

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.206 OF 2000

JUDGMENT:

The plaintiffs, having succeeded in the Court of first instance could not retain the decree, as the appeal preferred by defendant Nos.3 to 5 was allowed, and aggrieved over the same, preferred the present second appeal.

2. The appellants herein, who are respondents in A.S. No.148 of 1996, on the file of the learned Additional District Judge, Vizianagaram, are the plaintiffs in O.S. No.25 of 1996, on the file of the District Munsif, Kothavalasa, while respondents, who are appellants in the said appeal suit, are defendant Nos.3 to 5.

3. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in O.S. No.25 of 1996.

4. The case of the plaintiffs, in brief, is that they instituted the suit way-back in 1988 registered as O.S. No.266 of 1988, on the file of the District Munsif Court, Srungavarapukota. Subsequently, when it was transferred to District Munsif Court at Kothavalasa, it was assigned O.S. No.25 of 1996.

i) The suit was one for partition of plaintiff - A and B schedule properties into three (3) equal shares, and to allot one such share to both the plaintiffs. Plaintiff - A schedule consists of sixteen (16) items of immovable properties. The total extent works out to

Acs.2-10 cents; towards 1/3rd thereof, an extent of Ac.0-70 cents is shown. Plaintiff - B schedule consists of two (2) bulls and a cart, worth Rs.2,700/-.

ii) Substantially, the case set out by the plaintiffs has been that one Narapureddi Durgalu, Narapureddi Simhadri (defendant No.1, who remained *ex parte* before the trial Court) and Narapureddi Venkataswamy are the natural brothers. Narapureddi Durgalu married one Atchayamma. Since through her he did not beget any children, it is alleged that he married Gowramma. The plaintiffs are the daughters of Narapureddi Durgalu through Gowramma. Defendant No.1 is no other than the second brother, while Narapureddi Venkataswamy is the third brother. Defendant No.2 is wife of Narapureddi Venkataswamy, and defendant Nos.3 to 5 are their sons and daughter.

iii) They state that their father, Narapureddi Durgalu travelled to Singapore along with their mother and step-mother. He earned sufficient money and sent to his brothers, and they said to have acquired plaintiff schedule items through the money sent by him. Thus, according to them, the suit properties constituted joint family properties.

iv) Their further case is, that their father, Narapureddi Durgalu and mother Gowramma died at Singapore. Therefore, their step-mother - Atchayamma brought them back to the suit village and

joined Narapureddi Venkataswamy, the third among the brothers. According to them, Narapureddi Venkataswamy performed their marriages and, thus, the suit properties have been joint family properties and enjoyed by them jointly.

v) They propounded a Will stating that their step-mother Atchayamma executed a Will on 01-05-1982, bequeathing undivided 1/3rd share of Narapureddi Durgalu in their favour, and defendant No.3 purchased the stamps, whereas, the third brother, Narapureddi Venkataswamy has scribed the contents.

vi) Their demand for partition was being postponed on one pretext or other and when they got issued notice through their advocate on 12-06-1988, for which a reply was got issued by the defendants levelling incorrect allegations denying the marriage between Narapureddi Durgalu and their mother, Gowramma and they being the daughters of Narapureddi Durgalu.

vii) Pleading that by virtue of the Will in their favour executed by Atchayamma, they are entitled for 1/3rd share, sought to partition the plaint properties and to allot 1/3rd therein towards their share.

5. Defendant Nos.3 and 4 filed written statement resisting the relief sought for by the plaintiffs and the same was adopted by defendant Nos.2 and 5 by filing a memo.

6. It appears that defendant No.1 was set *ex parte* and his legal representatives have made an attempt to come on record by filing I.A.

No.40 of 1996 (old I.A.No.845 of 1994) under Order I Rule 10 CPC, but it proved abortive, since the said I.A. was dismissed on 12-03-1996; nothing was stated whether they pursued the matter before Higher Courts.

i) In their written statement, they admitted the *inter se* relationship of Narapureddi Durgalu, Narapureddi Simhadri (defendant No.1) and Narapureddi Venkataswamy as the natural brothers. But, they denied the allegation that Narapureddi Durgalu married Gowramma.

ii) According to them, Gowramma was no other than the sister of Atchayamma, and since Narapureddi Durgalu and Atchayamma did not have any issues, both of them along with Gowramma and her husband one Madina Durgalu with the plaintiffs went to Singapore to eke out their livelihood about 50 years prior to the institution of the suit. They claim that all three of them and their father Narapureddi Chinnayya owned and possessed Ac.0-50 cents of dry land and thatched house. On their father's death, the said properties devolved on them. Later, Narapureddi Durgalu, Madina Durgalu and Gowramma also died at Singapore. Since the plaintiffs were parentless, Atchayamma brought them to her parent's house at Gulivindada village.

iii) They state that Narapureddi Durgalu never sent money. The plaint schedule properties are their self-acquisitions. They never

lived jointly. Narapureddi Durgalu, in fact, relinquished his right in Acs.0-50 cents of land and thatched house while leaving to Singapore. According to them, Narapureddi Venkataswamy never performed the marriages of the plaintiffs and Achayamma was only senior maternal aunt, but not step-mother as claimed by the plaintiffs. They denied Atchayamma executing any Will in favour of the plaintiffs; contending that the Will is a forged document. They denied the allegation that defendant No.3 purchased a stamp paper, on which, the Will said to have executed and also the allegation that Narapureddi Venkataswamy scribed the contents of the Will. According to them, it is a got up document for the purpose of claiming right in the plaint schedule properties. Therefore, they sought to dismiss the suit.

7. Basing on the said pleadings, the trial Court framed the following six (6) issues:

- “ i) Whether the plaintiffs are daughters of Narapureddi Durgalu?
- ii) Whether Narapureddi Durgalu has relinquished his interest in the ancestral properties?
- iii) Whether the will alleged to have been executed by Narapureddi Atchayamma on 1.5.82 in favour of plaintiff is true, valid and properly attested?
- iv) Whether plaint schedule is correct?
- v) Whether Court fee paid is proper?
- vi) To what relief? ”

8. In order to substantiate their claim, the plaintiffs examined PWs.1 to 4 and marked Exs.A-1 to A-3. Whereas, on behalf of the

defendants, DWs.1 to 3 were examined, and no documents were marked.

9. On issue No.1, the trial Court, disbelieved the evidence of PW.3 and PW.4 holding that they were not competent to depose about the marriage of Durgalu and Gowramma and the birth of the plaintiffs, recorded a finding that the plaintiffs are not the daughters of Narapureddi Durgalu.

i) On issue No.2, the trial Court elaborately dealt with the stand taken by rival parties and the submissions of their learned counsel respectively and recorded a finding that the stand of the defendants, that Narapureddi Durgalu relinquished his share in the joint family property hitherto held by the joint family, was incorrect, since no document evidencing the relinquishment by Narapureddi Durgalu of his share in an extent of Ac.0-50 cents of land and thatched house, which constitutes ancestral property, was filed and thereby disbelieved that stand. As to whether the plaint schedule properties are joint family properties or self-acquisitions of other two brothers respectively, placing reliance on the judgment of this Court in **Y. Venkata Raju v. Y. Yedukondalu**¹, on burden of proof and shifting of onus, having held that since nucleus was available in the shape of Ac.0-50 cents of agricultural land and thatched house, and the same could be established since the relinquishment put forth by the defendants was disregarded, the onus shifts to the defendants to

show that the plaint schedule properties were acquired with their self-acquisitions and since the defendants failed to prove that they had other source of income, held that the plaint schedule properties are joint family properties and that late Narapureddi Durgalu was entitled to his share.

ii) On issue No.3, holding that the evidence of PW.2 is sufficient to prove the execution of Will - Ex.A-3 by Atchayamma and satisfies the requirement of evidentiary rule contemplated by the provisions of Section 67 of the Indian Evidence Act, held that Ex.A-3 is proved and valid and, thus, tendered a finding in favour of the plaintiffs.

iii) On issue No.4, held that the defendants failed to prove that the plaint schedule is incorrect and, accordingly, tendered a finding against the defendants.

iv) Issue No.5 also held against the defendants holding that the court fee payable was under Section 34 (2) of A.P. Court Fee Act, but not under Section 34 (1) of the Act as contended by the defendants and, accordingly, recorded a finding against the defendants.

v) In view of the findings arrived at on issue Nos.1 to 5, the trial Court decreed the suit only concerning A-schedule properties for division into three (3) equal shares and to allot one such share to the plaintiffs, while dismissing the claim in B-schedule properties.

¹. AIR 1958 A.P. Pg.147

Concerning mesne profits, observed that an inquiry can be made in the final decree proceedings on an application being filed by the plaintiffs.

10. Challenging the said judgment and decree, the defendants preferred the first appeal before the appellate Court.

11. The appellate Court formulated the following three points:

- “ i. Whether the schedule property is the ancestral property and acquired with the aid of joint family nucleus;
- ii. Whether the Will said to have been executed by Atchayamma on 01-05-1982 in favour of the plaintiffs is true, valid and properly attested?
- iii) Whether the court fee paid on the plaint is proper? ”

12. The appellate Court having formulated the aforesaid points and discussing the same, allowed the appeal setting aside the judgment and decree passed by the trial Court by dismissing the suit.

13. Aggrieved over the judgment and decree of the appellate Court, the present second appeal is preferred by the plaintiffs. While agitating grounds of second appeal, touching the Will - Ex.A-3, the appellants formulated the following substantial questions of law in paragraph No.15:

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- a) Whether Durgalu, husband of Atchayamma can be said to have relinquished his share in the Joint family property without

there being any document to that effect simply secured and he left for Singapore.

- b) Whether the 1st Appellate Court is right in holding that Ex.A.3 will executed by late Atchayamma in favour of the appellants/plaintiffs is not properly proved when the sole surviving attesor of the Ex.A.3 will was examined by the appellants/plaintiffs to prove its execution.
- c) Whether the non reference to Ex.A.3 registered will in the Registered Lawyer's notice got issued by the appellants/plaintiffs can be said to be enough to find that Ex.A.3 will is not true and valid, especially when its truth is supported by the evidence of PWs.2 and 3 whose evidence is well considered by the trial Court.
- d) Whether the acquisition of any properties in the name of the Joint Family Manager, automatically assumes the character of self acquisition especially when there is nucleus for the joint family to acquire further properties?
- e) Whether the burden is on the Joint Family member asserting a particular property to be his self acquisition when there is a ancestral nucleus for the joint family, is on the person asserting that the property standing in his name in his self acquisition.
- f) Whether the Court fee has to be paid as per the averments in the plaint."

14. This Court taking into consideration the substantial question of law shown as ground No.15(c), admitted the present second appeal and, therefore, in the present second appeal it has to be confined to said question of law alone.

15. Heard Sri K. Subrahmanyam, learned counsel for the appellants - plaintiffs. Though, service was completed on respondents - defendants, having made their appearance, none represented the matter.

16. Learned counsel for the appellants referred to rulings of Hon'ble Supreme Court in **Smt. Indu Bala Bose and others v. Manindra Chandra Bose and another**², in the context of modes of proving the Will and the onus lying on the propounder explaining the suspicious circumstances; and in **M.B. Ramesh (D) by LRs. V.K.M. Veeraje Urs (D) by LRs. and others**³, submitting that the Will has to be proved in terms of Section 63 (3) of the Succession Act read with Section 68 of the Evidence Act, and also as an answer to the finding recorded by the appellate Court that Will under Ex.A-3 fails for want of satisfactory proof of 'due attestation'.

i) Learned counsel would submit that the appellate Court, somehow, overlooked the fact that DW.2, one of the attestors to Ex.A-3 - Will executed by Achayamma, asserting that the other attestor Jerripotula Pydithalli was also present at the time when signed and the Executant Achayamma and Narapureddi Venkata Swamy, the father of DW.1 was also present and, therefore, ought to have confirmed the judgment and decree passed by the trial Court.

². AIR 1982 SC 133

³. AIR 2013 SC 2088

17. As mentioned hereinbefore, ground No.15 (c) was alone considered at the time of admission as substantial question of law and, accordingly, admitted the present second appeal. The rest of the grounds were discarded by this Court at the time of admission, and nothing was addressed by the learned counsel for the appellants that the other grounds also can be considered. Hence, it would be difficult to examine the other substantial questions of law. Even otherwise, the entire case of the plaintiffs rests on Ex.A-3 alone. This is so because, there is no concrete proof to show that the plaintiffs are born to Gowramma through Narapareddi Durgalu though, the plaintiffs time and again went on averring in their plaint and asserting in their evidence, still, no documentary evidence is forthcoming to show that their father's name was recorded anywhere as Narapareddi Durgalu. Even in Ex.A-3, Achayamma, the alleged testatrix did not specifically mention that the plaintiffs are born to Gowramma through Narapareddi Durgalu. Therefore, the trial Court has rightly held that it is difficult to construe that the plaintiffs are the daughters of Narapareddi Durgalu through Gowramma. Even a thorough scanning of evidence let in by the parties does not reflect that the plaintiffs were born to Narapareddi Durgalu through Gowramma, leave apart that Narapareddi Durgalu married Gowramma during the life time of Achayamma. Therefore, it has to be held that the plaintiffs failed to prove that they are the daughters of Narapareddi Durgalu through Gowramma.

18. Now, turning to the allegation of the plaintiffs that Narapareddi Durgalu used to send money from Singapore and utilizing the same by his other two brothers i.e., defendant No.1 and Narapareddi Venkata Swamy whose wife and children are defendant Nos.2 to 5, acquired the plaint schedule properties, there is no tangible evidence on record to show that Narapareddi Durgalu sent money from Singapore periodically, and that the said money was utilized for purchasing the plaint schedule properties. None of the witnesses examined on behalf of the plaintiffs did give relevant details. No documentary evidence is filed, nor there is anything in the cross-examination of DWs.1 to 3 in the form of admission suggesting that Narapareddi Durgalu did send money and that the same was utilized for acquiring the plaint schedule properties. Mere averments in the plaint and bald assertions in evidence let in by the plaintiffs would not lead to proving the said allegations. Therefore, it has to be held that the trial Court did rightly reject that stand of the plaintiffs.

19. As already mentioned in the above, the trial Court on the premise that there is positive evidence on record to show that the joint family did possess ancestral nucleus of Ac.1-50 cents and one thatched house and that Narapareddi Durgalu relinquishing his share is not proved by the defendants opined that the onus shifts to defendants to prove that the plaint schedule properties are their self-acquisitions as having been acquired without aid of the ancestral nucleus, and since there is no material to show that other two brothers,

who are deceased defendant No.1 and the father of defendant Nos.3 to 5, Narapareddi Venkata Swamy, did own and possess any property other than the ancestral nucleus that generated income for acquiring the plaint schedule properties, held plaint schedule properties in all probability must have been acquired with the aid of the ancestral nucleus. So observing, the trial Court acceded to the request of the plaintiffs and ordered division of plaint schedule properties into three equal shares and to allot one such share to the plaintiffs by granting other consequential reliefs. The appellate Court did not agree with the trial Court and recorded a definite finding that the Will - Ex.A-3 since not proved by the plaintiffs, the question of plaintiffs deriving any right over the plaint schedule properties does not arise, and thereby set aside the judgment and decree passed by the trial Court, dismissing the suit.

20. So, what is crucial to decide the controversy in the present second appeal is,

whether the findings recorded by the appellate Court on execution of Ex.A-3 by Achayamma can be sustained?

21. Thus, Ex.A-3 is a crucial document in the present second appeal. In case it is found on scanning of the evidence, both, oral and documentary, let in by the parties, that the evidence of DW.2 proves due attestation and execution of Will by late Achayamma, certainly, the plaintiffs are entitled to the relief of division of properties and

allotment of 1/3rd share affirming the judgment and decree passed by the trial Court, or else they will have to fail.

22. A perusal of evidence of PW.2, who is examined to prove Ex.A-3, would reflect that his evidence is not convincing. In strict sense, when examined whether due attestation is satisfied or not, certainly, it has to be held that his evidence does not prove due attestation. What all he asserts in his evidence is, that both Achayyamma and Narapureddi Venkata Swamy came to him with a Will already written and telling him to sign and he has signed in it and the other attesor put his thumb impression. It is clear from his evidence that in his presence, the executant-cum-testatrix has not affixed her thumb impression. So, the very essential requirement of his witnessing testatrix putting her thumb impression and his subscribing signature in her presence is not proved though, it is the case of the plaintiffs that Narapureddi Venkata Swamy is the scribe of that Will and DW.1 has purchased the stamp of the Will. Nothing is brought out in the cross-examination of DW.1 to show that the stamp for writing Ex.A-3 was purchased by DW.1 and scribed by his father.

23. It is now, desirable to examine the features of Will - Ex.A-3. There is thumb impression occurring on Ex.A-3 described as 'Narapureddi Achayyamma's Nishani' in vernacular language. It is difficult to construe when it is written as 'Nishani' any thumb impression would be put. In normal parlance, 'nishani' indicates a

‘dot’ to be marked indicating that it refers to the executant. Even otherwise, a perusal of the signature of Narapureddi Venkata Swamy written at the bottom against the word ‘Dasturi’ written in vernacular language, the prefix ‘Narapureddi’ appears to be in thick ink, whereas suffix ‘Venkata Swamy’ appears to be in light ink, giving rise to some suspicion as to whether it belongs to Narapureddi Venkata Swamy. When this signature was confronted to DW.1, he bluntly denied that it belongs to his father. A suggestion made there-for was also bluntly denied by him. In case, the plaintiffs were really serious in proving Ex.A-3, they would have made every attempt to examine the stamp vendor, since it is their case that DW.1 purchased the stamp paper of Ex.A-3. The plaintiffs did not make any attempt in that regard. The plaintiffs ought to have summoned the stamp vendor along with the register which invariably contains the signature of DW.1, had he really purchased the stamp paper of Ex.A-3 and could have confronted that signature to DW.1. In case, the register was destroyed, the stamp vendor would have, certainly, supplied that information. Though, these circumstances appear to be not that serious, but in a case of this nature, where, rival party denies the genuinity of Will, the onus is cast on the propounder of Will to dispel all suspicious features invariably which, in the present case, the plaintiffs failed to do.

24. The other probability on which substantial question of law rests is, non-mentioning of existence of Ex.A-3 in the notice got

issued by the plaintiffs to defendants, demanding partition of properties and allotment of share. The said notice was dated 12-06-1988. A perusal of Ex.A-1, which contains six (6) paragraphs does not reflect the execution of Ex.A-3 by Achayamma, though, in paragraph No.3, there is reference to late Achayamma. The allegations therein were replied by getting a notice issued by the defendants dated 28-06-1988. Thus, it is not as though that there is no reply given to Ex.A-1. So, the inescapable inference that the Will under Ex.A-3 was not in existence on the date when Ex.A-1 notice was got issued, cannot be ruled out. Thus, this probability which disfavours the plaintiffs' stand and favours the defendants, since the said probability can be derived from proved facts basing on issuance of Ex.A-1 and reply notice under Ex.A-2. Thus, the finding recorded by the appellate Court that the absence of reference to Ex.A-3 in Ex.A-1 is a strong circumstance that favours the defendants to view that Ex.A-3 was not in existence on the date when Ex.A-1 was issued and recording a finding there-for disbelieving Ex.A-3's execution by Achayamma cannot be faulted.

25. Now, turning to the decisions; in **M.B. Ramesh** (Supra 2) there were concurrent findings recorded on due execution and validity of a Will propounded therein, more particularly, the attesor therein asserting that the other attesor has signed in his presence and spoken to the presence of the scribe and the very Will being written in his presence, besides the fact that Will was registered on the very next

day, inspiring confidence as to its genuinity. In the instant case, the fact-situation touching Ex.A-3 is altogether different. Even as admitted by PW.2, the Will was already scribed and it was brought to him. Even an examination of Ex.A-3 would show that the stamp was purchased on 01-09-1981, but the alleged execution of Will was on 01-05-1982. Thus, nine (9) months after its purchase, the Will was written. Admittedly, the said Will was not registered. An attempt was made to elicit that since there was no Sub-Registrar's office existing during 1982, it was not registered, as DW.1 has given the answer that Sub-Registrar's office was established in the year 1985. If there was any intent to get the Will registered, nothing prevented to get it registered in the nearest sub-Registrar's office, for which there is no explanation at all. It is no doubt true, an unregistered Will is valid and can be acted upon, provided the proof of attestation as well as execution and the truth of contents mentioned therein are satisfactorily established. But, certainly, the ruling relied on would not aid the plaintiffs to dispel the suspicious circumstances referred to in the above.

26. Even the decision in **Smt. Indu Bala Bose** (Supra 1) would not aid the plaintiffs to prove due attestation as well as execution of Ex.A-3 and its genuinity. Therefore, it has to be held that the appellants – plaintiffs failed to substantiate the question of law, they have agitated in the present second appeal. The consequence is, the present second appeal fails.

27. Therefore, the second appeal is dismissed, confirming the judgment and decree rendered by the appellate Court setting aside the judgment and decree passed by the trial Court by dismissing the suit of the plaintiffs. No order as to costs.

As a sequel thereto, miscellaneous applications, if any pending in the second appeal, stand closed.

A. SHANKAR NARAYANA, J

November 02, 2016.
Mgr

