

JUDGMENT:

Heard Sri M.P.Chandramouli, learned standing counsel for the appellant/1st defendant and Sri P. Gangarami Reddy, learned counsel for respondents 1 to 7/plaintiffs. Perused the material on record.

2. This appeal is directed against the judgment and decree dated 10.01.2003 passed by the learned Senior Civil Judge, Gudur, in OS No.81 of 1993. Respondents 1 to 7 herein are the plaintiffs and the appellant is the 1st defendant in the suit. For the sake of convenience, the parties will be referred to hereinafter, as plaintiffs and defendants.

3. The brief facts, leading to filing of this appeal, may be stated as follows:

The plaintiffs filed the suit against the defendants for partition of the schedule properties into certain shares as mentioned in the plaint. Plaintiffs 2 to 7 and the 1st defendant are the sons and daughters and the 1st plaintiff is the second wife of late Shaik Dasthagiri Saheb. Defendants 2 to 7 are tenants of certain items of the plaint schedule properties. According to the plaintiffs, the plaint schedule properties are the self-acquired properties of Shaik Dasthagiri Saheb. He died on 23.02.1993 leaving behind him, plaintiffs and the 1st defendant, as his legal heirs. In the alternative, they took the plea that they came to know that late Shaik Dasthagiri Saheb, executed a Will, but the said Will is not genuine, valid and binding on the plaintiffs. They further stated that the Will is not valid, as the plaintiffs, who are the other heirs, did not give consent to Dastagiri Saheb to execute the Will.

4. The 1st defendant on the other hand, contended that the first plaintiff is not validly married to late Dasthagiri Saheb and she has no claim over any part of the properties of Dasthagiri Saheb. It is further contended that during the life time of Dasthagiri Saheb, he executed a registered Will dated 27.11.1992 bequeathing all his properties, in favour of the 1st defendant and the said Will was duly published and it was accepted and consented by the plaintiffs. Dasthagiri Saheb died on 23.02.1993 and thereafter, the Will became operative and therefore, the plaintiffs are not entitled to any share in the schedule properties.

5. With regard to the validity of the marital status of the 1st plaintiff, there is evidence of PWs.2 and 4, who are daughter and sons of late Dasthagiri Saheb. They admitted in their evidence that their father Dasthagiri Saheb, married the 1st plaintiff, as his second wife. Taking into consideration the evidence of PWs.2 and 4 and other evidence on record, the learned trial court has rightly held that the 1st plaintiff is the wife of late Dasthagiri Saheb. Further, the issue relating to the marital status of the 1st plaintiff, has not been very much disputed by the appellant in the present appeal.

6. The contention of the appellant/D.1 appears to be that the learned trial court has erroneously recorded a finding that the Will Ex.B.1 is not genuine and that the further finding that there is no consent by any plaintiffs, who are other heirs of late Dasthagiri Saheb, for the registered Will dated 27.11.1992 Ex.B.1 executed by him in favour of the 1st defendant bequeathing all his properties. The learned trial court ultimately decreed the suit holding that the plaintiffs and the 1st defendant are the legal heirs of late Dasthagiri Saheb and that the 1st plaintiff is entitled to 1/8th share, 2nd plaintiff, 1st defendant, being sons, are entitled to 2/9th share each and plaintiffs 3 to 7, being daughters of Dasthagiri Saheb, are entitled to 1/9th share each in the plaint schedule properties and consequently decreed the suit.

7. Now the points that arise for consideration in the present appeal are,

(1) Whether the Will dated 27.11.1992 executed by late Shaik Dasthagiri Saheb in favour of the 1st defendant is valid?

(2) Whether the plaintiffs did not give any consent to the Will and Consequently, it is invalid and inoperative?

8. Point No.1: To prove the contents of the Will Ex.B.1, the 1st defendant examined himself as DW.1 and also examined one of the attestors of the Will, as DW.2, who is an independent witness. DW.2 categorically stated in his evidence that late Dasthagiri Saheb has executed the Will in the last week of November, 1992 near Sub-Registrar's Office, Nayudupeta, at the time of execution of Will Ex.B.1, Dasthagiri Saheb was in a sound and disposing state of mind and that he and another person attested the said Will and one person by name Prakasam has scribed the Will. He also stated that the contents of the Will were read over to Dasthagiri Saheb. However, the trial court held that as per the evidence of

DW.1, he was not present when the Will Ex.B.1 was executed, but DW.2 admitted in his evidence that the 1st defendant was also present at the time of execution of the Will and therefore, the Will might not have been executed by late Dasthagiri Saheb. The learned trial court further expressed the view that DW.1, who is the profounder of the Will, did not explain the circumstances that led to execution of the Will Ex.B.1 by his father, by eliminating all the other legal heirs. Taking into consideration the above circumstances, the learned trial court held that the Will is not genuine and valid.

9. This court, however, is of the considered view that the finding regarding the genuineness of the Will, as recorded by the trial court, is not based on the evidence. The Will is a registered one and one of the attestors to the said Will, has categorically stated in his evidence that late Dastagiri Saheb, voluntarily, while in a sound and disposing state of mind, executed the Will. Merely because, the other heirs were excluded, the said circumstance alone cannot give rise to a conclusion that the Will was not voluntarily executed by late Dasthagiri Saheb. Basing on the evidence available on record, this court is of the considered view that the Will Ex.B.1 is genuine one. Further, the other heirs of Dastagiri Saheb, who are some of the plaintiffs in the suit, also came to know about the execution of Ex.B.1 Will and the said fact is borne out from the record. Therefore, it is held that the Will Ex.B.1 executed by late Dasthagiri Saheb, in favour of the 1st defendant, is a genuine one.

10. Point No.2: Now the crucial question is, even if the Will is genuine and if it is established that the other heirs of the Testator did not give consent for the said Will, whether it is valid and binding on the plaintiffs?

11. In the instant case, admittedly, the parties to the suit are Muslims, governed by Mohammadan Law. The policy of the Mohammadan Law is to prevent a testator interfering by Will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. Therefore, bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and the bequest is valid to that extent only and binds his or her share. In the present case, the specific case of the plaintiffs is that they have not given any consent to the Will, which was required to be given after the death of the testator. As to this, it is the contention of the 1st defendant that after the death of the testator, the

plaintiffs gave consent to the Will and there was implied consent on the part of the plaintiffs.

12. Under Mohammadan Law, consent for the Will can also be implied, but the circumstances have to be examined to find out whether there is any implied consent by the heirs other than the legatee under the Will. In the present case, plaintiffs 1 and 2 gave notice to the 1st defendant disputing Ex.B.1 Will allegedly executed by late Dastagiri Saheb, within few months after the death of Dastagiri Saheb. Further, the suit was also filed by the plaintiffs few months after the death of Dasthagiri Saheb. All these facts clearly show that the Will Ex.B.1 executed by Dasthagiri Saheb is not valid and the recitals therein are not binding on the plaintiffs. The learned trial court, therefore, has rightly decreed the suit.

13. For the foregoing reasons, the appeal fails and the same is dismissed, but without costs. Miscellaneous petitions, pending if any in this case, shall stand closed.

R. KANTHA RAO, J

Date: 01.04.2016
BSS

HON’BLE SRI JUSTICE R. KANTHA RAO

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Date: 01.04.2016

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