

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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A.S.No. 497 OF 1997, CROSS-OBJECTIONS (SR). No. 42457 OF 1997

AND

A.S.No. 3460 OF 2004

COMMON JUDGMENT:

The 14th defendant in O.S.No. 70 of 1985 on the file of the Court of Subordinate Judge, Narasapur (for short, 'the trial Court'), filed A.S.No. 497 of 1997 challenging the decree and judgment dated 28-10-1996, whereby and whereunder preliminary decree was passed for partition of A schedule property into 8 equal shares; to allot 1/8th share to the plaintiff and deliver possession of the same together with profits while negating partition of other schedules. The plaintiff filed Cross-Objections (SR). No. 42457 of 1997 challenging dismissal of the plaintiff's claim for partition of B and D schedules; rendition of accounts for the years from 1982 to 1985 and profits for the year 1985 onwards. The 14th defendant also preferred A.S.No. 3460 of 2004 challenging the decree and decretal order dated 17-08-2004 passed by the trial Court in I.A.No. 329 of 2000 in I.A.No. 452 of 1997 in O.S.No. 70 of 1985, whereunder share of the plaintiff and defendant Nos. 2 to 12 is modified as 1/7th instead of 1/8th on account of death of the 1st defendant.

2. For convenience of reference, the ranks given to the parties in O.S.No. 70 of 1985 before the trial Court will be adopted throughout this common judgment.

3. The plaintiff, the 2nd defendant and late Sankuratri Ramachandra Rao are brothers and sons of the 1st defendant and late Sankuratri Veeramma. Sankuratri Ramachandra Rao since died, his legal-heirs, defendant Nos. 3 and 4, are made as parties to the suit. Defendant Nos. 10 to 12 and late Smt. Uppalapati Venkataratnam are daughters of the 1st defendant and Veeramma. Uppalapati Venkataratnam died leaving behind her sons, defendant Nos. 5 to 8, and daughter, defendant No. 9, to succeed her

property. Veeramma died intestate on 03-05-1980 leaving behind the plaintiff and the defendants as the nearest legal-heirs to succeed her estate. A to D schedule properties are properties of late Veeramma left by her at the time of her death. The 1st defendant, his three sons and four daughters became entitled to claim 1/8th share each in A to D schedule properties. Since late Ramachandra Rao is pre-deceased to Veeramma, his sons *i.e.* defendant Nos. 3 and 4 succeeded his estate. Uppalapati Venkataratnam died subsequent to the death of Veeramma, consequently defendant Nos. 5 to 9 succeeded her estate.

The plaintiff and the defendants are in joint possession and enjoyment of A to D schedule properties. Defendant Nos. 1 and 2, for the benefit of all the co-owners or joint owners, used to manage schedule property after the death of Veeramma. The plaintiff demanded defendant Nos. 1 and 2 for partition of schedule property by metes and bounds and to deliver his due share but defendant Nos. 1 and 2 did not cooperate for partition. Defendant Nos. 1 to 11 admitted about 1/8th share of the plaintiff in criminal proceedings in M.P.No. 1093 of 1985 in P.R.C.No. 5 of 1980 on the file of the Court of I Additional Judicial I Class Magistrate, Narsapur, in connection with Crime No. 29 of 1980 of Achanta Police Station which was later registered as Sessions Case No. 63 of 1980 on the file of the Court of Sessions Judge, Eluru, as Veeramma died under suspicious circumstances. Thus, defendant Nos. 1 and 2, who are managing schedule property on behalf of other co-owners, are deemed to be the trustees and liable to render true and correct account of income from schedule property. Despite demands made by the plaintiff for partition and for rendition of account before elders, the defendants did not co-operate for such partition. Therefore, the plaintiff filed the suit for partition and for other reliefs.

4. The 1st defendant filed written statement contending that his wife Veeramma was murdered by Uthammarao, son of the plaintiff, on 03-05-

1980. Uthammarao was arrested by police on 04-05-1980 and cash of Rs.60/- was recovered from his possession. On information of Uthammarao leading to discovery, one gold kasulaperu, bangles, jigini golusu, ring, kumkuma bharinelu, one rupee coins and some other coins were recovered from a garden and cash of Rs.6,850/- was also recovered from a place covered by coconut leaves in the cattle shed of Uthammarao. The Station House Officer, Achanta Police Station, registered a case in Crime No. 29 of 1980 and later filed charge sheet which was registered as S.C.No. 63 of 1980. After full-fledged trial, Uthammarao was found guilty and he was sentenced to undergo imprisonment for 6 years while acquitting the other accused in the said case. Uthammarao carried the matter in Criminal Appeal No. 1159 of 1980 before this Court against the judgment dated 08-12-1980 in S.C.No. 63 of 1980. However, this Court reduced the sentence of imprisonment to 18 months from 6 years. Suppressing all these facts, the plaintiff filed the suit.

Veeramma executed will dated 27-01-1980 in sound disposing state of mind bequeathing all her immovable property to the 1st defendant and, therefore, he is entitled to entire estate of Veeramma, being the husband, as legatee under the will dated 27-01-1980, took possession of the property and enjoying the same in his own right paying land revenue and other taxes to the concerned department. As the 1st defendant became too old and unable to cultivate the land, he leased out the land including plaint A schedule to his grandson Venkatanarayana *i.e.* the 14th defendant, son of the 2nd defendant, for a period of 20 years with effect from 01-04-1985 under registered lease deed dated 01-04-1985. In view of the lease, the 14th defendant is cultivating the land as a tenant. Subsequently, the 1st defendant executed gift deed dated 06-04-1985 reserving life interest by himself and transferred the property to the vested remainder holder Venkatanarayana.

The deceased Veeramma did not bequeath her property either to the

plaintiff or defendant Nos. 2 to 12 and, therefore, they are not entitled to any share in the property. Since there is no provision in the will dated 27-01-1980 executed by Veeramma in respect of movable properties, the 1st defendant himself, defendant Nos. 2 to 5 and 7 to 12 filed an application in M.P.No. 1093 of 1985 in S.C.No. 63 of 1980 for return of movable property of late Veeramma. The plaintiff was also impleaded as respondent No. 2 in M.P.No. 1093 of 1985 who filed counter with false and untenable allegations in the said petition. Therefore, the plaintiff is not entitled to claim any share either in A schedule or C schedule in view of testamentary disposition by Veeramma. Consequently, question of rendering true and correct account of income from A schedule property by the 1st defendant does not arise.

Late Veeramma did not possess any movables described in plaint B schedule but she only possessed the subject matter of property in M.P.No. 1093 of 1985. However, the parties to the suit are entitled to 1/8th share each in movables of Veeramma described in C schedule and the same were divided accordingly.

The 1st defendant deposited an amount of Rs.28,000/- on 19-03-1979, which is income from his lands, in Kalpa Taruvu deposit for 63 months in his name and in the name of his wife Veeramma payable to either or survivor. The maturity value of the deposit is Rs.45,347.55 ps. Late Veeramma has no right in the said amount and the name of Veeramma was added by the 1st defendant to facilitate withdrawal as per usual practice in bank deposits. The 1st defendant withdrew an amount of Rs.45,000/- on 05-10-1984 from Andhra Bank, Siddantam Branch. The 1st defendant again deposited an amount of Rs.28,000/- on 05-10-1984 in the name of the 14th defendant for one year in Kalpa Taruvu deposit and the 1st defendant withdrew an amount of Rs.30,000/- on 09-10-1985 after maturity. The plaintiff has no right whatsoever to question the right of the defendants to withdraw the amount

deposited with the 13th defendant bank. Thus, except 1/8th share in plaint c schedule property, the plaintiff is not entitled to claim any share in any of the schedules. The claim of the plaintiff is frivolous and vexatious and prayed for dismissal of the suit.

5. The 2nd defendant filed written statement adopting the written statement filed by the 1st defendant while contending that there was no relationship of trustee and beneficiary between the parties to render accounting of income from the property. Therefore, the plaintiff is not entitled to seek accounting relief of income from A schedule property. The 1st defendant is in possession and enjoyment of the property as legatee under the will executed by Veeramma in sound disposing state of mind. The 2nd defendant never borrowed any amount from Veeramma much less Rs.30,000/- and that the plaintiff has not cooperated with him and the other defendants to take return of C schedule property from the Court. Except in C schedule property, the plaintiff is not entitled to claim any share in other schedules and prayed for dismissal of the suit with exemplary costs.

6. Defendant Nos. 3, 4 and 10 to 12 filed memo adopting the written statement filed by the 1st defendant.

7. The 13th defendant bank filed written statement contending that Sankuratri Veeramma and the 1st defendant deposited an amount of Rs.28,000/- jointly payable to either or survivor for a period of 63 months and, on maturity, the 1st defendant withdrew an amount of Rs.45,000/- on 05-10-1984 itself. The 1st defendant again re-deposited an amount of Rs.28,000/- on 05-10-1984 in Kalpa Taruvu deposit in his name and in the name of the 14th defendant payable to either or survivor for a period of one year which was matured on 05-10-1985. The 1st defendant withdrew an amount of Rs.30,000/- on 09-10-1985 after maturity of Kalpa Taruvu deposit whereas the suit notice was received by the bank on 12-10-1985. Therefore, the 13th

defendant has nothing to do with the claim of the plaintiff and there is nothing to be paid to the 1st defendant or to any of them except balance amount of Rs.321.45 ps. to the credit of savings bank account and prayed to dismiss the suit.

8. The 14th defendant filed written statement, admitting the relationship between the plaintiff and the defendants, adopting the written statement filed by the 1st defendant in the suit while contending that the 1st defendant was examined as D.W.1 in the suit and withstood to the cross-examination by learned counsel for the plaintiff in spite of his old age and specifically contended that his grandmother *i.e.* wife of the 1st defendant was murdered and, after the death of Veeramma, the 14th defendant and his wife were looking after the welfare of the 1st defendant occupying item No. 3 of plaint A schedule property. As legatee under the will dated 27-01-1980 executed by Veeramma, the 1st defendant took possession of the property after the demise of Veeramma and cultivated Ac. 2.94 cents of land, which is described as item Nos. 1 and 2 of plaint A schedule, till the end of 1985. The 1st defendant leased out item Nos. 1 and 2 of plaint A schedule property to the 14th defendant under registered lease deed dated 01-04-1985 and, as per the terms of the lease deed, the 14th defendant is entitled to cultivate the land till 31-03-2005 on payment of Rs.5,000/- as maktha to the 1st defendant by the 1st April of every year. Accordingly, the 14th defendant has been continuing in possession and enjoyment of the above property of Ac. 2.94 cents *i.e.* item Nos. 1 and 2 of plaint A schedule property and, thereby, he is the cultivating tenant of item Nos. 1 and 2 of plaint A schedule property. The 14th defendant paid maktha to the 1st defendant till 01-04-1993.

The 1st defendant executed registered gift deed dated 06-04-1985 reserving life interest in himself and vested remainder to the 14th defendant.

Thereby, the 14th defendant is entitled to Ac. 2.94 cents of land with absolute rights from 03-10-1993 when the 1st defendant died. The 14th defendant further contended that the 1st defendant executed registered will dated 08-04-1985 in sound disposing state of mind bequeathing item No. 3 of plaintiff A schedule property to him. Thereby, the 14th defendant is entitled to claim item Nos. 1 to 3 of plaintiff A schedule property under registered gift deed dated 06-04-1985 and registered will dated 08-04-1985. Therefore, the plaintiff is not entitled to claim any share in item Nos. 1 to 3 of plaintiff A schedule property or in any other schedules and prayed to dismiss the suit.

9. On the strength of the above pleadings, the trial Court framed the following issues and additional issues:

Issues:

- (1) Whether Veeramma was the owner of all the plaintiff A B C and D schedule properties?
- (2) Whether the will dated 27-01-1980 executed by Sankuratri Veeramma is true and valid?
- (3) Whether the gift deed dated 06-04-1985 executed by 1st defendant in favour of Sankuratri Venkatanarayana is true, valid and binding?
- (4) Whether Sankuratri Veeramma had no right in plaintiff B and D schedule properties?
- (5) Whether plaintiff is entitled to a share in plaintiff A B and D schedule properties?
- (6) Whether the plaintiff is entitled to rendition of accounts? If so, from whom?
- (7) Whether 1st defendant is entitled to exemplary costs under Section 35-A C.P.C.?
- (8) To what relief?

Additional issues:

- (1) Whether the will dated 08-04-1985 executed by the 1st defendant is true and valid?
- (2) Whether the lease deed dated 01-04-1985 is true and valid?

(extracted)

10. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 4 were examined and got marked Exs.A1 and A2. On behalf of the defendants, D.Ws.1 to 6 were examined and got marked Exs.B1 to B6 and Exs.C1 to C10.

11. Upon hearing argument of both counsel and considering oral and documentary evidence on record, the trial Court passed preliminary decree for partition of A schedule property into 8 equal shares by metes and bounds and for profits on 1/8th share of the plaintiff from the date of death of the 1st defendant *i.e.* 03-10-1993.

12. Aggrieved by the decree and judgment of the trial Court, the 14th defendant filed the present appeal raising several contentions. The main contention of the 14th defendant is that the conclusion of the trial Court that the will dated 27-01-1980 bequeathing A schedule property to the 1st defendant by Veeramma is not genuine and this finding is *ex facie* erroneous for the reason that voluminous evidence produced before the trial Court was not considered and gave much credence to the evidence of expert and Exs.C1 to C10. If the evidence is appreciated based on sound principles of law, the trial Court would have upheld the will dated 27-01-1980. The 14th defendant is not liable to render account of the income from A schedule property since there was no relationship of trustee and beneficiary between the plaintiff and the 14th defendant but the trial Court erroneously granted decree for rendition of income from A schedule property. It is further contended that in view of registered lease deed dated 01-04-1985, the 14th defendant is entitled to enjoy the property as a tenant on payment of Rs.5,000/- *p.a.* till 31-03-2005 but the trial Court, on erroneous appreciation of facts, granted the relief of partition of item Nos. 1 and 2 of A schedule property ignoring the statutory tenancy rights in item Nos. 1 and 2 of A schedule property. The approach of the trial Court is perverse. The 1st defendant executed gift deed dated 06-04-1985 for item Nos. 1 and 2 of A

schedule property reserving life interest for himself. Therefore, after the death of the 1st defendant on 03-10-1993, this defendant became absolute owner of item Nos. 1 and 2 of A schedule property but this contention was not appreciated by the trial Court in proper perspective. Finally, it is contended that the trial Court, by cryptic finding on issue No. 1, did not accept the claim of the 14th defendant as legatee under Ex.B5 will dated 08-04-1985 only for the simple reason that Ex.B2 will was disbelieved while answering issue No. 2. The claim of the 14th defendant was negated under the will and this approach is totally erroneous. Unless Ex.B5 is disbelieved, denial of right under Ex.B5 will is totally perverse.

13. The plaintiff filed Cross-Objections in (SR). No. 42457 of 1997 challenging the adverse findings and denial of claim in B and D schedule property, accounting relief from 1982 to 1985 and profits from 1985 to 1993 on various grounds. The main contention of the plaintiff is that when Ex.B2 was disbelieved, the 1st defendant's possession in A schedule property is joint with the plaintiff and the other defendants and, therefore, he is liable to render true and correct account of income from A schedule property but the trial Court did not grant accounting relief from 1982 to 1985. That apart, after the death of the 1st defendant, the 14th defendant is liable to pay share in the profits from item Nos. 1 and 2 of A schedule property, who is admittedly in possession of the property, when his claim under gift deed was disbelieved by the trial Court but, on erroneous appreciation of evidence on record, the trial Court declined to grant decree for partition of B and D schedule property, accounting relief for the years from 1982 to 1985 and profits from 1985 to 1993 and, thereby, committed an error.

14. During the course of argument, learned counsel for the 14th defendant mainly raised a specific contention that when the lease deed is true and valid, the 14th defendant became a statutory tenant under Ex.B3 registered lease deed. Consequently, he is entitled to claim protection under the

provisions of the Andhra Pradesh (Andhra Area) Tenancy Act, 1956 (for short, 'the Act of 1956'). As the 14th defendant paid maktha to the 1st defendant during his lifetime, the 14th defendant is not liable to render account of income from the property for the years 1982 to 1985 and pay profits to the plaintiff from 1985 to 1993 as his possession is not wrongful. Till the 14th defendant is duly evicted as per the provisions of the Act of 1956, he is entitled to protection under the provisions of the Act of 1956 being statutory tenant.

It is further contended that even if Ex.B2 will was believed, the 1st defendant is entitled to 1/8th share as per the admissions both in pleadings and evidence being the husband of the deceased Veeramma. If Ex.B2 will is ignored, the 1st defendant is entitled to claim 1/8th share and bequeathed his share under Ex.B5 will to the 14th defendant but the trial Court, without recording any finding about genuineness of Ex.B5 will, declined his share to the 14th defendant as legatee under the will only on the simple ground that Ex.B2 was disbelieved. This finding is *ex facie* erroneous and the same is liable to be set aside. Finally, learned counsel for the 14th defendant requested this Court to re-appreciate facts with reference to evidence and prayed to allow the appeal protecting the tenancy rights of the 14th defendant in schedule property and allot 1/8th share of the 1st defendant to this defendant as legatee under Ex.B5.

15. Learned counsel for the plaintiff, refuting the contentions of learned counsel for the 14th defendant, raised a specific contention that though the 14th defendant is in possession as a statutory tenant under Ex.B3 lease deed, the 1st defendant is liable to render true and correct account of income from A schedule property as he received maktha at the rate of Rs.5,000/- per year even according to the 14th defendant but the trial Court did not consider the same in proper perspective. In addition to denial of accounting relief and

profits, the trial Court declined to grant decree for partition of B and D schedule property erroneously. Though Rs.28,000/- was kept in deposit with the 13th defendant bank by the 1st defendant in his name and in the name of his wife Veeramma payable to either or survivor but the 1st defendant had withdrawn the entire amount from the 13th defendant bank. Therefore, the said amount is liable for partition and the plaintiff is entitled to 1/8th share in the same but the trial Court did not appreciate the evidence and committed an error in declining the relief of partition of B and D schedule property, accounting and profits and prayed to allow the cross-objections passing preliminary decree for partition of B and D schedule property, accounting relief and for profits.

16. The plaintiff filed petition under Order 20 Rule 12 read with Section 151 of the Code of Civil Procedure (for short, 'C.P.C.') to determine the share of the deceased 1st defendant, which was devolved on the plaintiff and defendant Nos. 2 to 12 equally, and modify the shares accordingly alleging that during pendency of the suit, the 1st defendant died at the fag end of trial but, without introducing the same, the trial Court passed preliminary decree declaring that the plaintiff and other sharers are entitled to 1/8th share each. In the absence of proof of the wills and gift, the share of the deceased 1st defendant was devolved upon the plaintiff and the other defendants equally. Accordingly, the plaintiff requested to modify the share.

17. The 14th defendant opposed the petition on the ground that preliminary decree was passed determining share of the plaintiff and defendant Nos. 2 to 12 entitling them to 1/8th share each and that final decree has to be passed only in accordance with the preliminary decree and any variance is not permissible and prayed for dismissal of the petition.

18. The trial Court, after hearing both counsel, modified the share of the plaintiff and the defendants from 1/8th to 1/7th allotting one such share to him

and passed final decree entitling the plaintiff to claim *mesne* profits.

19. Aggrieved by the order in final decree, the 14th defendant preferred A.S.No. 3460 of 2004 contending that final decree shall be passed only in terms of preliminary decree and no change is permissible but the trial Court committed an error modifying 1/8th share into 1/7th share and allotted the same to the plaintiff entitling him to claim 1/7th share in *mesne* profits, which is an illegality, and prayed to set aside the decree and decretal order.

20. During the course of argument, learned counsel for the 14th defendant reiterated the contentions urged in the grounds of appeal while contending that modification was only due to death of the 1st defendant which was ignored by the trial Court while passing preliminary decree. However, the 14th defendant is entitled to claim share of the 1st defendant as legatee under Ex.B5 will. In such case, share of the 1st defendant has to be allotted to the 14th defendant; the same cannot be divided among the legal-heirs of the deceased 1st defendant and prayed to set aside the order in final decree passed by the trial Court.

21. Whereas, learned counsel for the plaintiff argued totally in support of the final decree passed by the trial Court and prayed for dismissal of the appeal.

22. Considering rival contentions, perusing material available on record including decree and judgment under challenge and oral and documentary evidence, the points that arise for consideration are as follows:

1. *Whether the 14th defendant is tenant of item Nos. 1 and 2 of A schedule property under Ex.B3 registered lease deed dated 01-04-1985, if so, is he entitled to claim protection as statutory tenant under the provisions of the Act of 1956?*
2. *Whether Ex.B5 will dated 08-04-1985 executed by the 1st defendant bequeathing item No. 3 of plaint A schedule property to the 14th defendant is true, valid and genuine, if so, is the 14th*

defendant entitled to claim share of the 1st defendant in item No. 3 of A schedule property?

3. *Whether the defendants are liable to render true and correct account of income from A schedule property and future profits to the plaintiff together with interest at 12.5% p.a.?*
4. *Whether B schedule movables are available for partition, if so, is the plaintiff entitled to 1/8th share in B schedule property?*
5. *Whether the amount lying in deposit with the 13th defendant bank is joint family property, if so, is it liable for partition and, thereby, is the plaintiff entitled to claim 1/8th share in it?*
6. *Whether modification of share of the plaintiff and defendant Nos. 2 to 12 is in accordance with law, if not, is the final decree liable to be set aside?*

23 **In Re. Point No. 2**

The contention of the 14th defendant is that his grandfather *i.e.* the 1st defendant executed Ex.B5 will and he, being legatee under the will, succeeded the entire estate. The 1st defendant, being legatee under Ex.B2 will dated 27-01-1980 allegedly executed by Veeramma, became owner of the property but the trial Court disbelieved the will assigning its own reasons mostly relying on the evidence of P.W.4 but the said finding was not challenged before this court though raised a contention that the finding of the trial Court is contrary to law. Therefore, the finding regarding Ex.B2 will attained finality. The deceased 1st defendant allegedly executed Ex.B6 will dated 16-03-1985 initially bequeathing his property in favour of the 14th defendant but, surprisingly within a month, the 1st defendant allegedly executed Ex.B5 will dated 08-04-1985 bequeathing item No. 3 of A schedule property to the 14th defendant. On the strength of Ex.B5, the 14th defendant is claiming right and interest over the property. At this stage, it is appropriate to advert to the pleadings *i.e.* written statement of the 1st defendant filed before the trial Court. In the entire written statement filed by the 1st defendant on 17-01-1986 before the trial Court, there was no whisper about execution

of either Ex.B6 or B5 but admitted about execution of Ex.B3 registered lease deed dated 01-04-1985. If really, the 1st defendant executed any will in favour of the 14th defendant either Ex.B6 or B5, he would have mentioned the same in the written statement filed on 17-01-1986 since the alleged wills were allegedly executed even before the date of filing written statement dated 17-01-1986. Curiously, in examination in chief of D.W.1 on 19-04-1983, he did not disclose anything about execution of any will either Ex.B5 or B6 and revocation of Ex.B6 also. Strangely, in cross-examination dated 16-06-1993, the 1st defendant denied execution of any will and the relevant piece of evidence of D.W.1 is extracted hereunder for better appreciation:

"My wife has executed a will three months prior to her death. I have not executed any will. My wife was 15 years younger than me. By the date of my wife's death I was in a position to manage my affairs. My wife was also in the same position."

From this piece of evidence, it is evident that the 1st defendant never executed either Ex.B6 or B5. Therefore, question of cancellation of Ex.B6 and executing Ex.B5 does not arise.

24. The 2nd defendant, father of the 14th defendant, also filed written statement on 17-01-1986. Even in the written statement filed by the 2nd defendant, he did not disclose anything about execution of any will except the will allegedly executed by Veeramma dated 27-01-1980 in favour of the 1st defendant while adopting the written statement filed by the 1st defendant. For the first time after the death of the 1st defendant, the 14th defendant came on record by filing I.A.No. 94 of 1994 under Order I Rule 10 of C.P.C. claiming right as legatee under Ex.B5 will and got himself impleaded. The 14th defendant filed written statement claiming right over Ac. 2.94 cents in view of Ex.B4 gift deed but the trial Court disbelieved the same in view of failure to prove Ex.B2 will. However, in para No. 7 of the written statement, the 14th defendant specifically contended that the 1st defendant executed

Ex.B5 will dated 08-04-1985 in sound disposing state of mind bequeathing item No. 3 of plaint A schedule property to him but he did not disclose anything about execution of Ex.B6 in the entire written statement.

25. At the same time, in the evidence of D.W.2 Seetha Mahalakshmi, paternal aunt of the 14th defendant, she did not disclose anything about execution of will by the 1st defendant in favour of the 14th defendant except about Ex.B2 will.

26. Similarly, the scribe of Ex.B2 will namely Venkata Subbarao was examined on 25-06-1993. D.W.3, in his evidence, testified about execution of Exs.B2 to B4 but his evidence is totally silent about execution of Exs.B5 and B6. Later, D.W.3 was recalled for further examination in chief as per the orders in I.A.No. 126 of 1996 dated 12-02-1996. For the first time, D.W.3 testified about execution of Exs.B5 and B6 by the 1st defendant and he is the scribe of Exs.B5 and B6 also. Both the wills are registered wills. The 1st defendant died on 03-10-1993.

27. D.W.4, father of the 14th defendant, testified about execution of Exs.B2 to B4 but did not disclose anything about execution of Exs.B5 and B6 wills in favour of the 14th defendant.

28. When the 14th defendant propounded Ex.B5 will, it is his duty to prove its execution by the 1st defendant in sound disposing state of mind by the 1st defendant dispelling all suspicious circumstances. In the present case, execution of Exs.B5 and B6 was not disclosed by defendant Nos. 1 and 2 in their written statements as well as in their evidence as D.W.1 and D.W.4 before the trial Court. Curiously, in cross-examination of D.W.1, he denied execution of any will unequivocally. If really Exs.B5 and B6 were executed, the 1st defendant would have disclosed about their execution but, for the reasons best known to defendant Nos. 1 and 2, they maintained silence and, for the first time, the 14th defendant filed an application under Order I Rule 10

of C.P.C. on the strength of Ex.B5 will but without disclosing execution of Ex.B6 will. Failure to disclose execution of Exs.B5 and B6 in the written statements of defendant Nos. 1 and 2 and in their evidence is the strongest suspicious circumstance to disbelieve their very execution. Apart from that, D.W.3, though examined during the lifetime of the 1st defendant, did not disclose anything about execution of Exs.B5 and B6 by the 1st defendant in sound disposing state of mind. Non-disclosure of the *factum* of execution of Exs.B5 and B6 wills during the lifetime of the 1st defendant by D.W.3, scribe of the alleged wills, is another strong suspicious circumstance to doubt the execution of Exs.B5 and B6. The parties to the suit though closely related to one another, there is longstanding bitter enmity between them; that too, Veeramma was murdered by Uthammaraao, son of the plaintiff; he was convicted and sentenced by the Sessions Court and, later, reduced the sentence to one and half years by this Court. On account of such enmity, possibility of creation of wills cannot be ruled out.

29. In view of the suspicious circumstances pointed out by this Court in the above paras, it is the duty of the 14th defendant to prove Ex.B5 by producing cogent and satisfactory evidence strictly adhering to special rules of evidence contained under Section 68 of the Indian Evidence Act, 1872 (for brevity, 'the Act of 1872'). As per Section 68 of the Act of 1872 and Section 63 of the Indian Succession Act, 1925 (for short, 'the Act of 1925'), will is a compulsorily attestable document and it should be proved by examining at least one of the attesting witnesses. 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."

In **Malapati Suryamba and others Vs. Venigalla Koteswaramma and others**^[2], the Apex 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 under Section 68 of Indian Evidence Act is not sufficient to succeed on the basis of will."

In **Balathandayutham and another Vs. Ezhilarasan**^[3], the Apex Court ruled as follows:

"Execution of the will, suspicious circumstances surrounding the will, father of 1st appellant as also of respondent-plaintiff bequeathing properties in favour of respondent-plaintiff and his other son and two daughters and giving his wife life interest. No property bequeathed to 1st appellant and 1st appellant tried to disturb possession of respondent-plaintiff. Attestation of the will by strangers to the family and unless those suspicious circumstances are dispelled or removed, the appellant will not succeed in discharging their onus."

In **Joseph Antony Lazarus (dead) by L.Rs. Vs. A.J. Francis**^[4], the Supreme Court held that

"It is the duty of the Court to scrutinize carefully the circumstances leading to execution and registration of the will and the duty of propounder all the more onerous."

In view of the law consistently declared by Apex Court, mere

registration of a will by itself is not sufficient to accept the will, more particularly when there are several suspicious circumstances as pointed out by me in the earlier paras.

30. Yet, another strong suspicious circumstance is non-disclosure of Ex.B6 by the 14th defendant. His evidence is totally silent about execution of Ex.B6 who spoke about execution of Ex.B5 dated 08-04-1985. Ex.B6 was allegedly executed on 16-03-1985, Ex.B5 on 08-04-1985 and Ex.B4 on 06-04-1985. Thus, within a span of 23 days, three documents were brought into existence allegedly executed by the 1st defendant in favour of the 14th defendant. If really Ex.B6 is true and valid, again execution of Exs.B4 and B5 bequeathing the same property in favour of the 14th defendant creates any amount of suspicion. All these circumstances are strong enough to suspect the very execution of Exs.B5 and B6. In the evidence of D.W.3 or D.W.5, no explanation was offered for execution of Exs.B4 to B6 within a span of 23 days by the 1st defendant in favour of the 14th defendant alone. The 14th defendant also did not explain the reason for non-disclosure of execution of Exs.B5 and B6 in his favour in the written statements filed by defendants Nos. 1 and 2 and in their evidence.

31. Ex.B4 is gift deed dated 06-04-1985 and Ex.B5 is will dated 08-04-1985. In Ex.B5, there is a reference about execution of Ex.B2 by Veeramma bequeathing her property to the 1st defendant but there is no reference about Ex.B6. If really Ex.B6 will was executed by the 1st defendant, certainly that should have been referred in Ex.B5 which was later in point of time. As seen from the contents of Exs.B4 to B6, it is clear that the 14th defendant brought them into existence in haphazard manner somehow to knock away the property of the 1st defendant and Veeramma. When Veeramma did not execute will in favour of the 1st defendant, the 1st defendant is incompetent to bequeath the property of Veeramma. Therefore, bequeath to the extent of

property of Veeramma *i.e.* item Nos. 1 and 2 of plaint A schedule is invalid. Moreover, in view of the suspicious circumstances referred *supra*, even bequeath of separate property of the 1st defendant in favour of the 14th defendant cannot be accepted since the 14th defendant did not dispel the suspicious circumstances by adducing evidence to the satisfaction of this Court.

32. On overall consideration of entire material available on record, more particularly the evidence of D.W.3, scribe of Exs.B2 to B6, D.W.4, father of the 14th defendant, and D.W.5, I find no satisfactory evidence to dispel the suspicious circumstances which I pointed out in the earlier paras. When the 14th defendant, propounder of the wills, failed to dispel the suspicious circumstances, the wills cannot be accepted. Though the trial Court did not discuss anything about due execution of Ex.B5, it simply overlooked Ex.B5 in view of finding on the genuineness of Ex.B2 will allegedly executed by Veeramma in favour of the 1st defendant but the reason assigned by the trial Court is not satisfactory. However, on reappraisal of entire evidence, I find that the 14th defendant miserably failed to establish due execution of Ex.B5 by the 1st defendant dispelling all the suspicious circumstances. Therefore, execution of Ex.B5 will is disbelieved. Accordingly, the point is held in favour of the plaintiff and against the 14th defendant.

33. **In Re. Point No. 1:**

The 14th defendant claimed to be tenant for a period of 20 years under Ex.B3 registered lease deed but the trial Court, discussing about lease in additional issue No. 2 (para No. 24 of the judgment), recorded a finding that, when the 1st defendant is not the absolute owner in view of disbelieving Ex.B2, he is incompetent to execute lease deed in favour of the 14th defendant. The said finding is now assailed before me by the 14th defendant in this appeal contending that, when one co-owner leased out the property for

the benefit of other co-owners, the lease is valid. As seen from the evidence on record, the 1st defendant executed Ex.B3 lease deed dated 01-04-1985; within few days, Ex.B4 gift deed dated 06-04-1985 was executed and, later, Exs.B5 and B6 were executed. The *factum* of execution of lease deed was mentioned in the written statements of defendant Nos. 1 and 2 and supported by oral evidence of D.W.1 who leased out the property. Thereby, the 14th defendant established execution of Ex.B3 lease deed for a period of 20 years. Mere execution of Ex.B4 gift deed and Exs.B5 and B6 wills would not defeat the rights of the 14th defendant as statutory tenant of A schedule property when the lease is accepted. The trial Court, disbelieving Exs.B4 to B6, did not record any finding about validity of Ex.B3 lease deed. As per my finding on point No. 2, this Court also disbelieved Ex.B6 since Ex.B6 was already cancelled and the finding on Ex.B4 gift deed was not challenged before this Court. Therefore, the 14th defendant is continuing as tenant in view of 20 years lease under Ex.B3 registered lease deed dated 01-04-1985 and he has to pay maktha @ Rs.5,000/- for the period of 20 years and, till today, he is continuing in possession of the same as statutory tenant as per evidence on record. When the 14th defendant is a statutory tenant, till he is duly evicted by due process of law, he is entitled to continue as tenant subject to payment of maktha to the legal-heirs of the deceased 1st defendant and Veeramma. It is settled law that a co-owner, being landlord, is entitled to lease out the property. Therefore, Ex.B3 is valid. Consequently, the 14th defendant is entitled to protection under the Act of 1956. A civil Court cannot declare rights of a tenant but the Special Officer under the Act of 1956 alone is entitled declare the 14th defendant as statutory tenant. Therefore, the 14th defendant is entitled to approach the Special Officer under Section 16 of the Act of 1956 if advised but this Court is incompetent to extend protection to the 14th defendant as statutory tenant. The observation made hereinabove is only for the limited purpose of deciding the *lis* before this Court. Accordingly,

the point is held in favour of the 14th defendant and against the plaintiff.

34. **In Re. Point No. 3:**

The plaintiff claimed relief of accounting of A schedule property. Item Nos. 1 and 2 of A schedule property are agricultural lands and they were admittedly in the occupation of the 1st defendant till his death on 03-10-1993. The 14th defendant, being lessee, allegedly paid entire maktha till the date of death of the 1st defendant but claimed absolute right as legatee under Ex.B5 will and continuing in possession of the same. The lease was for a period of 20 years. When Ex.B5 is disbelieved, his continuation in possession was revived as tenant. Therefore, the 14th defendant has to pay agreed maktha to the legal-heirs of the deceased Veeramma and the 1st defendant. Hence, the 14th defendant is liable to pay maktha at the agreed rate of Rs.5,000/- *p.a.* on the agricultural land and render true and correct account of income from item No. 3 of plaint A schedule but the trial Court did not record any specific finding on this issue. Thereby, I hold that the plaintiff is entitled to claim share in the maktha under Ex.B3 payable by the 14th defendant to the legal-heirs of the deceased 1st defendant after his death and income from item No. 3 of A schedule property after death of the 1st defendant. Accordingly, the point is answered in favour of the plaintiff and against the 14th defendant.

35. **In Re. Point No. 4:**

The plaintiff claimed share in B schedule movables which include gold and silver jewelry and other household articles. In the evidence of P.W.1, he pleaded ignorance about details of gold and silver articles and other household articles. When the plaintiff claimed share in the long list of movables described in B schedule, it is for him to establish that his joint family possessed those movables and, then only, he is entitled to claim share but the plaintiff miserably failed to establish about possession of B schedule property. On the other hand, the trial Court discussed about B schedule in

para No. 17 of the judgment and recorded its finding on the ground that the plaintiff was unable to disclose details of acquisition of gold and silver articles so also steel and other metal articles described in B schedule and disbelieved the same. Even after re-appraisal of entire evidence, I find no evidence on record to believe availability of B schedule movables for partition. Therefore, it is difficult to hold that joint family possessed B schedule movables to pass decree for partition of the same in the absence of cogent and satisfactory evidence about possessing those movables. Hence, the trial Court rightly declined to pass decree for partition of B schedule property and I find no legal infirmity in the finding recorded by the trial Court. Accordingly, the finding of the trial Court is hereby confirmed holding this point in favour of the defendants and against the plaintiff.

36. **In Re. Point No. 5:**

The plaintiff claimed share in the amount, *i.e.* D schedule property, deposited with Andhra Bank, Siddhantham Branch, on the ground that the deposit was in the name of both the 1st defendant and his wife Veeramma payable to either or survivor. Admittedly, the amount was withdrawn by the 1st defendant on its maturity and, as on the date of filing the suit, the deposit was not available with the 13th defendant bank. However, the plaintiff also failed to prove that the amount kept in deposit belongs to Veeramma or both the 1st defendant and his wife Veeramma. In the absence of cogent and satisfactory evidence to establish the same, it is difficult to accept the contention of the plaintiff that the amount kept in deposit with the 13th defendant bank is joint family property liable for partition among the legal-heirs of the deceased Veeramma. Therefore, the trial Court rightly declined to pass decree in favour of the plaintiff for partition of D schedule property *i.e.*

deposit lying with the 13th defendant and the finding is free from any legal infirmity warranting interference of this Court. Hence, the finding of the trial Court is hereby confirmed holding this point in favour of the defendants and against the plaintiff.

37. In Re. Point No. 6:

Admittedly, the plaintiff is one of the sons of the deceased 1st defendant and he is entitled to claim share in the property of Veeramma in the absence of any testamentary disposition. Though the 1st defendant set up will allegedly executed by Veeramma in his favour, the same was disbelieved by the trial court and also by this Court in view of my discussion in the earlier paras. Similarly, Exs.B4 to B6 allegedly executed by the 1st defendant in favour of the 14th defendant are also disbelieved by assigning specific reasons in the above paras. In such case, share of the 1st defendant will devolve on his legal-heirs equally. The trial Court, without considering death of the 1st defendant during pendency of the suit, allotted one share to him along with the plaintiff and defendant Nos. 2 to 12 but, after death of the 1st defendant, share of the 1st defendant devolved on the plaintiff and defendant Nos. 2 to 12 as per Hindu Succession Act, 1956, as Ex.B5 will allegedly executed by the 1st defendant is disbelieved by this court. Therefore, modification of share of the plaintiff and defendant Nos. 2 to 12 is not erroneous.

38. One of the contentions of learned counsel for the 14th defendant is that final decree must be in consonance with the preliminary decree. There is no dispute with regard to the said contention but the property belongs to coparcenary and shares of coparceners in the property always fluctuating and there may be increase due to death of one of the coparceners and decrease on account of birth in the coparcenary. Here, on account of death of the 1st defendant, shares are changed and, in view of the special feature of

coparcenary, the final decree passed by the trial Court cannot be found fault. Thereby, I find no merits in the contention raised by learned counsel for the 14th defendant. Accordingly, the point is answered in favour of the plaintiff and against the 14th defendant.

39. In the result, A.S.No. 497 of 1997 is dismissed leaving it open to the 14th defendant to agitate his claim of statutory tenancy before Special Officer under the Andhra Pradesh (Andhra Area) Tenancy Act, 1956, if advised, while allowing the cross-objections directing the 14th defendant to render true and correct account of income from item Nos. 1 and 2 of plaint A schedule property from the date of death of the 1st defendant till he is evicted by due process of law and dismissed rest of the plaintiff's claim in the cross-objections. A.S.No. 3460 of 2004 is dismissed in toto confirming the final decree dated 17-08-2004 passed in I.A.No. 329 of 2000 in I.A.No. 452 of 1997 in O.S.No. 70 of 1985 on the file of the Court of Subordinate Judge, Narasapur.

Pending miscellaneous petitions in these appeals, if any, shall stand dismissed in consequence. No order as to costs.

M.SATYANARAYANA

MURTHY, J.

Date: 07th July, 2015.

JSK

[\[1\]](#) AIR 1982 SC 133

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

[\[3\]](#) 2010 (4) ALT 8 (SC)

[\[4\]](#) 2006 (3) ALT 87 (SC)