the trial court framed the following additional issues:

- 1) *Whether D.13 is a tenant in respect of suit 'C' schedule property ?***
- 2) *Whether the Will dated 15.04.1985 executed by late Sreerama Murthy in favour of D.1 to 3 conveying his share in joint family property and his wives is not true and genuine and binding on all parties ?***
- 3) *Whether the 1st wife of late Sreerama Murthy died intestate and that she got Ac.5.00 of land at Duvva and it is to be partitioned among all the parties ?***
- 4) *Whether the deceased 1st wife of late Sreerama Murthy had got 20 sovereigns for gold ornaments and it is liable to be partitioned ?***
- 5) *Whether the 2nd wife of Sreerama Murthy died intestate in the year 1981 possessing Ac.1.00 cents at Attili and that the plaintiff is entitled to 1/20th share in the said property ?***
- 6) *Whether the late Sreerama Murth, the father of plaintiff and D.1 to 3, indebted an amount of Rs.20,000/- to Attili Cooperative Society and the same is to be discharged out of the schedule properties ?***
- 7) *To what relief ?***

21. During the course of trial, on behalf of Plaintiff, PW.1 was examined, Exs.A.1 to 10 were marked. On behalf of defendants, Dws.1 to 14 were examined, Exs.B.1 to B.9 and Ex.C.1 were marked.

22. Upon hearing the argument of both the counsel, considering oral and documentary evidence on record, the trial Court decreed the suit partly as follows:

“The claim for partition of item Nos.4 and 5 of ‘A’ schedule and ‘C’ schedule property was negatived and the property of an extent of Ac.2.46 cents belonging to the first wife of the deceased Sreerama Murthy was divided into 10 equal shares and allotted 6 shares to defendant Nos.1 to 3 and 5 and four shares to the plaintiff and Ac.1.46 cents belonging to the second wife of Sreerama Murthy was divided into 20 equal shares and allotted 18 shares to defendant Nos.1 to 3 and one share to Plaintiff and defendant No.5 and fixed past profits at the rate of Rs.300/- per month while dismissing the suit against defendant No.13 holding that the plaintiff is entitled for future profits and advised him to file a separate application for determination of future profits”.

23. (a) Dissatisfied with the share of property allotted in the partition, the plaintiff being unsuccessful before the trial Court, preferred this appeal on various ground mainly contending that item Nos.4 and 5 of ‘A’ schedule and ‘C’ schedule properties are also part of joint family property as the ‘C’ schedule property was purchased by Sreerama Murthy with the joint family nucleus. But, the trial Court did not consider the nature of acquisition of ‘C’ schedule property and committed an error in dismissing the suit in respect of ‘C’ schedule property.

(b) The finding of the trial Court on Issue No.1 is factually incorrect and legally untenable and the trial Court ought to have held that ‘C’ schedule property was purchased by late Sreerama Murthy under an agreement

of sale and delivered possession of the same by Sakuntala to the plaintiff's father and therefore, it is a part of joint family property and Ex.B.4 is only an agreement of sale agreeing to sell the property and the evidence of DWs.1, 5, 6 and 7 is not believable regarding the sale of property to Sri B.Ramakrishna under Ex.B.4, in view of the orders in Land Ceiling Proceedings.

(c) The trial Court overlooked the inconsistencies in the evidence of DWs.1, 2, 3 and 6 with regard to the execution of the Will allegedly executed by Sreerama Murthy in favour of defendant Nos.1 to 3, so as to disinherit the plaintiff and defendant No.5 and it is a strong circumstance to disbelieve the Will and thereby the Trial Court committed an error in dismissing the part of the claim, if the evidence on record is appreciated properly, the trial Court would have granted decree in favour of plaintiff, as claimed by plaintiff, and finally prayed to allow the appeal, passing a preliminary decree in favour of the plaintiff as claimed in the plaint.

24 . Learned counsel for appellant/plaintiff Sri K.V.Satyanarayana, during arguments would contend that the Will allegedly executed by Sri Sreerama Murthy, father of the plaintiff and defendant Nos.1 to 3, is not proved as required under Section 68 of Evidence Act and the evidence of defendants did not dispel the suspicious circumstances surrounded in the execution of the Will

under Ex.B.4 infavour of defendants. If the Will is disbelieved, the plaintiff is entitled to equal share in the share of late Sreerama Murthy, but the trial Court on erroneous appreciation of evidence on record, did not consider the circumstances under which the Will was brought into existence and committed an error in believing Ex.B.4 Will, disinheriting the plaintiff to claim any share in the share of his father Sreerama Murthy.

25. He further contended that 'C' schedule property was purchased under possessory agreement of sale by late Sreerama Murthy and that the sale of 'C' schedule property to Sri Ramakrishna under Ex.B.5 dated 03.04.1984 is not proved and that the order under Land Ceiling Proceeding was attained finality, and it is sufficient to conclude that 'C' schedule property is a property of the joint family and is liable for partition, but the trial Court did not look into the order under Land Ceiling and committed an error in dismissing the claim with regard to 'C' schedule property. He is further contended that the Will and the agreement of sale under Exs.B.4 and B.5 respectively were taken back before the trial Court by the defendants after substituting certified copies of those documents with an undertaking to produce the same as and when directed. But, those documents were not produced before this Court, despite a direction was given by this Court, and violated the undertaking given by the defendants, thereby an adverse inference has to be drawn that the Will under

Ex.B.4 and agreement of sale under Ex.B.5 are not genuine documents and with those documents are excluded from consideration, the plaintiff is entitled to the reliefs as claimed in the plaint, and he prayed to pass preliminary decree as claimed.

26 . *Per contra*, the counsel for the respondents/defendants Sri A.Veerawamy would contend that the evidence on record established that except item Nos.4 and 5 of 'A' schedule property and 'C' schedule property, the other items of the schedule are joint family properties and whereas the 'C' schedule property is the separate property purchased under an agreement of sale by Sreerama Murthy without the aid of joint family nucleus and thereafter he sold the same to Sri Ramakrishna under Ex.B.5 and thereby the plaintiff is not entitled to claim any share in the 'C' schedule property. Even assuming for a moment that the 'C' schedule property is a part of joint family property, the title was not transferred to the father of plaintiff and that Smt Sakuntala, the vendor of late Sreerama Murthy, continued as registered owner and in such a case, the plaintiff and defendants are entitled to claim relief of specific performance against Smt Sakuntala and the same cannot be partitioned. Therefore, there is no error in the finding recorded by the trial Court with regard to 'C' schedule property. As far as Item Nos.4 and 5 of 'A' schedule

property are concerned, the plaintiff did not prove the existence of those items. The father of the plaintiff and defendant Nos.1 to 3 executed Ex.B.4 Will, disinheriting the plaintiff to claim any share. No doubt, it is the duty of the propounder of the Will Ex.B.4 to prove the same as required under Section 68 of the Evidence Act, dispel the suspicious circumstances, if any, in execution of Ex.B.4. But, in the present case except disinheriting the plaintiff and 5th defendant to claim any share in the share of Sreerama Murthy, no other circumstances were brought on record in the entire cross-examination of the witnesses. Therefore, in the absence of any evidence adduced by the plaintiff pointing out the suspicious circumstances in execution of Ex.B.4, the finding of the trial Court cannot be said to be violation and therefore, the trial Court rightly believed the execution of Ex.B.4 as the execution was proved under Section 68 of the Indian Evidence Act and explained the reason for execution of Ex.B.4 in favour of defendant Nos.1 to 3, disinheriting the plaintiff to claim any right in the share of his father late Sreerama Murthy. The findings of the Trial Court are based on probabilities of the case and astounded by legal reasoning. Hence, the finding of the trial Court with regard to execution of Ex.B.4 needs no interference even after re-appraisal of the evidence.

27. Finally it is contended that non production of

Exs.B.4 and B.5 Will and agreement of sale respectively taken by defendants No.4 being the guardian of defendant Nos.1 to 3 from the trial Court by substituting certified copies of those documents, no adverse inference can be drawn, since, the plaintiff did not request this Court to compare the disputed signatures on Exs.B.4 and 5 with the admitted signatures of Sreerama Murthy and apart from that no other material is brought on record as additional evidence to disprove the execution of Exs.B.4 and B.5. Therefore, mere failure to produce the above said documents would not enure any benefit to the plaintiff and apart from that the certified copies are available on record and they explained the reason for non-production of those documents by filing an affidavit. Hence, no adverse inference can be drawn to grant a decree in favour of plaintiff, as claimed, and accordingly, prayed this Court to dismiss the appeal by confirming the decree and judgment of the trial Court in O.S.No.109 of 1987.

28. Considering the rival contentions after perusing the grounds of appeal, decree and judgment under challenge and the oral and documentary evidence available on record, the points that arise for consideration are as follows:

- 1) Whether the 'C' schedule property is the joint family property, if so, the plaintiff is entitled to claim any share in the 'C' schedule property ?
- 2) Whether late Sreerama Murthy executed Ex.B.4

Will in a sound and disposing state of mind bequeathing 'C' schedule property in favour of defendant Nos.1 to 3 disinterring the plaintiff and D.5, who are the Class I heirs of the deceased Sreerama Murthy?

- 3) Whether Item Nos. 4 and 5 of 'A' schedule property are the joint family property and whether the plaintiff is entitled to claim share in the 'C' schedule property and Item Nos. 4 and 5 of 'A' schedule property and share in the share of his father Sreerama Murthy?

29. **Point No.1:** According to plaintiff, the 'C' schedule property was purchased by his father under possessory agreement of sale with the aid of joint family nucleus and continued in possession and enjoyment till his death and thereafter the property is being maintained by defendant No.4 on behalf of plaintiff and defendant Nos.1 to 3.

Whereas, the defendants, while disputing the said contention, raised a specific plea that late Sreerama Murthy purchased 'C' schedule property under agreement of sale, but later it was sold to Sri B.Ramakrishna under agreement of sale Ex.B.5. Therefore, the same cannot be treated as part of undivided Hindu joint family property. Consequently, the plaintiff is not entitled to claim any share in 'C' schedule property.

30. The trial Court believed Ex.B.5 and held that 'C' schedule property was already sold to Sri B.Ramakrishna under Ex.B.5 and consequently, the 'C' schedule property is not liable for partition. The said finding is now

challenged in this appeal on the ground that Ex.B.5 is forged document and not enforceable under law and the original of Ex.B.5 was taken by defendant No.4 by filing a petition under Order 39 Rule 9 of the Code of Civil Procedure by furnishing an undertaking that the original agreement of sale will be produced as and when required, but the same is not produced, despite a direction given by this Court, and hence, an adverse inference has to be drawn that Ex.B.5 is not a genuine document.

31. Undisputedly, late Sreerama Murthy purchased 'C' schedule property from Smt Sakuntala, original registered owner, under an agreement of sale and the same was not produced before the trial Court or atleast before this Court to find out whether the agreement of sale was possessory agreement or not. Irrespective of delivery of possession, Sri Sreerama Murthy only a purchaser of the property under agreement of sale and such agreement of sale would not create any interest in the immovable property, in view of Section 54 of Transfer of Property Act, which reads as follows:

“A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property”.

32. It is clear from the above provision that any contract for sale would not create any right in the immovable property. Unless a regular conveyance is executed in

favour of Sreerama Murthy by Smt Sakuntala, vendor of 'C' schedule property, title is not deemed to have been transferred. Thus, the title is with Smt Sakuntala, vendor of 'C' schedule property. However, the said Sreerama Murthy allegedly executed Ex.B.5 agreement of sale in favour of Sri Ramakrishna, who is not a party to the present suit. But, recording any finding in his absence about the genuineness and legality of Ex.B.5 would amount to violation of principles of natural justice since he had not given an opportunity to prove that Ex.B.5 is genuine and enforceable document under law. Hence, no findings needs be given about the genuineness of Ex.B.5 in the absence of the evidence of said Ramakrishna. Though defendant No.4 raised a specific plea in the Written Statement that Ex.B.4 is the agreement of sale executed by Sreerama Murthy in favour of Sri B.Ramakrishna, no steps have been taken by the plaintiff to implead the said Ramakrishna, the purchaser of 'C' schedule property under Ex.B.5, as he is a necessary party and his rights will be defeated, if any finding is given against them based on Ex.B.5.

33. Even assuming for a moment that Ex.B.5 is not genuine one, at best the said Sreerama Murthy or the legal heirs of the deceased Sreerama Murthy are entitled to sue for specific performance of agreement of sale being the legal heirs of Sreerama Murthy, as per Section 15 of the Specific Relief Act. However, it is evident from the

record that no title is conveyed either in favour of Sreerama Murthy or in favour of Ramakrishna, who is not a party to the suit, by executing any registered conveyance for 'C' schedule property. Unless a registered conveyance is executed, no title would pass either to Sreerama Murthy or to Ramakrishna and admittedly no such conveyance was executed by Sakuntala, the vendor of Sreerama Murthy. Hence, the plaintiff is not entitled to seek partition of 'C' schedule property for the reason that the title to 'C' schedule property was not conveyed to Sreerama Murthy by his vendor Smt Sakuntala, as admitted by both the parties.

On this ground alone, the plaintiff is not liable to claim any share in the 'C' schedule property, but the trial Court did not advert to legal consequences of execution of agreement of sale by Smt Sakuntala in favour of Sreerama Murthy, not produced before this Court, or execution of Ex.B.5 by Sreerama Murthy in favour of Ramakrishna keeping in view Section 54 of Transfer of Property Act, Section 15 of Specific Relief Act and the provisions of Indian Registration Act. Hence, I hold that the plaintiff is not entitled to claim partition of 'C' schedule property and he is entitled to sue the vendor of Sreerama Murthy for specific performance of agreement of sale in respect of 'C' schedule property as the plaintiff stepped into the shoes of his father Sreerama Murthy and the right to sue is devolved upon him. Non-production of the

original of Exs.B.4 and B.5 by the defendants is of no consequence in view of the circumstances stated above.

Accordingly, the Point is answered in favour of the defendants.

34. **Point No.2**: The plaintiff claimed that his father Sreerama Murthy died intestate and thereby he is entitled to claim equal share along with D.1 to D.3 and D.5 being the Clause-I legal heirs under Hindu Succession Act. Whereas, defendant Nos.1 to 3 contended that late Sreerama Murthy executed Ex.B.4 Will in sound and disposing state of mind bequeathing his share in the joint family property in favour of defendant Nos.1 to 3 only. The plaintiff did not file any rejoinder disputing the alleged execution of Ex.B.4. However, it is the duty of propounder of the Will to prove due execution of Ex.B.4 strictly adhered to special rules of evidence as contained in Section 68 of Indian Evidence Act to admit the document in evidence to claim share of late Sreerama Murthy as legatee under the Will Ex.B.4, though no rejoinder is filed disputing the Will by the Plaintiff.

35. In a decision reported in ***Smt. Indu Bala Bose and others Vs. Manindra Chandra Bose and another***^[1], the Apex Court ruled as follows:

“The mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances

surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Even where circumstances give raise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that it also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances even succeed in the case.”

36. In another judgment of this Court reported in ***Malapati Suryamba and others Vs. Venigalla Koteswaramma and others***^[2], this Court held that:

“It is the duty of the propounder of the will to dispel the suspicious circumstances surrounding the will. Mere proof of will as required U/s. 68 of Indian Evidence Act is not sufficient to succeed on the basis of will”.

Thus in view of the settled principles laid down by the Apex Court and other Courts, it is obligatory on the part of the defendants, who set up Ex.B.4 Will, to establish that it was duly executed by Sreerama Murthy in sound and disposing state of mind, dispelling all suspicious circumstances.

37. To substantiate the contentions of the defendants,

the defendant No.4 was examined as DW.1, the guardian of defendant Nos.1 to 3 and brother of second wife of Sreerama Murthy, who is closely related to both plaintiff and defendants. In his examination in chief, he asserted that Sreerama Murthy executed last testament, which is marked as Ex.B.4 bequeathing his share in favour of defendant Nos.1 to 3. In the cross-examination, he admitted that there was no reference about the debts of Sreerama Murthy in the Will and he was a drunkard. As Sreerama Murthy was chronic alcoholic, he was treated by Dr.Narasimham @ Bucchibabu at the time of execution of Ex.B.4 Will. Thus, the facts elicited in the cross examination established that the deceased Sreerama Murthy was addicted to vices, more particularly, drinking alcohol and not maintained good health by the date of execution of Ex.B.4. But, these facts elicited would not establish that the mental condition of deceased Sreerama Murthy as on the date of Ex.B.4. It is further elicited in the fourth page of cross-examination of DW.1 that PW.1 did not send word informing about the sickness of his brother earlier and he did not care to come when his father fell ill and DW.1 did not send any word to the plaintiff though DW.1 came to know about the execution of the Will. This fact elicited in the cross-examination would not assist the plaintiff to disprove the execution of Ex.B.4. DW.1 further testified that Ex.B.4 was scribed at the house of his brother and attested by witnesses DWs.2 and 3 in his

presence. The facts elicited in the cross-examination would help to the defendants to prove execution of the Will but not helpful to disprove the same.

38. DWs.2 and 3 attestors of Ex.B.4, whose testimony is consistent that Ex.B.4 was scribed by T.Narayana Rao and the contents of Ex.B.4 were read over to testator i.e., Sreerama Murthy and then Sreerama Murthy signed on Ex.B.4 and after signing on Ex.A.4 by Sreerama Murthy, defendant Nos.2 and 3 signed on it as attestors. The evidence of DW.2 is specific that he has seen the executant signing on Ex.B.4 and thereafter the attestors signed on it. In the cross-examination DW.2 admitted that he was called by late Sreerama Murthy, the testator, through his brother Sri Suribabu and the other attestor was also called through his brother Sri Suribabu. A draft was prepared and Ex.B.4 was prepared later and it was read over and explained to the testator about the order of signing by the executants, attestors, time and place of execution and condition of the testator at the time of Ex.B.4. In the entire cross-examination of DWs.2 and 3, nothing was elicited to prove that the deceased Sreerama Murthy was not in fit state of mind to execute Ex.B.4, but mere admission of DWs.1 to 3 that Sreerama Murthy was a drunkard or chronic Alcoholic, is of no use unless it is elicited that by the time of execution of Ex.B.4 he was in drunken state and he is not in a position to distinguish the things. But, no suggestion was put to DWs.1 to 3 that the

mental condition of the deceased Sreerama Murthy at the time of execution of Ex.B.4 was not fit. Therefore, the facts whatever elicited in the cross-examination of DWs.1 to 3 are of no use. On the other hand, no suspicious circumstances surrounding the execution of Ex.B.4 are pointed out in the cross examination by putting any suggestion. In the absence of pointing out any suspicious circumstances in execution of Ex.B.4 in the cross-examination or by filing a rejoinder by the plaintiff, mere raising a contention that there are suspicious circumstances is of no use and it would not serve any purpose.

39. The defendants also examined the document writer Sri T.Narayana Rao, scribe of Ex.B.4, as DW.6, and according to his testimony, he scribed Ex.B.4 and thereafter he read over and explained the contents to the testator and after the testator signing on the document, attestors signed and thereafter he signed on it. By the time he went to the place of execution, the attestors were already present. In the cross-examination, the plaintiff has attempted to disprove the execution of Ex.B.4 by late Sreerama Murthy and tried to elicit the pen used for signing on Ex.B.4 by the testator, attestors and scribe, but there is a minor discrepancy about the pen used for signing on Ex.B.4, but it is inconsequential for the reason that no one can remember with which pen the executant

and attestors signed in normal course of events. Therefore, basing on human impossibility by taking advantage of the inconsistency about the pen used for signing the Will cannot be disbelieved, such discrepancy can be ignored and even if the evidence with regard to use of pen is accurate, much credence cannot be given to such testimony since remembrance of minute details is human impossibility unless the witness has got photographic memory. Therefore, the facts whatever elicited in the cross-examination of DW.6 regarding use of pen for signing on Ex.B.4 are inconsequential on the strength of those facts the execution of Ex.B.4 cannot be disbelieved.

40. As per Section 68 of Indian Evidence Act, the Will is a compulsorily attestable document and it should be proved by examining atleast one of the attesting witnesses. Here the defendants examined both the attestors and scribe and discharged their initial onus of proof. The plaintiff though himself examined as PW.1, except stating that his father Sreerama Murthy died intestate, did not dispute Ex.B.4 Will specifically. However, in the cross-examination of DW.6, a suggestion was put to him that after the death of Sreerama Murthy, Ex.B.4 was brought into existence and similar suggestion was not put to defendant Nos.2 and 3, who are the attestors of the document. Therefore, in the absence of pointing out any suspicious circumstances, the defendant

Nos.1 to 3 need not be called upon to dispel any of the suspicious circumstances.

41. Before the trial Court, the counsel for plaintiff appears to have been pointed out suspicious circumstances during the course of argument, but the trial court disbelieved those circumstances and assigned its own reasons, which are as follows:

- 1) No provision is made about the other properties.
- 2) How the testator got the properties is not mentioned.
- 3) Agreement of sale in favour of B. Ramakrishna is not mentioned.
- 4) Loans are also not mentioned; and
- 5) Pendency of Land Ceiling Proceedings is not mentioned.

42. Undoubtedly, the points referred in para No.21 of the Judgment of the trial Court, as pointed out by the counsel for plaintiff before the trial Court, are relevant to decide the validity and genuineness of the Will. However, no opportunity is provided to the defendants to explain those circumstances or to dispel those suspicious circumstances in their evidence. If anything is elicited about those suspicious circumstances in the cross-examination of DWs.1 to 3 and 6, they can be considered by the Court. However, the trial Court assigned its own reasons in para No.23 and believed due execution of

Ex.B.4. Admittedly, no provision is made for discharge of debt and the plaintiff was totally disinherited the share of Sreerama Murthy and no provision is made for Defendant No.5, the mother of the deceased Sreerama Murthy, so also about Ex.B.5. At this stage, it is pertinent to note that defendant Nos.1 to 3 are the minor sons, aged less than 10 years, by the date of death of Sreerama Murthy. Normally, a father is affectionate towards minor children, who lost their mother, and whereas the plaintiff is a major by the date of death of Sreerama Murthy and that his son i.e., defendant No.1 is suffering from Polio, as admitted by PW.1 in his cross-examination in para No.4. Naturally, the father being responsible will show interest on the crippled person, who is suffering from Polio and bequeathed his share in favour of his disabled son along with D.2 and D.3, who are the daughters, whose marriages have to be performed. With a view to make sufficient arrangements for performing their marriages, Sreerama Murthy executed a Will bequeathing the properties under Ex.B.4 to the defendant Nos.1 to 3. Admittedly, there is enmity between plaintiff and deceased Sreerama Murthy prior to his death. In the normal course of events when father is enmical towards him, bequeathing the property in his favour by executing a Will does not arise. Therefore, execution of Ex.B.4 by Sreerama Murthy bequeathing the property under Ex.B.4 in favour of defendant Nos.1 to 3 is probable to natural conduct in view of the circumstances

stated above. In any view of the matter, it is evident that PW.1 was not totally disinherited but made him to disinherit any share in the share of Sreerama Murthy being a member of co-parcenary. Therefore, it is not a suspicious circumstance, which is not required to be dispelled by the defendants. Failure to make a provision for discharge of the debt and mention the source or nature of the property etc., as referred in the earlier paragraphs pointed out before the trial Court, is of no avail to disbelieve the execution of Ex.B.4.

43. In normal course of events, a document can be proved by different modes under the provisions of Indian Evidence Act. In ***State Delhi Administration Vs Pali Ram***^[3], the Hon'ble Apex Court laid down certain modes of proof basing on the provisions contained in the Evidence Act. According to Second mode of proof, as per the judgment of the Apex Court, a document can be proved by examining any person, who are acquainted with the signatures. Here, DWs.2, 3 and 6 were examined, who witnessed the execution of the document by late Sreerama Murthy and their presence is highly probable at the time of execution of Ex.B.4 for the reason that they are very close to Sreerama Murthy and called through his brother Sri Suribabu. In the entire cross-examination, no suggestion was put to them that they were not present at the time of Ex.B.4 and that the

Sreerama Murthy was not in fit state of mind to execute Ex.B.4. Therefore, I find no suspicious circumstances to disbelieve the execution of Ex.B.4 even after re-appraisal of the entire evidence on record. Hence, I find that the trial Court rightly applied the law laid down by the Apex Court and other Courts to the present facts of the case and recorded a finding that Ex.B.4 is proved by the defendants and on the other hand, the plaintiff did not disprove the execution of Ex.B.4 by adducing any independent evidence or by eliciting anything in the cross examination of DWs.1 to 3 and 6. Hence, I find no legal infirmity warranting interference of this Court in the finding recorded by the trial Court.

44. The counsel for the plaintiff made strenuous efforts to convince this Court about non-production of Ex.B.4 after substituting the same by certified copies, despite the direction of this Court for production of document, would render the claim of the defendants based on Ex.B.4 is worthless. Admittedly, the defendants produced the original Will marked as Ex.B.4 before the trial Court. However, by filing a petition under Order 13 Rule 9 CPC, they took back Ex.B.4 substituting a certified copy of the document giving an undertaking to produce the same, as and when directed by this Court. In view of the undertaking, this Court issued a direction to the defendants to produce the document before this Court. However, the same was not produced and explained

reasons for non-production of document by filing an affidavit. Admittedly, the plaintiff's counsel did not make any request before this Court to exercise the power conferred under Section 73 of the Evidence Act to compare the disputed signatures with that of admitted signatures of late Sreerama Murthy, the executant of Ex.B.4. In the absence of such request, non-production of original Ex.B.4, Will, is not fatal. However, in view of the violation of undertaking, the Court may initiate proceedings under Contempt of Court on the application of plaintiff or *suo motto*. But, in view of the explanation offered by the defendants, I find that it is not proper to initiate contempt proceedings *suo motto*. Therefore, non-production of Ex.B.4 (original Will) is of inconsequential and no adverse inference shall be drawn in the absence of any specific request made before this Court by the plaintiff to compare the disputed signatures on Ex.B.4 with the admitted signatures of late Sreerama Murthy or to refer the document to expert under Order 26 Rule 10 (a) of CPC. The learned counsel for plaintiff contended that if any decree is passed in favour of defendants in the absence of original document, it amounts to playing fraud on the Court and an adverse inference has to be drawn by placing reliance on a judgment reported in ***T.S. Murugesam Pillai V. M.D. Gnana Sambandha Pandara Sannadhi and others***^[4], wherein the Privy Council held as follows:

“A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Court the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is ; an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition.

Where the question was whether certain debts contracted by defendants’ predecessors in office were contracted for necessary purposes so as to bind the defendants and the defendants failed to bring into court the account books which would have been of great help in deciding the question, the failure of defendants to produce them justified an inference adverse to the defendants”.

45. In any view of the matter, the best assistance of the Justice, scrutiny of those documents and Ex.B.4 in this matter directly throw light on the rights of the plaintiff, but the situation in the present case is totally different from the facts of the above case for the reason that the certified copy of Ex.B.4 is substituted and it is not the case that the document is required to be sent to an expert for comparison or required to compare by this Court. Hence, non production of Ex.B.4 is of no consequence to decide the rights of the parties to this /is much less in the absence of any request for referring the disputed signatures to the expert or to compare the disputed signatures with that of admitted signatures of late Sreerama Murthy by this Court while exercising the power conferred under Section 73 of

the Evidence Act.

46. Learned counsel for the plaintiff further placed reliance in a judgment reported in ***S.P.Chengalvaraya Naidu v. Jagannath and others***^[5], wherein the Apex Court held that a litigant, who approaches the Court, is bound to produce all the documents executed by him, which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side, then he would be guilty of playing fraud on the Court as well as on the opposite party.

47. Viewed from any angle, the plaintiff proved Ex.B.4 as required under Section 68 of Evidence Act and no suspicious circumstances were pointed out in the cross-examination of Dws.1 to 3 and 6 affording an opportunity to explain or dispel those suspicious circumstances and even otherwise the suspicious circumstances pointed out before the Trial Court were considered by the Trial Court and rightly concluded that Ex.B.4 is genuine and executed by late Sreerama Murthy and the finding of the trial Court is totally in accordance with law and hence, the point is answered in favour of the defendant Nos.1 to 3 and against the plaintiff.

48. **POINT No.3:** One of the contentions of the defendants is that Item Nos.4 and 5 of 'A' schedule property are the separate properties of first and second wife of late Sreerama Murthy. But, whereas the plaintiff

claimed that those two items are also part of joint family properties. The Trial Court framed specific issues i.e., issues 3 and 5 and held that Ac.2.46 cents is the separate property of first wife of late Sreerama Murthy and similarly Ac.1.46 cents is the property of second wife of late Sreerama Murthy. This finding is not specifically challenged in the grounds of appeal. However, during arguments, it is contended by the learned counsel for plaintiff/appellant that the finding of the Trial Court on Issue Nos.3 and 5 are erroneous.

49. As seen from the material available on record, the first wife of late Sreerama Murthy died intestate possessing Ac.5.00 of land at Duvva. In the cross-examination of DW.1, he made a categorical admission that the first wife of Sreerama Murthy i.e., Satyavathi died intestate leaving Ac.0.50 cents in S.No.623/1 and Ac.1.96 cents in R.S.No.623/2. DW.1 in his cross-examination further admitted that he gave Ac.2.46 cents to his daughter, who is the first wife of late Sreerama Murthy. He further admitted in para No.3 that his son-in-law did not ask for any account or partition of Ac.2.46 cents of land given by him to his daughter. On the strength of evidence of DW.1, the trial Court rightly concluded that Ac.2.46 cents belonged to the first wife of late Sreerama Murthy and similarly, Ac.1.46 cents belonged to second wife of Sreerama Murthy basing on the admission of witnesses

before the trial court. These facts were not specifically disputed by raising any specific ground in the grounds of appeal except questioning those findings. In any view of the matter, the unchallenged findings of the trial Court in the grounds of appeal need not be disturbed in view of the scope of the present Appeal.

50. The trial Court decreed the suit in part granting preliminary decree for partition of Item Nos.1 to 3 of 'A' and 'B' schedule property. The trial Court after elaborate consideration of evidence of the witnesses, rightly decreed the suit and the finding of the trial Court does not call for any interference by this Court. Hence, the point is answered in favour of the defendants and against the plaintiff.

51. In view of the findings on Point Nos.1 to 3, I find no grounds to interfere with the well-reasoned judgment of the trial court.

52. In the result, the appeal is dismissed confirming the decree and judgment passed in O.S.No.109 of 1987 on the file of Subordinate Judge, Tanuku, West Godavari District.

M. SATYANARAYANA MURTHY,
J

Date: 30 -01-2015.

eha

**HON'BLE SRI JUSTICE M. SATYANARAYANA
MURTHY**

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APPEAL SUIT No.609 of 1995

Dt. 30-01-2015

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[\[1\]](#) AIR 1982 Supreme Court 133

[\[2\]](#) 2010(1) ALT 228

[\[3\]](#) AIR 1979 SC 14

[\[4\]](#) AIR 1997 Privy Council 6

[\[5\]](#) (1994) 1 SCC 1