

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.995 OF 2011

JUDGMENT:

This Second Appeal is filed by the defendants assailing the decree and judgment dated 26.11.2010 in A.S.No.138 of 2008 on the file of the Court of the II Additional District Judge, Ongole, wherein and whereby the decree and judgment dated 30.10.2008 in O.S.No.84 of 2004 on the file of the Court of the Senior Civil Judge, Chirala, decreeing the suit filed by the plaintiff for partition was confirmed.

2. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court to avoid confusion.

3. The facts leading to filing of the present appeal are briefly as follows: The plaintiff and first defendant are the sons and second defendant is the wife of late Chinnam Parasuramulu of Gonasapudi Village. Late Parasuramulu originally hails from Muppala- Maddirala Village. In the family partition, Parasuramulu got an extent of Ac.3.02 cents of land and one house in Muppala- Maddirala Village. The said Parasuramulu sold the property in Muppala-Maddirala Village and purchased different properties in Gonasapudi and Kadavakuduru Villages including the suit schedule properties. Parasuramulu died due to cancer on 30.03.2004. The first defendant obtained a collusive settlement deed from the second defendant in respect of her properties to deprive the rights of the plaintiff. The defendants are not co-operating with the plaintiff for partition of the properties. Hence, the suit.

4. The first defendant filed written statement admitting the relationship between the parties *inter alia* contending that the suit schedule properties are the self acquired properties of late Parasuramulu. It is further contended that late Parasuramulu never managed or enjoyed the properties as kartha of joint family. Late Parasuramulu executed a will in favour of the first defendant and his children bequeathing the suit schedule properties. The plaintiff constructed a house at Ongole with the funds provided by Parasuramulu. Hence, the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaint schedule properties are self acquired properties of late Parasuramulu?
2. Whether late Parasuramulu bequeathed his properties to his daughter and son of first defendant under registered will?
3. Whether the first defendant obtained collusive settlement deed from second defendant?
4. Whether the plaintiff is entitled for partition of plaint A and B schedule properties and to allot 4/9th share as claimed by him?
5. Whether the plaintiff and defendants 1 and 2 are co-owners and they are in joint and constructive possession of plaint schedule properties?
6. To what relief?

6. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and no documents were marked. On behalf of the defendants, DWs.1 to 4 were examined and Exs.B.1 to B.6 were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that late Parasuramulu purchased the suit schedule properties with the income derived from joint family properties; therefore, the plaintiff

is entitled for share in the suit schedule properties and decreed the suit as prayed for, while disbelieving Ex.B.1 registered will dated 20.03.2004. Feeling aggrieved by the decree and judgment dated 30.10.2008, the defendants have filed A.S.No.138 of 2008 on the file of the Court of the II Additional District Judge, Ongole. The learned II Additional District Judge, after reappraising the oral and documentary evidence available on record afresh, arrived at a conclusion that the suit schedule properties are the joint family properties; therefore, the plaintiff is entitled for a share in the suit schedule properties. The first appellate Court also disbelieved the will dated 20.03.2004 set up by the first defendant. Hence, the second appeal.

8. Learned counsel for the defendants (appellants herein) strenuously submitted that the Courts below failed to consider that the properties covered under Exs.B.2 to B.6 were purchased by Parasuramulu with his own money. He further submitted that the Courts below have not properly appreciated the oral testimony of DWs.2 to 4 and discarded Ex.B.1 will on erroneous and untenable grounds. He also submitted that the findings recorded by the Courts below are perverse and are liable to be set aside.

9. *Per contra*, learned counsel for the plaintiff (respondent herein) submitted that this Court shall not lightly interfere with the concurrent finding of fact recorded by the Courts below. He further submitted that the Courts below considered the oral testimony of DWs.2 to 4 in right perspective and disbelieved Ex.B.1 will. He also submitted that there is no question of law much less

substantial question of law is involved in this appeal. Hence, the appeal is liable to be dismissed.

10. Basing on the submissions made by the learned counsel for both parties, the questions of law that arise for consideration in this second appeal are as follows:

1. Whether the suit schedule properties are the joint family properties of late Parasuramulu, plaintiff and defendants? and
2. Whether the Courts below discarded Ex.B.1 on surmises?

11. Point Nos.1 and 2 are interlinked with each other; hence, this Court is inclined to address both points simultaneously in order to avoid recapitulation of facts and evidence.

12. The following admitted facts can be culled out from the pleadings of both parties: Late Parasuramulu, who is the father of plaintiff, first defendant and husband of second defendant, are originally natives of Muppala-Maddirala Village of Prakasam District. The said Parasuramulu got an extent of Ac.3.02 cents of land and one house at Muppala-Maddirala Village in the family partition. Thereafter Parasuramulu shifted his family to Gonasapudi Village. Parasuramulu purchased landed properties covered under Exs.B.2 to B.6 in his own name. The said Parasuramulu died on 30.03.2004 due to acute cancer.

13. The first question that falls for consideration is whether late Parasuramulu purchased the properties covered under Exs.B.2 to B.6 with joint family nucleus or not?

14. The material available on record clinchingly establishes that late Parasuramulu sold his ancestral property situated in Muppala-Maddirala Village and purchased landed properties in Gonasapudi and Kadavakuduru Villages. Except the self-served

testimony of D.W.1 (first defendant), there is no convincing evidence to establish that by the time of filing of the suit, late Parasuramulu was having land in his name at Muppala-Maddirala Village. The fact remains that Parasuramulu sold his properties and purchased the properties in Gonasapudi and Kadavakuduru Villages. As per the testimony of DW.1 (first defendant), himself, plaintiff and late Parasuramulu lived jointly upto 1985. Thereafter the plaintiff shifted his residence to Ongole and started a book stall. Even as per the testimony of DW.1, the plaintiff himself and his father went to Ballari and cultivated the lands there. The testimony of witnesses clearly reveals that the plaintiff and the first defendant helped and assisted Parasuramulu in day-to-day cultivation activities and affairs. Basing on the material available on record, an irresistible conclusion that can be drawn is that the plaintiff, late Parasuramulu and defendants constitute the joint family. The first defendant has taken a specific plea in the written statement that the plaintiff was given Ac.10.00 cents of land from and out of the joint family properties. Mere assertion in the written statement by itself is not sufficient to substantiate the stand of the first defendant. Except the assertion in the written statement, nothing was produced before the trial Court or the first appellate Court to substantiate the stand of the first defendant that Acs.10.00 of land out of joint family properties was given to the plaintiff. It is needless to say that unless and until a contrary is proved, the property acquired and stood in the name of Kartha of joint family can be treated as joint family property. Therefore, the Court can safely presume that the properties acquired by late Parasuramulu are joint family properties. It is not the case of the

first defendant that the joint family properties were partitioned either before or after the death of Parasuramulu. The material available on record clinchingly establishes that by the time of filing of the suit, the plaintiff and defendants constitute the joint family and the suit schedule properties are the joint family properties. Both the Courts below concurrently held that the suit schedule properties are the joint family properties of the plaintiff and defendants. It is needless to say that this Court shall not lightly interfere with the concurrent finding of fact recorded by Courts below.

15. The next question that falls for consideration is whether the Courts below have discarded Ex.B.1 will on erroneous and untenable grounds?

16. It is a settled principle of law that duty is cast on the proponent of the will to dispel suspicious circumstances surrounding the execution of will. In the instant case, the burden of proof lies on the first defendant to establish that Ex.B.1 will dated 20.03.2004 was executed by late Parasuramulu in a sound and disposing state of mind. A perusal of the record reveals that late Parasuramulu was suffering with some ailment prior to identifying or diagnosing the ailment as acute cancer. The testimony of DW.1 clearly reveals that the plaintiff stayed in Gonasapudi Village for a period of 20 days prior to the death of his father. His testimony further reveals that the plaintiff had taken Parasuramulu to Vijayawada and Chennai for treatment. The material available on record clinchingly establishes that Parasuramulu died due to acute cancer. As seen from the testimony of the witnesses, Parasuramulu was taken to Salmon

Hospital at Chirala on 20.03.2004 for treatment. The evidence on record clearly reveals that by that time he was suffering with cancer. Immediately he was taken to Chennai Adayar Hospital, wherein he died on 30.03.2004. It is not in dispute that Parasuramulu died within 10 days from the date of execution of Ex.B.1 will. In view of Section 68 of the Indian Evidence Act and Section 63(c) of the Indian Succession Act, one of the attestors of the will has to be examined to prove the same. DWs.2 and 3 are the attestors and DW.4 is the scribe of Ex.B.1 will. The testimony of DWs.2 and 3 reveals that initially draft will was prepared by the scribe and obtained their signatures. Thereafter the will was got typed and registered the same before the Sub-Registrar's Office, Chirala. As per the testimony of DW.1, stamps were purchased on 20.03.2004. In fact stamps were purchased on 19.03.2004. If the testimony of DWs.2 and 3 are taken into consideration, late Parasuramulu expressed his willingness to execute draft Will on 20.03.2004. If that is so, how the stamp papers were purchased on 19.03.2004 is not properly explained. This aspect was considered by the Courts below while appreciating the testimony of the witnesses. There is no whisper in the testimony of DWs.2 and 3 that the scribe read over and explained the contents of Ex.B.1 Will to late Parasuramulu, who in turn admitted the contents as true and correct and thereafter subscribed his signature on it. There is no whisper in the testimony of DWs.2 and 3 that they have attested Ex.B.1 Will immediately after subscribing his signature by late Parasuramulu. On the other hand, DWs.2 to 4 have given a different version with regard to the exact place of execution of the Will, the manner of preparing draft Will, typing fair

copy of the Will and other relevant aspects. At one stage, DWs.2 and 3 have stated that the Will was prepared inside the thatched hut, while they were standing outside the thatched hut. DW.2 is the brother-in-law of first defendant by courtesy and DW.3 is the own bother-in-law of the first defendant. It is not the case of the first defendant that these two persons belong to Gonasapudi Village. A perusal of the record clearly reveals that late Parasuramulu was straightaway went to Sub-Registrar's Office from Solmon Hospital, Chirala and executed Ex.B.1 Will. By that time Parasuramulu was very much aware that he was suffering with advanced stage of cancer. That fact was not mentioned in Ex.B.1. The fact remains that execution of Ex.B.1 was not informed to the plaintiff even though he was very much present at Gonasapudi Village to look after the welfare of his father. Parasuramulu died within 10 days from the date of execution of Ex.B.1 will. This itself indicates the health condition of Parasuramulu as on 20.03.2004. The material placed before the Court clearly reveals that Parasuramulu was not in a sound and disposing state of mind to execute the will as he was suffering with acute cancer. A perusal of the record also reveals that the first defendant was very much present at the time of preparing of the will and registration of the will. This also indicates the role played by the first defendant in creating Ex.B.1 will. The first defendant failed to dispel the suspicious circumstances surrounding the execution of Ex.B.1 will. Both the Courts below concurrently held that the will was obtained when Parasuramulu was not in a sound and disposing state of mind. If any finding is based on no evidence or based on any evidence, which is not legally admissible, then

such findings can be termed as perverse. The concurrent findings of fact recorded by the Courts below are supported by oral and documentary evidence. Therefore, I am unable to accede to the contention of the learned counsel for the appellants that the findings recorded by the Courts below are perverse.

17. In **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, while dealing with the scope of Section 100 of C.P.C., the Hon'ble apex Court held at paragraph No.16 as follows:

16. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC.

18. Having regard to the facts and circumstances of the case and also the principles enunciated in the case cited supra, I am of the considered view that the points raised by the learned counsel for the appellants will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law is involved in this appeal.

19. In the result, the Second Appeal is dismissed at the admission stage. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date: 08.11.2017
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¹ (2010) 13 SCC 216