

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.C.C.A.No.325 of 2004

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JUDGMENT:

This appeal is filed by the defendants 2 and 4, out of 5 defendants, of O.S.No.79 of 1996 on the file of VI Senior Civil Judge, City Civil Court, Hyderabad, against the sole plaintiff as 1st respondent and defendants 1, 3 and 5 as respondents 2 to 4 impugning the decree and judgment dated 27.08.2004 seeking to set aside the same by allowing the appeal. The respondents 5 and 6 to the appeal brought on record as legal representatives of appeal R.1 Smt. Indira Suri (plaintiff) as per orders dated 22.11.2009 in CCCAMP.No.364 of 2009. The respondents 7 and 8 claimed as purchasers from the 3rd respondent and after contest they were brought on record as per orders dated 25.11.2015 in CCCAMP No.576 of 2006 and as 8th respondent died later, the respondents 9 to 12 are brought on record as legal representatives of the deceased 8th respondent as per orders in CCCAMP No.585 of 2007 dated. 25.11.2015. The son and daughter of 3rd respondent (D3) filed implead petition in CCCA.MP.No.118 of 2012, that was ended in dismissal vide order dated 03.11.2015 holding respondent No.3 – Amarnath is contesting and not remained exparte and their *inter se* claims with their father to be worked out pursuant to the trial Court's decree subject to appeal result and subject to alienations by respondent No.3, if any.

2. The factual matrix of the case is that the plaintiff and defendants are natural sisters and brothers being the issues of late Smt. P.Annapurna Devi and late P.Vishwanatham, that Smt. P.Annapurna Devi during her lifetime purchased the property consisting of building and open land, popularly known as Tajmahal bearing No.II C-6-851 admeasuring **3924 sq.mtrs**, situated at Rambaksh Banda, Shalibanda, Hyderabad from her vendors

Rajaratan Gopal and others through sale deed, out of her own funds, that the plaintiffs and the defendants were living with their parents jointly in the above said house and the property was developed and maintained from time to time by Smt. P.Annapurna Devi, that Smt. Annapurna Devi out of natural love and affection has gifted an extent of **248.32sq.mtrs.** in favour of the plaintiff herein through regd. gift deed bearing document No.1085 of 1975 dt. 18.05.1975 and also gifted an extent of **341.86sq.mtrs.** in favour of Master Chetan Kumar (one of the issues of plaintiff), her grandson, through registered gift deed bearing document No.1755/1973, dt.28.05.1973 in total extent **590 sq.mtrs.** was gifted by her to the knowledge of one and all, more particularly to the knowledge of the defendants herein, that the said gifted properties are being enjoyed by the donees as their absolute properties from the date of gift without any interruption from whomsoever. The mother of the plaintiff Smt. Annapurna Devi was exclusively owning and possessing remaining extent of **3333.82sq.mtrs.** of property, which was bearing municipal No.23-6-852/2-6, consisting of building and open land described supra, which is the plaint schedule at Shalibanda. Smt. Annapurna Devi (whose husband Vishwanatham predeceased her) died on 09.02.1983 leaving behind her sons and daughters i.e., plaintiff and defendants 1 to 5 of the suit. The plaintiff claims that pursuant to the above, she demanded the defendants for partition of the suit schedule property supra into six equal shares and to allot her one such (**1/6th**) share and the defendants since refused, she filed the suit for partition.

3. The 2nd defendant filed written statement adopted by 4th defendant, while admitting their relationship (defendants 1,3 and 5 remained exparte) with the plaintiff as natural sisters and brothers being the issues of Smt. Annapurna Devi and Vishwanatham. Their contest is that the property was purchased by their father Vishwanatham in the name of their mother Smt. Annapurna Devi and

not a purchase by her, for no source of her own and denied the plaintiff counter averment in this regard. The defendants also denied any execution of gift deeds out of love and affection by Smt. Annapurna Devi either in favour of plaintiff (her daughter) to an extent of 248.32 sq.mts in favour of any of the sons of plaintiff to the extent of 341.86 sq.mtrs, but for as part of settlement later reduced to writing dated 06.02.1973, to which plaintiff also a signatory, Smt. Annapurna Devi, having settled the property during her lifetime among her sons and daughters and as part of it, the share of plaintiff executed said two gift deeds in favour of the plaintiff and her son and for other properties as per said settlement, Smt. Annapurna Devi executed a Will dated 06.02.1983 bequeathing in favour of the defendants viz., sons and another daughter. It is their further contest that in said Will, it was also specifically mentioned with regard to the said two gift deeds stating inter alia that said properties were given to the plaintiff and her sons towards her share. The terms of said will make it manifestly clear that the entire property was divided and each of the property was allotted to each of the son and daughter and there was no other property left in common for partition at the time of death of Smt. Annapurna Devi. It is the contest that the plaintiff having already obtained her share in the property in the year 1973, covered by said two registered gift deeds, cannot maintain the suit for partition and is estopped by law. The other contest is that the plaintiff's suit filed 13 years after death of Smt. Annapurna for partition won't lie and it was nothing but with an intention to extract money, if possible, and the suit is liable to be dismissed in *limini*, that there is no cause of action or *locus-standi* for the plaintiff to file the suit. It is also the contest that D.3, having sold away his share bearing H.No.23-6-852/5 admeasuring 119.78sq.yards to Smt. Asha Jain under registered sale deed bearing document No.459/92 executed on 18.02.1992, and the plaintiff and D.3 also attested the sale deed, which confirms division of the total property of late Annapurna Devi and D.1 also sold the share of D.4 fraudulently

claiming it that the D.1 is the absolute owner of the House bearing No.23-6-852/6 admeasuring 185.00 sq.yards, by defrauding the rights and ownership of D.4 and registered the same in favour of Ranga Rao Jadhav on 4.09.1998 bearing document No.736 of 1998 pending the suit and the plaintiff also signed as attesting witness to the sale deed, that clearly shows plaintiff, D.1 and D.3 colluded each other and filed the present suit. It is also contended that the plaintiff's two sons, by name Bhupender Suri and Chatan Suri under the name and style SURI BROTHES obtained a portion of the property from D.2 on a monthly rent and committed default in payment of monthly rents and therefrom D.2 filed R.C.C.No.231 of 1998 on the file of the I Additional Rent Controller at Hyderabad and the same was allowed. The defendants 2 and 4, therefore, sought for dismissal of the suit.

4. From above pleadings, trial Court framed the following issues:

- (1) Whether the plaintiff is entitled for the partition of the suit property by meets and bounds, as prayed for?
- (2) Whether the plaintiff is entitled for 1/6th share in the plaint schedule property?
- (3) Whether the plaintiff is not entitled for any share in the suit schedule property as contended by the defendant No.2?
- (4) Whether there is any cause of action for filing of the suit as contended by the 2nd defendant?
- (5) Whether the Will dated 06.02.1983 claimed by defendant No.2 is true, valid and binding on the plaintiff?
- (6) To what relief?

5. From the above pleadings and in deciding the issues supra before the trial Court, the plaintiff was examined herself as P.W.1 and got marked documents Exs.A.1 and A.2 ULC proceedings and legal notice and on the defendants side, the defendants 2 and 4 were examined as D.Ws.1 and 3 and also cause examined one S.Sadanandam as D.W.2 as an attesting witness to said Will and got marked Exs.B.1 to B.6(copy of the sale deed, dt.18.02.1992, copy of

sale deed dated 14.09.1998, will deed, dt.06.02.1983, copy of declaration dt.Nil.02.1983, memorandum and legal notice dt.30.07.2002, respectively.

6. On hearing both sides, the trial Court concluded that execution of the Ex.B.3 Will is doubtful and suspicious and discarded the Will holding as created for the purpose of the suit and not genuine, so also Ex.B.4 declaration dt.Nil.02.83, that the suit schedule property belongs to the mother of the parties which she purchased from Raja Ratan Gopal and others through sale deed and out of her own funds and there is also no disputes in respect of the relationship of the parties, since the suit property devolved upon the plaintiff and defendants in equal shares, for their father predeceased their mother, they are each entitled to $1/6^{\text{th}}$ share in the suit property, in decreeing preliminarily the suit claim in favour of plaintiff for her $1/6^{\text{th}}$ share in suit schedule property for division by metes and bounds with other parties to the suit.

7. Impugning said decree and judgment of the trial Court, the contesting defendant Nos.2 and 4 preferred this appeal with the contentions in the grounds of appeal that both the parties have been in possession of their respective shares as owners as per the Will executed by their mother, that the plaintiff after lapse of 23 years, with an ill-motive and in active collusion with Defendant Nos.1, 3 and 5 to grab the property, filed the suit claiming partition of $1/6^{\text{th}}$ share and the trial Court on erroneous assumptions and presumptions, without going into the evidence on record, passed the preliminary decree in favour of the plaintiff, though she is not entitled to any share, that the trial Court gravely erred in decreeing the suit though plaintiff has already acquired property from her mother by obtaining gift deeds and she also sold away said properties to third parties after collecting huge amounts, that the trial Court ought to have seen that the property in question was already bequeathed in favour of the sons and another

daughter by virtue of the will deed dated 06.02.1983 by Annapurna Devi, having settled an area of 248.32 sq.mtrs and 341.86 sq.mtres respectively under the two gift deeds out of her said property in favour of the plaintiff and her sons, that the trial Court grossly erred in not taking into consideration Ex.B.4 where all the parties to the suit have categorically declared and admitted to have received their respective shares in the suit schedule property and they have been in possession of their respective portions and the terms of said Will and the declaration signed by all the parties have been acted upon and plaintiff and the defendants have been in effective possession of their respective portions in the property, that the trial Court erred in not taking into consideration the admissions made by plaintiff of the property bearing No.25-6-852/4 was allotted to D.2 and said property thereby belongs to D.2 being owner and similarly D.3 is the owner of the premises No.23-6-852/5 of 119.78 sq.yards, which he sold to others and plaintiff was the attesting witness to the sale deed, that the trial Court failed to take into consideration another serious admission made by the plaintiff of D.1 also sold a portion of the suit schedule property bearing Municipal No.23-6-852/6, comprising an area of 193 sq.yrds claiming to be as his exclusive property and the plaintiff is the attesting witness also to said sale deed executed by during pendency of the partition suit, that the trial Court erred in ignoring the factum of the sales made by the D.1 and D.3 and also the admission of the plaintiff in respect of the D.2 which was from each of the defendants were allotted separate shares and they claim said properties as their exclusive, that the trial Court failed in considering the fact that the mother of the parties died in the year 1983 and the suit was filed in the year 1996, after lapse of 13 years with an intention to grab the property belonging to the defendants, that the trial Court erred in not considering the fact that the suit filed by the plaintiff is in collusion with the Defendant Nos.1, 3 and 5, who have already sold their shares of the properties and appropriated the moneys for themselves and now,

the Defendant Nos.2 and 4 who have not sold their properties are the targets in the hands of plaintiff, that the trial Court erred in not considering the Will executed by the mother of the parties on erroneous assumptions and presumptions that the original copy of the will was not filed, though the original was with the D.1 and not with D.2 and 4, who even tried their best to seek direction to D.1 to produce the original will, but D.1 conveniently remained *ex parte* and not produced the Will in spite of issuing a notice to produce by falsely stating that the will is not with him and D.1 has not even chosen to come into the witness box nor filed his written statement which is outcome of collusion between D.1 and the plaintiff along with D.3 and 5, that the trial Court erred in not believing the evidence of D.W.2 about the execution of the Will by the mother of the parties and also its attestation by him which is sufficient to prove the execution of the Will and the plaintiff could not elicit anything *contra*, that the trial Court ought to have seen that plaintiff has no right to seek for partition of the suit property having already been allotted larger chunk of the property under said two registered settlement deeds. Hence, sought for allowing the appeal dismissing the plaintiff's suit claim by setting aside the trial Court's decree and judgment.

8. Heard both sides and perused the material on record.

9. Now the points for consideration in deciding the appeal are:-

- (1) Whether there was any oral partition pursuant to any arrangement and the two gift deeds given, one to the plaintiff and the other to the plaintiff's sons, are only pursuant to the same towards her share, for no right in the remaining property and the same being entitled by defendants 1 to 5, brothers and sister of plaintiff, and consequently, they divided their respective extents and the plaintiff thereby being non-suited, for no property for partition and separate possession to be entitled by her and, if so, the trial Court's decree and judgment granting 1/6th share each to the plaintiff and defendants 1 to 5 of the plaint schedule property is unsustainable and requires interference by this Court, while sitting in appeal and, if so, with what observations and consequences and to what

extent?

(2) To what result?

Point No.1 :

10. The plaintiff is the elder sister of the defendants is not in dispute. The suit was filed on 06.02.1996, which bears the Court seal and stamp with initial, that also not in dispute. The plaintiff's father died in the year 1964 leaving behind him, his wife and children, who are none other than the mother-(since died on 09.03.1983), brothers and sister of the plaintiff and plaintiff. Though it is the claim in the written statement of D.2 adopted by D.4 for no separate written statement, since exparte by D.1 and D.3, of the property originally belongs to the father of plaintiff and defendants and with his funds and for no means for mother of plaintiff and defendants of her own to acquire, the property was purchased in her name, before the trial Court from the evidence supra, there is no proof, much less any documentary evidence, among Exs.B-1 to B-6. Thus, in the absence of proving, benami or for the benefit of the joint family, the property was purchased by the father of plaintiff and defendants in the name of mother of plaintiff and defendants, it has to be concluded of the property was that of the mother of plaintiff and defendants and she enjoyed as such in her own right and also undisputedly as her own and also proved from the evidence on record, including from the two gift deeds, one in the name of plaintiff and the other in the name of her sons, executed by mother of plaintiff and defendants, respectively, in the name of plaintiff's sons on 28.05.1973 and in the name of plaintiff on 18.05.1975 for the respective extents of 341.86 sq.mtrs and 248.32 sq.mtrs, out of the total extent of 3,924 sq.mtrs site with building. It is subsequently, she died on 09.03.1983. Will dated 06.02.1983 said to have been executed by her as per the written statement contest of defendants 2 and 4 and others not even disputed. Prior to the filing of the suit on 06.02.1996, from death of Annapurna Devi on 09.03.1983,

for nearly 13 years there was nothing from the plaintiff to show any demands in writing and to say orally demanded even, she did not examine any witness, but for her sole testimony, though giving of notice before filing of suit for partition not mandatory, but for to consider the credibility of her version with reference to the conduct. So far as exhibit Ex.B.4 declaration dated 19.02.1983 is concerned, the signature of plaintiff in the plaint shows a short signature, when compared to the document signature on Ex.B.4. So far as Ex.B.5 Memorandum is concerned, it was also on the stamp paper shown purchased from the stamp vendor – Syed Mohammed on even date of Ex.B.4 stamp dated 19.02.1983. The signature on said Memorandum when compared to the plaint is also as referred in Ex.B.4 declaration in similarity. Even the sale deeds said to have been executed by plaintiff for the property covered by the gift in her favour by her mother not exhibited and not even cause produced by summoning the vendees for comparison of the signatures therein with any contemporary relevancy to the signatures on Exs.B.4 and B.5, even the plaintiff is disputing the signatures on Exs.B.4 and B.5 saying not signed and those are creation.

11. From the background, coming to the core of the plaint pleadings, plaintiff did not plead anywhere in the plaint, including in para-5 as to after the death of her mother on 09.02.1983 or 09.03.1983, as the case may be, testate or intestate in dispute, as the case may be, subsequently any profits, she shared or given to her by any of the defendants, much less to say she was in joint possession, in any manner; it is not even a landed property, but house property with site and the enjoyment must be specific like sharing of rents by leasing out the house portions, but for any vacant site and as such, if at all plaintiff got share, to claim, leave about there is no proof of she ever demanded for partition for no witness referred even in the plaint much less examined and not even any legal notice she cause issued, which is one of the circumstances in judging the conduct of any prudent

person for the Court to draw inferences as appreciation of evidence is not only from direct evidence, but also from circumstances attending to the *lis*, covered by material on record and also from the lapse of time, necessarily to draw any inferences, including in judging the conduct of the parties with reference to any ordinary prudent man as of probable or improbable in deciding with assistance therefrom of the *lis*. The plaintiff, a perusal of the plaint shows, valued the suit relief with a fixed Court fee, though in the plaint there is no whisper of joint possession. What she claimed in para-4 of the plaint was that defendants are denying the right of plaintiff and are evading. She did not speak when the first demand was made and denied after the death of her mother. Once the defendants are in exclusive possession and enjoyment by division of the respective house portions after death of their mother, that too plaintiff resides side-by in the property given to her and her sons by her mother in what remained of sale of some portion therein, she got knowledge of the defendants' exclusion of plaintiff to establish ouster.

12. From this background, coming to the contest of defendants, it is their specific claim that their mother from the settlement of the properties between all the issues, including plaintiff and defendants to share equally and towards the share of plaintiff, she executed two gift deeds of 1973 and 1975 to the sons of plaintiff and plaintiff, for nothing more she gets to claim for other brothers and sister of plaintiff divided their respective extents during their mother's time and are separately enjoying in seeking to dismiss the claim for partition by otherwise not entitled for never enjoyed more particularly after the death of her mother, pursuant to the Will executed by their mother on 06.02.1983 unregistered in saying plaintiff also estopped from questioning the rights of defendants after a lapse of 23 years to the partition and taking of separate extents in the year 1973 or so in the life time of their mother from the arrangement.

13. At the cost of repetition, the suit was filed in the year 1996, nearly 13 years after death of Plaintiff's mother in March 1983, and the fact that D.3 sold to one Smt. Asha Jain under registered sale deed No.459/1992, dated 18.02.1992, his share pursuant to said arrangement referred and plaintiff and D.1 were attestors to the sale deed not even in dispute by the plaintiff, so also D.1 sold on 04.09.1998 by registered document No.736/1998 even subsequent to the filing of the suit his extent fallen to his share pursuant to the arrangement and plaintiff is even one of the attestors to it not in dispute. Once such is the case, this also probablises, particularly from the plaintiff's attestation of the registered sale deed dated 18.02.1992 executed by D.3 as that property fallen to his share and that too when it is part of the property succeeded from their mother, who died in March, 1983 and though attestation otherwise not readily infer knowledge of contents, when the sale is undisputedly for part of the property belongs to their mother, unless there was oral arrangement pursuant to which what was the property get by plaintiff and her son by gifts allotted to plaintiff's share and the other extents to other brothers and sister of plaintiff, her attesting of the sale deed in 1992 of that share of D.3 sold to strangers does not arise and she cannot even pretend innocence of totality of contents, including the nature of transaction and the property involved under the sale deeds. In fact she has admitted in her cross examination about attestation knowing for part of the property sold as fallen to her said brother's share. That also leads an inference in favour of the defence of defendants and against the inference to the claim of plaintiff.

14. No doubt, the plaintiff though not referred in the plaint, much less in her chief-examination even, exhibited Ex.A.1 Urban Land Ceiling (ULC) proceedings. In fact, whether the ULC proceedings by itself tantamounts to an admission of the property joint and of got a share therein or not is a question of fact. **It is also important to appreciate a fact with reference to the context in which it is stated,**

rather taking it as conclusive. It is relevant to recollect as part of appreciation of evidence with reference to the pleadings as part of discovering truth, the well laid down expression of the three judge bench of the Apex Court in Mrs. **Rukhmabai Vs Lala Laxminarayana**^[1] at para-19 by relying upon the Privy council's expression **Alluri Venkatapathi Raju Vs Danthuluri Venkata Narasimha Raju**^[2] that, it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and there **it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.** In **Provident Investment Company Limited Vs Court of I.T.**^[3] it was held that Court is not confined merely to look into the form of the transaction between the parties (in giving effect to the legal rights and obligations there under), but the true legal position that arises out of it (by ignoring the form to ascertain real nature) in which the transaction was embodied and for that the Court may even look at the surrounding circumstances in construing the fact covered by oral statement or document, with reference to the substance and subject to the limitations for admissibility of oral over documentary evidence under Sections 91 and 92 of the Evidence Act. Thus, in appreciation of evidence, Judges are bound to call into aid their experience and knowledge of human affairs, depending upon facts and circumstances of each case, and regard had to the credibility of the witness, probative value of the documents, lapse of time if any in proof of the events and occurrence for drawing inferences, from consistency to the material on record to draw wherever required the necessary inferences and conclusions from the broad probabilities and preponderances from the overall view of entire case to judge as to any fact is proved or not proved or disproved. Thus, mere marking of Ex.A.1 document by plaintiff, without any reference to the circumstances, cannot be given credence

to say the property is still joint or the contents therein of Ex.A.1 is conclusive admission or estoppel or to say there is entitlement to partition by plaintiff therefrom by exhibiting the document, that too having the plaintiff a party, the document executed by D.3 way back in 1992, about 4 years before filing of the suit, which speaks the property sold by D.3 as fallen to his share. Plaintiff as P.W.1 admitted that the property bearing D.No.23-6-852/4 belongs to D.2, which he claimed as fallen to his share from the arrangement; and the property bearing D.No.23-6-851/2 belongs to D.3, which he claimed as fallen to his share as per arrangement; and the property bearing D.No.23-6-852/6 belongs to D.4, which he claimed as fallen to his share as per arrangement; and the property bearing D.No.23-6-852/5 belongs to D.5, which she claimed as fallen to her share as per arrangement, and once such is the case and when it is in the exclusive possession and enjoyment of the respective defendants of the entire suit property separately, pursuant to the arrangement pleaded by them during the life time of their mother, their possession and enjoyment in their own right commences adverse possession and from same is in the knowledge of the plaintiff, a side-by resident, it is nothing but ouster to the bar of claim for any share over the property respective taken to the respective shares and exclusively enjoying by all the defendants. Even the plaintiff's marriage was performed after death of their father by her brothers and mother, as admitted by her. She deposed further in the cross-examination of she is residing since 1970 in the property that was later gifted to her by her mother in 1973 and the said property is adjacent to the plaint schedule and she categorically deposed, as referred supra, of the respective residential portions, respective defendants are residing. She deposed in the further cross-examination that after death of her mother in March, 1983, she and her brothers were living together and received a letter from ULC Ex.A.1 and they all decided as to who should occupy which portion and therefrom the respective defendants occupied the respective portions and D.1

mutated in his name the portion which he occupied as per arrangement supra and he is paying electricity and water taxes in his name for that portion and the other brothers and sister not raised any objection to the D.1's said enjoyment, and equally the other portion belongs to D.2 in his occupation mutated in his name by his paying taxes for which none objected, equally the other portion referred supra of D.3 mutated in his name and he is in possession and enjoyment by paying taxes etc., and none objected, equally D.4 for the premises in his occupation by paying taxes mutated in his name and even let out to tenants, including to her sons as tenants and none objected. She deposed about the property sold by D.3 to which she is an attester in the year 1992 and she saw the original sale deed and the property was purchased by Asha Jain bearing D.No.20-6-852/5, which is part of the suit property, she knows and said Asha Jain is in possession and enjoyment of the property since then and not even impleaded as a party to the suit filed in 1996 and she also deposed that D.4 and D.5 are owners of respective properties in their occupation and enjoyment. She also deposed that she attested the sale deed of 1998 covered by Ex.B.2 of D.1 sold his portion. In the ULC Declaration Ex.A.1, filed by her mother and her name is not there in the proceedings and she does not aware of the declaration given by her mother showing the names of her sons only i.e., brothers of plaintiff and she did not claim for impleadment, however, says she addressed a letter to the Sub-Registrar, Charminar Zone, Hyderabad, in this regard, informing that she and her brothers filed affidavits before the ULC authorities in respect of family settlement regarding shares in the open land and other properties covered by the plaint schedule etc., that they have taken and after death of her mother, she did not claim before the ULC authorities as one of the sharers for the plaint schedule and do not remember whether her brothers filed affidavits along with her of the family settlement pleaded. She admits that her sons were evicted by Rent Control Case filed by D.2 of the portion in his occupation

claiming as belongs to him and she did not even raise any objection for that.

15. Once there was a partition, the question of claiming any property by partition again does not arise, for not a case of behind her they partitioned collusively to defeat her rights and the same not binding, which is not even the pleading of the plaintiff; apart from no legal notice even given, that too having attested the document in 1992 and not even the case of no knowledge of the contents being an educated and employee, equally pending suit in attesting the sale deed of the property sold by D.1 in the year 1998, specifying it was property already fallen to his share. Even she categorically deposed of she knows the transaction and she did not object for the sale by D.1 and while attesting even, as he stated he was in need of money and, like so when D.2 was selling earlier, she attested as he stated he wants to sell away his share to third parties for his children's education to meet. Once such is the case, she got contents of the documents in knowledge, while attesting and is estopped thereby also, in claiming contrary much less to maintain the suit, that too when the alienations for not any undivided interest, but for specific extents referring to arrangements and partition/ division. She deposed that she was also an attester for the sale agreement executed by D.1 and she also deposed her sons were staying as tenants in the portion fallen to the share of D.2 by paying a rent of Rs.200/- per month. Apart from what is discussed above of her brothers admittedly taken respective house portions and are enjoying as their own since before or atleast since death of her mother even to her knowledge from what she admits and there is ouster of her and they perfected title by adverse possession from the evidence discussed supra, but for to any other vacant site not to presume ouster. These aspects the trial Court did not properly adverted to, though these are very crucial. There is nothing even explained by plaintiff of her sons taken the property fallen to the share of D.2 on lease, that also substantiates the earlier partition and that

too, with that averment, the Rent Control Case in RCC.No.231 of 1998 filed for eviction was decreed and plaintiff admitted the same also in her cross-examination as P.W.1. That also ignored by the trial Court.

16. Coming to proof of unregd. Will, the original besides not seen light of day, not even laid foundation for marking so called copy of the unregd.will as Ex.B.3, dt.06.02.1983, for not even cause produced or issued notice to produce or by summoning as court witness any person even among parties in possession to exhibit the original. D.W.2- Sadanand is one of the attestors to the unregistered Will, a reading of his evidence regarding will doubts his credibility and due execution and attestation as per law. The recitals in the Will though confirm the shares taken by D.1 to D.5 and the property gifted to plaintiff and her sons as allotted to the share of plaintiff in the arrangement; that is not decisive to prove the will. P.W.1 deposed that DW.2 Sadanand and other attestor of the Will known of her. She is disputing the Will as fabrication. She deposed that her brothers divided the property according to the ULC Declarations and not as per bequeaths in the Will and even therefrom, she admits partition already effected for that house properties. D.W.1/D.2 deposed about the Will and there was arrangement and the gift deeds in favour of the plaintiff and her sons was towards plaintiff share from the arrangement and for others shares as per the arrangement, her mother later executed the Will in 1983, a few days before her death and about the other facts of plaintiff attesting the sale deed of D.3 and sale deed of D.1 and sons of plaintiff obtaining on lease a portion fallen to the share of D.2 etc. In the cross-examination, D.W.1/D.2 deposed that he denied the suggestion he helped in filing Ex.A.1 ULC proceedings and also given affidavit as legal heirs after death of their mother, he admitted that Ex.B.3 Will does not find place in the affidavit anywhere. No doubt, it clearly shows, as suggested the doubtfulness of the existence of the Will, that is rightly concluded by the trial Court, as it is one of the

crucial circumstances, though he made an attempt mainly to say for no necessity it was not mentioned. The Will could even brought to the light of the day had it been in existence and true and in the absence of which and when one of the suspicious circumstances against the existence of the Will and its due execution by their deceased mother in her life time, that too, a few days prior to her death, what D.W.2, so called attesor Sadanand, deposed is, plaintiff and defendants are nephews and their mother is his own sister and while his sister was critically ill, he visited her when she read over the Will, which was already written and at that time plaintiff and defendants of present and he obtained thumb impression of his sister, as she was not in a position to sign. When she was not in a position even to sign, could it be believed of the Will she cause prepared by understanding and explaining by her free will and sound and disposing state of mind. The other witness – Raghupathi is his first cousin, so also to his sister. In the cross-examination, he deposed that he does not know the name of the mother of Annapurna, being not a own brother to her, as his mother's name is one Manemma. He deposed that Annapurna does not know reading and writing English and she used to sign only in Telugu and she was affected with cancer and while suffering from, she breathed last, as hospitalized and treated for one month in Osmania Hospital by Dr. Sanjeevi before her death. These circumstances doubt the very execution and existence of the Will before and by the date of death of the mother of plaintiff and defendants. The trial Court is thus rightly disbelieved the Ex.B3 will. However, that is not be all and all, as the evidence on record from the admissions by plaintiff in the cross-examination and the attending circumstances, referred supra, leave about the evidence of D.W.1/D.2 and D.W.3/D.4 also in support of the defence belying entitlement of any share by plaintiff by partition from there was already an arrangement pursuant to which the shares taken and in the respective possession and enjoyment by plaintiff's brothers and sister i.e., D.1 to D.5 and some of them sold and some of them let

out in their enjoyment in their own with animus and exclusive and also pursuant to the arrangement and plaintiff even an attestor to the transactions, confirming the arrangements and the recitals in their claiming pursuant to arrangement fallen to their share and belongs to them. Once such is the case, for already there was a partition by virtue of arrangement and the property is not liable for partition, the plaintiff is not entitled to claim the relief of partition.

17. No doubt, besides the respective residential portions the defendants have been taken and enjoying towards their share respectively by cause mutated and paying taxes etc., as owners, there is still some vacant land out of the plaint schedule property and it is brought in the cross examination of P.W.1 on dt.17-03-2003, that in the said vacant site all defendants and plaintiff are having right to share equally to divide. Thus, the trial Court's decree and judgment granting $1/6^{\text{th}}$ share in the entire plaint schedule property, but for at best in said open vacant site after exclusion out of plaint schedule, the properties respectively taken and enjoying with respective door numbers by the defendants is unsustainable and liable to be set-aside. The plaintiff and defendants 1 to 5 are entitled to $1/6^{\text{th}}$ share each only in said open vacant site, subject to existence, after exclusion out of plaint schedule, the properties respectively taken separate possession and enjoying with respective door numbers by all the defendants and by alienation of some of their respective extents or part thereof. The point for consideration is answered accordingly and in favour of the appellants/defendants 2 and 4 and against the plaintiff.

Point No.2:

18. Accordingly and in the result, the appeal is partly allowed by setting aside the trial Court's decree and judgment dated 27.08.2004 granting $1/6^{\text{th}}$ share in the entire plaint schedule property, but for in said open vacant site after exclusion out of plaint schedule,

the properties respectively taken and being enjoyed with respective door numbers by the respective defendants. The plaintiff and defendants 1 to 5 are entitled to 1/6th share each only in said open vacant site. No order as to costs.

19. Miscellaneous petitions pending, if any, including additional evidence petition in CCCA.MP.No.150 of 2010, for no grounds to entertain, shall stand dismissed.

Dr. JUSTICE B. SIVA SANKARA RAO

Date:19.02.2016.

VVR

[\[1\]](#) AIR 1960 SC 335

[\[2\]](#) AIR 1936 PC 264

[\[3\]](#) AIR 1954 Bombay 95