

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**

CIVIL MISCELLANEOUS APPEAL NO. 739 OF 2016

JUDGMENT: (Per the Hon'ble Smt. Justice Anis)

1. This Civil Miscellaneous Appeal, under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (for short 'C.P.C.),' is directed against the order, dated 14.09.2016 passed in I.A.No.1364 of 2016 in O.S.No.108 of 2016 on the file of the III Additional District Judge, Kakinada.

2. Appellant was arrayed as the respondent No.5, while the respondents 1 to 5 as the petitioners 1 to 5 and the respondents 6 to 9 as the respondents 1 to 4 in I.A. before the trial Court.

3. For the sake of convenience, the parties are referred to as arrayed in the I.A. before the trial Court.

4. The petitioners/plaintiffs filed the petition under Order XXXIX Rules 1 and 2 C.P.C. for grant of interim injunction restraining the respondents/defendants 4 and 5 (no relief is claimed against respondents 1 to 3) not to interfere with the peaceful possession and enjoyment of the petitioners/plaintiffs over the plaint schedule property till disposal of the suit.

5. The brief averments made in the petition filed before the trial Court are as follows:

The petitioners filed the suit for partition of the suit schedule property and for cancellation of registered Sale deed dated 04.05.2016 executed by 4th respondent in favour of 5th respondent on the ground that 4th respondent is not having any right or title to any part of the said property and also sought for permanent injunction. Originally, the suit schedule property is an agricultural land to an extent of Ac.5.06 situated in Survey No.190/2 of Sarpavaram Village of Kakinada Rural Mandal and it belonged to the grandfather of the petitioners by name Gottumukkala Venkata Gopalacharyulu. The said Gopalacharyulu executed a registered Settlement deed on 01.07.1953 bequeathing the schedule property to his wife Appallamma, who is the grandmother of the petitioners. As per the said Settlement deed, the said Appalamma can enjoy the schedule property during her lifetime and after her death, the schedule property must be devolved to his living sons and the grandsons equally on the date of death of Appalamma. On 11.12.1988, Appalamma died intestate and all the petitioners are alive at the time of death of Appalamma along with her four sons. Thus, the four sons of Appalamma and five grandsons are entitled for the schedule property. The respondent No.4 is the wife of one of the sons of Gopalacharyulu by name Gottumukkala Venkata Veera Raghavacharyulu and during

his lifetime, the respondent No.4 deserted him. The said Raghavacharyulu died on 03.12.2007 at Kakinada. The respondent No.4 being his wife left him in the year 1977 and she never joined with her husband later. The said Raghavacharyulu lived with his brothers and they used to look after his welfare and provided treatment during his last days. The said Raghavacharyulu was unemployed and completely dependant on his brothers. The said Raghavacharyulu – husband of 4th respondent executed a Will on 07.09.2007 bequeathing his undivided 1/9th share to all the petitioners equally after his death. Even at the time of his death, the respondent No.4 did not turn up and her whereabouts were not known to the petitioners. After the death of Appamma - grandmother of the petitioners, the petitioners were enjoying the schedule property with their respective fathers. Further, all the family members got pattadar passbooks and title deeds in their names to an extent of their respective shares. After death of one of the brothers by name Venkata Surya Narasimhacharyulu, passbook was given in the name of his wife. After the death of all the sons of Appamma, the petitioners are cultivating the land peaceably and paying taxes to the Government. The petition schedule property has not been partitioned and the respondents 1 to 3, who are the sisters of petitioners 1 to 3, are having meager share and not cooperating for partition. On 07.05.2016, the petitioners gave a representation to

Tahsildar informing about the Will deed executed by Venkata Veera Raghavacharyulu in their favour and requested to remove the name of 4th respondent in the revenue records as she does not have any right over the part of the petition schedule property, but no reply was given by Tahsildar, Kakinada Rural. Thereafter, they came to know that the respondent No.4 executed a registered Sale deed in favour of the respondent No.5 to an extent of Ac.1.69 cents which is forming part of the petition schedule property. On 06.06.2016, the petitioners got issued a reply notice for the caveat petition to the advocate of the respondent No.5 requesting to serve the copy of the Sale deed, but he did not do so. However, the petitioners are the absolute owners of the petition schedule property and the Sale deed executed by the respondent No.4 in favour of the respondent No.5 is null and void and not binding on the petitioners. Moreover, the respondents 4 and 5 are never in possession of the plaint schedule property and they are no way concerned with it, and prayed the Court to grant injunction as they are having *prima facie* case and balance of convenience is also in their favour.

6. The brief averments made in the Counter filed by the respondents 1 to 3 before the trial Court are as follows:

The above respondents admitted the claim of the petitioners and denied that they are not cooperating for partition. According to the respondents, the respondent No.4

is not having any right and title to the property and in fact during the lifetime of her husband, she never came to the petition schedule property and in fact she left her husband long back. After the death of her husband also, the respondent No.4 did not turn up. During the lifetime of the husband of the respondent No.4, all his family members used to look his welfare as he did not have any occupation. Only with a view to grab the property of the petitioners and the respondents 1 to 3, the respondent No.4 created the document as if her husband is the owner of Ac.1.69 cents out of the petition schedule property and trying to trespass into the petition schedule property. The respondents 4 and 5 are not having any right and possession over any part of the petition schedule property and they never in possession of the property. Therefore, prayed the Court to grant injunction by allowing the petition.

7. The respondent No.4 filed counter and denied the allegations made in the petition. She admitted that she is the wife of Venkata Veera Raghavacharyulu and immediately after the marriage, she joined with him at his residence at Sarpavaram and led conjugal life. In the year 1979, they blessed with a daughter by name Padmaja, but she died in the year 1980. Later, there were no issues to the respondent No.4 and the said Raghavacharyulu. During the lifetime of her husband, himself and his brothers orally partitioned their joint family property among themselves and her husband was

allotted an extent of Ac.1.69 cents in Survey No.190/2 of Sarpavaram village. The brother of the husband of the respondent No.4 by name Venkata Raja Gopala Narayanacharyulu got a house site situated at Sarpavaram village and his other brothers got Ac.1.69 cents of agricultural land each. The revenue authorities issued pattadar passbooks in their names for their respective extents and recognized their title and separate possession. It is also specifically pleaded that the suit for partial partition is not maintainable under law as one of the brothers already took the house site at Sarpavaram village and that property was not included in the present suit. According to the respondent, she never separated from her husband and she lived with him till his demise on 03.12.2007 and the Tahsildar, Kakinada Rural mandal issued 'No Objection certificate' on 12.12.2008 stating that 4th respondent is the only legal heir of the deceased Gottumukkala Venkata Veera Raghavacharyulu. After his death, the share of her husband devolved on the respondent No.4 as there are no other legal heirs. The petitioners used to demand the respondent No.4 to leave the counter schedule property and obstructed the respondent from withdrawing money kept in the S.B. account of her husband. The petitioners also made attempts to interfere with her possession of the counter schedule property, as such she got published in a newspaper as if she gifted the same to her brother in order to protect the counter

schedule property. Thereupon, she lodged a complaint before Lok Adalat and subsequently their relatives interfered and admonished the petitioners. On that, the petitioners promised that they would not interfere with her possession and enjoyment of the said property. On the application of this respondent, the revenue authorities mutated her name in the relevant records and also 1-B register. As she was away from her husband's village, she sold the counter schedule property under registered Sale deed in favour of 5th respondent for a valid consideration and put him in possession. The revenue authorities issued E-pass book in favour of the respondent and in turn she handed over the same to 5th respondent. Finally, she denied that her husband executed an unregistered Will deed and also denied the signature on the alleged Will deed is that of her husband and stated that it is a forged document. The petitioners having an evil eye over the schedule property, fabricated the alleged Will by forging the signature of her husband Venkata Veera Raghavacharyulu, and finally prayed the Court to dismiss the petition as there is no *prima facie* case in favour of the petitioners.

8. The respondent No.5 filed counter and stated that the petitioners and the respondents 1 to 3 are not in possession and enjoyment of the property purchased by him and that the petitioners brought the Will into existence by fabricating and forging the same. The deceased Venkata Veera

Raghavacharyulu is a Sanskrit pandit and he used to sign in Telugu and he never put his signature in English. The sale deed executed by 4th respondent in favour of 5th respondent is a valid document and the petitioners are not entitled to seek declaration that the Sale deed dated 04.05.2016 executed by 4th respondent in his favour to an extent of Ac.1.69 cents as null and void. Except the 4th respondent, no one has any manner of right and title of the said extent of Ac.1.69 cents and after purchase, 5th respondent has been in exclusive possession and enjoyment of the said property and thereby question of trespass into the said property does not arise. The petitioners have no *prima facie* case and balance of convenience, and prayed the Court to dismiss the petition with costs.

9. During the course of enquiry, on behalf of the petitioners, Exs.P.1 to P.29 got marked and on behalf of the respondents 4 and 5, Exs.R.1 to R.12 got marked.

10. Basing on the pleadings and the documentary evidence, the trial Court allowed the petition and restrained the respondents 4 and 5 by way of temporary injunction not to interfere with the peaceful possession and enjoyment of the petitioners over the plaint schedule property pending disposal of the suit.

11. Aggrieved by the order passed by the trial Court, the respondent/defendant No.5 preferred the present Civil Miscellaneous Appeal.

12. The learned counsel for the appellant/respondent No.5 argued that the trial Court failed to see that respondent No.4 is the only legal heir of late Venkata Veera Raghavacharyulu and after his death, she being the sole legal heir, became the owner of the property, and that the legal heir certificate was issued in favour of 4th respondent and her name was mutated in the revenue records as owner of the property. It is also contended that the trial Court ought to have seen that the suit for relief of cancellation of registered Sale deed is not maintainable in view of Section 31 of the Specific Relief Act, 1963, and that is the ration card, 4th respondent was shown to be the wife of said Venkata Veera Raghavacharyulu and when the petitioners tried to interfere with the property belongs to 4th respondent, she approached Lok Adalat. It is argued that the appellant purchased the property by paying valid sale consideration and 4th respondent after receiving the said consideration, executed the Sale deed for an extent of Ac.1.69 cents under Ex.R.1 on 04.05.2016 and thereafter the appellant became the owner of the said property, and that the respondents have nothing to do with the petition schedule property, filed a false and frivolous suit, and therefore, prayed the Court to set aside the orders in I.A.No.1364 of 2016, dated 14.09.2016,

passed by the III Additional District Judge, Kakinada by allowing the Civil Miscellaneous Appeal.

13. On the other hand, the learned counsel for the respondents/petitioners 1 to 5 argued that they filed the suit for partition of the suit schedule property and also for cancellation of registered Sale deed dated 04.05.2016 stands in the name of appellant. It is also argued that originally the suit schedule property is an agricultural land admeasuring Ac.5.06 situated in new Survey No.190/2 (old Survey No.155/2) of Sarpavaram village and the said property belonged to the grandfather of the petitioners by name Gottumukkala Gopalacharyulu and during his lifetime, he executed a Settlement deed on 01.07.1953 bequeathing the plaint schedule property to his wife Appalamma, who is the grandmother of the petitioners and as per the said Settlement deed, Appalamma could enjoy the property during her lifetime and after her death, the property must be devolved to his living sons and the grandsons equally. It is also argued that the said Appalamma died intestate on 11.12.1998, leaving behind the petitioners and their fathers i.e. four sons and five grandsons, and that on the date of death of Appalamma, the petitioners are alive along with her four male sons, therefore, they filed the present suit seeking for partition of 1/9th share in the schedule property. It is also argued that Gottumukkala Venkata Veera Raghavacharyulu – one of the sons of Appalamma died on 03.12.2007 and during his

lifetime, 4th respondent left the matrimonial house and she did not even present at the time of his death, and that on 07.09.2007, the said Raghavacharyulu executed a Will bequeathing his undivided 1/9th share to the petitioners equally. It is further argued that 4th respondent is not having any right over the property admeasuring Ac.1.69 cents out of total extent of Ac.5.06 cents and she has no right to execute the Sale deed in favour of 5th respondent. It is finally argued that the trial Court, after considering all the above aspects, granted interim injunction in favour of respondents/petitioners and the said findings of the trial Court need no interference, and prayed the Court to dismiss the Civil Miscellaneous Appeal.

14. After hearing both sides, the point that arises for consideration is:

Whether the appellant/respondent No.5 has made out any case to set aside the impugned order passed by the trial Court as prayed for?

15. **POINT:**

A perusal of the pleadings and the documents produced by both sides shows that there is no dispute that the petitioners and the respondents 1 to 4 are close relatives and interrelated to each other. Originally, the petition schedule property is an agricultural land admeasuring Ac.5.06 situated

in Old Survey No.155/2 (new Survey No.190/2) of Sarpavaram village, Kakinada Rural mandal belongs to Gottumumukkala Venkata Gopalacharyulu. The said late Gopalacharyulu was the grandfather of the petitioners and during his lifetime, he executed a Settlement deed dt. 01.07.1953 in favour of his wife Appalamma. As per the Settlement deed, his wife could enjoy the schedule property during her lifetime and thereafter, the property would devolve to his living sons and grandsons equally. It is also an admitted fact that on 11.12.1988, the said Appalamma died intestate leaving behind four sons and five grandsons. The petitioners are the grandsons of late Appalamma. The respondent No.1 is the sister of the petitioners 1 and 2. The respondent No.2 is the sister of 3rd petitioner and the respondent No.3 is the mother of the petitioners 4 and 5. The respondent No.4 is the wife of one of the son of G.Venkata Gopalacharyulu.

16. According to the petitioners, the petition schedule property was not partitioned, as such they are entitled for 1/9th undivided share each in the plaint schedule property and the respondents 1 to 3 are not cooperating for partition of the joint family property. It is the specific case of the petitioners that one of the sons by name Gottumukkala Venkata Veera Raghavacharyulu died on 03.12.2007 at Kakinada and 4th respondent is his wife and during his lifetime, she left from his conjugal society and the petitioners

used to look after him. The said Gottumukkala Venkata Veera Raghavacharyulu executed a Will dated 07.09.2007 bequeathing his 1/9th share to the petitioners. Therefore, it is contended that 4th respondent has no right in the property and she cannot execute the sale deed in favour of 5th respondent.

17. A perusal of the counter of respondent No.4 shows that one of the sons by name Gottumukkala Venkata Raja Gopala Narayanacharyulu took the house site situated at Sarpavaram village and the said property was not included in the partition suit. The specific case of the respondent No.4 is that the entire Ac.5.06 cents of landed property was orally partitioned and in that partition, her husband got Ac.1.69 cents and other two brothers also got Ac.1.69 cents each and their names were mutated in the revenue record, therefore, there was an oral partition and the petitioners cannot maintain the suit.

18. The other contention of the appellant is that the husband of 4th respondent was a Sanskrit Pandit and he used to sign in Telugu and he never put his signatures in English. Admittedly, the said Will deed is filed under Ex.P.8, it is an unregistered will deed dated 07.09.2007 bears the signature of Gottumukkala Venkata Veera Raghavacharyulu in English. Admittedly, 4th respondent specifically pleaded that after the death of her husband, his share of property was devolved on

her as there were no other legal heirs. From the date of his death, the property admeasuring Ac.1.69 cents has been in possession and enjoyment of 4th respondent and she made an application to the revenue authorities to issue pattadar passbook in her name and her name was mutated in the relevant revenue records, and as she being the lawful owner of the property, and executed the Sale deed in favour of 5th respondent for valid consideration and that the petitioners cannot challenge the said Sale deed. The other contention raised by 4th respondent in the counter is that the signature of her husband on the Will deed is a rank forged one and the petitioners brought the Will deed into existence with a view to grab the counter schedule property.

19. Admittedly, in the counter, 4th respondent has taken a specific plea that there was an oral partition effected between the sons and late Gottumukkala Venkata Gopalacharyulu after the death of his wife Appalamma and their names were mutated in the revenue records. However, whether the alleged Will dated 07.09.2007 is a forged document or not and whether there was earlier partition between the parties has to be decided by the trial Court after full-fledged trial.

20. Further, in order to attract Section 31 of the Specific Relief Act, 1963, the plaintiff has to establish three essential conditions, viz., 1) The instrument is void or voidable against him; 2) He may have a reasonable apprehension that such

instrument may cause serious injury; and 3) The Court must adjudicate the instrument as void or voidable. Admittedly, the petitioners are not parties to the Sale deed executed in favour of the appellant. Therefore, the petitioners being the third parties *prima facie* cannot seek cancellation of the registered Sale deed Ex.R.1 executed in favour of the appellant unless they establish their interest in the property sold thereunder. However, the trial Court is able to settle the issues that whether there can be an apprehension for the petitioners and the remedy for that apprehension lies under Section 31 or somewhere else like Section 34 or 39, only at the time of trial, but that cannot be a ground to tilt in favour of petitioners for granting injunction.

21. Therefore, considering all the above aspects, it is clear that the respondents/petitioners have not made out the essential ingredients of Order XXXIX Rules 1 and 2 C.P.C. All the more so, given the revenue records which support the plea of a prior partition. Therefore, the order of the trial Court in granting injunction is liable to be set aside.

22. In the result, the Civil Miscellaneous Appeal is allowed, setting aside the order dated 14.09.2016, passed by the III Additional District Judge, Kakinada, in I.A.No.1364 of 2016 in O.S.No.108 of 2016. No order as to costs. However, it is made clear that the trial Court shall dispose of the suit on its own merits, uninfluenced by any of the observations

made by this Court in this order or in the impugned order passed by the trial Court itself.

23. Miscellaneous Petitions, if any, pending in the Civil Miscellaneous Appeal shall stand closed.

(SANJAY KUMAR, J)

(ANIS, J)

23.11.2016

Anr



**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SMT. JUSTICE ANIS**



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