

THE HON'BLE JUSTICE SRI T. SUNIL CHOWDARY

SECOND APPEAL No.1283 of 2012

JUDGMENT:

1 The defendants, who suffered a decree for partition, in both the Courts, preferred this second appeal, assailing the judgment and decree dated 10.07.2012 passed in A.S.No.148 of 2010 on the file of the Court of the IV Additional District Judge, East Godavari at Kakinada, upholding the judgment and decree dated 08.06.2010 passed in O.S.No.642 of 2007 on the file of the Court of the II Additional Senior Civil Judge, Kakinada.

2 For the sake of convenience, the parties to this second appeal will hereinafter be referred to, as they were arrayed in the suit.

3 The facts leading to the filing of the present second appeal, in nutshell, are as follows:

4 The plaintiff and the 5th defendant are children of late Ramaswamy through his second wife by name Simhadri (late). Late Ramaswamy, after the death of his first wife – late Gowramma, married the mother of the plaintiff by name Simhadri. The defendant Nos. 1 and 2 and one Nagamma (late) i.e. mother of the defendant Nos.3 and 4 are the children of Late Ramaswamy through his first wife – Gowramma. Simhadri predeceased Ramaswamy in the year 1987 leaving behind her the plaintiff, defendant No.5 and Ramaswamy as her legal heirs, whereas Ramaswamy died in the year 2002. Ramaswamy and Simhadri jointly purchased Item No.1 of the plaint schedule property from one P.V.Subrahmanyam under a registered sale

deed on 25.8.1976. The plaintiff is having 1/6th share 5th defendant is having 1/6th share and Ramaswamy was having 4/6th share. After the death of Simhadri, the plaintiff and the 5th defendant came into joint possession of Item No.1 of the suit schedule property along with late Ramaswamy. Item No.2 of the plaint schedule property is house situated at Velampeta of Jaggammagari peta, Samalkot was purchased by late Simhadri with her stridhana property. After the death of Simhadri, the plaintiff, 5th defendant and late Ramaswamy succeeded the same. After the death of Ramaswamy, his undivided 1/3rd share in the said house was devolved on the plaintiff and the defendants and all of them are in joint possession and enjoyment of the same. The plaintiff along with defendant Nos.1 to 4 sold away an extent of Ac.1-50 cents in Sy.No.13/2 of Jaggammagari peta, Samalkot to third parties under a registered sale deed dated 30.06.2005. Ramaswamy purchased an extent of Ac.1-50 cents under a registered sale deed dated 12.3.1964 and out of the said property, the plaintiff and the defendants jointly sold away Ac.1-00 cents under a registered sale deed dated 30.06.2005 and the remaining extent of Ac.0-50 cents belongs to Ramaswamy. The plaintiff is also having 1/5th share in Item No.3 of the plaint schedule property. The plaintiff is also entitled for past profits of Rs.15,000/-. Hence the suit for partition.

5 Resisting the suit, the defendant Nos.1 and 4 filed the written statement denying the various averments made in the plaint, *inter alia* contending that the suit filed by the plaintiff is neither just nor maintainable under law. The joint family

properties were partitioned even during the lifetime of Ramaswamy and that the plaintiff was given Ac.0-80 cents towards her share in the joint family. The first defendant was given Ac.0-53 cents towards his share in the property. Thus Item No.1 of the plaint schedule was already partitioned along with other properties and Ac.0-53 cents fell to the share of the first defendant. Ac.0-53 cents was given to Ramaswamy, who in turn executed a Will bequeathing the property in favour of the 4th defendant. Thus Item No.1 of the plaint schedule was not liable for any partition. As far as the Item No.2 of the plaint schedule is concerned, it is the absolute property of late Ramaswamy. The said house property is not the property of Simhadri and she never enjoyed the Item No.2 of the plaint schedule property. In the family partition, Item No.2 of the plaint schedule fell to the share of the first defendant. Thus, Item No.2 is the absolute property of the first defendant. After the death of Simhadri, the properties were partitioned and Item No.2 of the plaint schedule and Ac.0-53 cents fell to the share of the first defendant. In fact, plaintiff, Ramaswamy, 5th defendant together sold away the house bearing D.No.17-6-1951 to one G.Demudu and the entire consideration was received by the plaintiff. Late Ramaswamy executed a Will dated 20.07.1998 bequeathing an extent of Ac.1-50 cents in Sy.No.13/2 to the defendant Nos.6 and 7. The said property was sold to defendant Nos.8 and 9 and they are in possession of the same. The plaintiff has no right to claim 9/30th share or 12/30th share in Item No.3 of the plaint schedule property. Hence the suit is liable to be dismissed.

6 Defendant Nos.8 and 9 filed separate written statement inter alia contending that the plaint schedule property an extent of Ac.1-50 cents covered by Sy.No.13/2 is the absolute property of late Ramaswamy and Ramaswamy in turn executed a Will on 20.07.1998 in a sound and disposing state of mind bequeathing the property to defendant Nos.6 and 7. The defendant Nos.4, 6 and 7 have become absolute owners of the property. The plaintiff has got full knowledge of the Will executed by late Ramaswamy. In fact, the plaintiff gave consent to sell the property to defendant Nos.8 and 9 under registered sale deed dated 21.11.2005. The defendant Nos.8 and 9 purchased Ac.1-50 cents covered by Sy.No.13/2 for Rs.6.00 lakhs and they also purchased Ac.0-50 cents for Rs.2.00 lakhs under a registered sale deed on the even date i.e. 21.11.2005. Thus, the defendant Nos.8 and 9 are bonafide purchasers for valuable consideration. The plaintiff is fully aware that the defendant Nos.8 and 9 have been in possession and enjoyment of Ac.2-00 cents of land in Sy.No.13/2. Hence the suit is liable to be dismissed. The defendant Nos.6 and 7 have adopted the written statement of the defendant Nos.8 and 9.

7 After the first defendant filed his chief examination affidavit, the plaintiff filed I.A.No.482 of 2008 seeking to permit her to amend the plaint. The plaintiff denied the factum of execution of Will dated 20.07.1998 by late Ramaswamy. The alleged Will is a rank forgery and is not binding on the plaintiff.

8 Basing on the above pleadings, the following issues were settled by the trial court:

1. Whether Item No.1 of schedule property originally belongs to late Ramaswamy?
2. Whether late Ramaswamy bequeathed Ac.0-53 cents in favour of Gandhi Ganga and Ac.0-50 cents in favour of 4th defendant in Item No.1?
3. Whether Item No.2 of schedule property is absolute property of late Ramaswamy?
4. Whether plaint schedule properties were already partitioned?
5. Whether the plaintiff is entitled to partition of plaint schedule properties, if so to what share?
6. Whether the plaintiff is entitled to past and future profits?
7. To what relief?

9 Before the trial Court, the plaintiff got examined herself as P.W.1 and got marked Exs.A.1 to A.7. On behalf of the defendants D.Ws.1 to 3 were examined and Exs.B.1 to B.3 were marked.

10 Basing on the oral, documentary evidence and other material available on record, the trial court arrived at a conclusion that the 4th defendant failed to dispel the suspicious circumstances surrounding the execution of Ex.B.1 Will and that the defendants also failed to prove the factum of previous partition and decreed the suit in part and accordingly passed a preliminary decree in favour of the plaintiff.

11 Feeling aggrieved by the judgment and decree dated 08.06.2010 passed by the trial Court in O.S.No.642 of 2007, the defendant Nos.1, 4, 6, 7, 8 and 9 preferred A.S.No.148 of 2012 on the file of the IV Additional District Judge, East Godavari at

Kakinada. The first appellate Court, after reappraising the oral and documentary evidence available on record and without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the 4th defendant failed to prove Ex.B.1 Will as well as the defendants failed to prove the factum of previous partition, consequently dismissed the appeal. Hence the present second appeal.

12 Heard the learned counsel for the appellants/ defendant Nos.1, 4, 6, 7, 8 and 9 and the learned counsel for the respondent/plaintiff and perused the material available on record. The questions of law urged by the learned counsel for the appellants are briefly as follows:

- (i) Whether the Courts below are right in holding that there was no prior partition between Ramaswamy and the first defendant in the absence of any evidence to show that there was no partition?
- (ii) In the absence of pleading and evidence with regard to the suspicious circumstances about the Will, whether the court below is right in imputing its own knowledge about the suspicious circumstances with regard to the execution of the Will?

POINT No.1:

13 To substantiate the arguments, the learned counsel for the appellants has drawn the attention of this Court to the ratio laid down in **Meenakshiammal (Dead) through LRs. and Ors. vs. Chandrasekaran and Anr.**¹ wherein the Hon'ble apex Court held at Para No.20 as follows:

20. In the case of Ryali Kameswara Rao v. Bendapudi Suryaprakasarao and Ors. (AIR 1962 AP 178) this Court while discussing the provisions of section 63 of the Succession Act, 1925, has held that the suspicion alleged must be one inherent in the transaction itself and not the

¹ (2005) 1 SCC 280

doubt that may arise from conflict of testimony which becomes apparent on an investigation of the transaction. That suspicious circumstances cannot be defined precisely. They cannot be enumerated exhaustively. They must depend upon the facts of each case. When a question arises as to whether a will is genuine or forged, normally the fact that nothing can be said against the reasonable nature of its provisions will be a strong and material element in favour of the probabilities of the will. Whether a will has been executed by the testator in a sound and disposing state of mind is purely a question of fact, which will have to be decided in each case on the circumstances disclosed and the nature and quality of the evidence adduced. When the will is alleged to have been executed under undue influence, the onus of proving undue influence is upon the person making such allegation and mere presence of motive and opportunity are not enough.

Madhukar D. Shende vs. Tarabai Aba Shedage² wherein

the Hon'ble apex Court held at para Nos.8 and 9 as follows:

8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in *R. v. Hodge* 1838 2 LCC 227 may be apposite to some extent.

"The mind was apt to make a pleasure in adapting circumstances to one another and even in straining them a title, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and

² (2002) 2 SCC 85

convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict -- positive or negative.

9. It is well-settled that one who propounds a will must establish the competency of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

Bhagwati Prasad vs. Chandramul³ wherein the Hon'ble apex Court held at para No.9 as under:

9. ".....In that case, it was held that where the defendant in his written statement sets up a title to the disputed lands as the nearest reversioner, the Court cannot, on his failure to prove the said case, permit him to make out a new case which is not only made in the written statement, but which is wholly inconsistent with the title set up by the defendant in the written statement. The new plea on which the defendant sought to rely in that case was that he was holding the suit property under a shikmi settlement from the nearest reversioner. It would be noticed that this new plea was in fact not made in the written statement, had not been included in any issue and, therefore, no evidence was or could have been led about it. In such a case clearly a party cannot be permitted to justify its claim on a ground which is entirely new and which is inconsistent with the ground made by in its pleadings."

Krishna Kumar v. Shah and another vs. Anila J. Shah and others⁴. As per the principle enunciated in this case, the propounder of Will has to dispel the suspicious circumstances surrounding the Will. In fact, the learned counsel for the respondent / plaintiff has also placed reliance on this decision.

³ (1966) 2 SCR 286 : AIR 1966 SC 735

⁴ 2016 (2) ALD 52 (DB)

14 The following admitted facts can be culled out from the above pleadings:

15 Late Ramaswamy married one Gowramma. After the death of said Gowramma, Ramaswamy married Simhadri. Defendant Nos.1 and 2 are daughter and son of Ramaswamy through his first wife Gowramma. Defendant Nos.3 and 4 are grand children of Ramaswamy and Gowramma. The plaintiff and defendant No.5 are daughter and son of late Ramaswamy and Simhadri. Defendant Nos.6 and 7 are children of Defendant No.4. Defendant Nos.8 and 9 are purchasers. Simhadri died in the year 1987 and Ramaswamy died in the year 2002.

16 It is the case of the plaintiff that the plaintiff schedule properties are joint family properties of plaintiff and defendant Nos.1 to 5, therefore, she is entitled to a share in the joint family properties. It is the case of the defendant Nos.1 to 6 that the joint family properties were partitioned 20 years back during the lifetime of Ramaswamy and nothing is available for partition. There is no dispute that the plaintiff and defendant Nos.1 to 7 belong to one family. It is a settled principle of law that unless and until contrary is proved, the Court can draw a presumption that members of the joint family are entitled for share in the joint family properties. The burden of proof lies on the party who pleads the factum of previous partition. Therefore, in the instant case, the burden of proof is on the defendants to establish the factum of previous partition as set up by them. The written statement is conspicuously silent with regard to the year in

which the joint family properties were partitioned. There is no whisper in the testimony of D.W.1 when the partition took place between the family members. Except the self serving testimony of D.W.1, there is no other convincing evidence to prove the factum of partition.

17 It is not in dispute that Item No.1 of the plaint schedule property was purchased by late Simhadri and Ramaswamy jointly under registered sale deed dated 25.8.1976 (Ex.A.1). It is the case of the defendants that this property was also partitioned and Ac.0-53 cents fell to the share of the first defendant and the remaining Ac.0-53 cents fell to the share of Ramaswamy. When Simhadri and Ramaswamy jointly purchased a total extent of Ac.1-06 cents, how the first defendant, who is the son of Ramaswamy through his first wife, got Ac.0-53 cents and how Ramaswamy got Ac.0-53 cents is not properly explained by the defendants. In fact, the legal heirs of Simhadri and Ramaswamy are entitled to Ac.0-53 cents. This also negatives the contention of the defendants. It is not in dispute that the plaintiff and defendants have jointly executed a registered sale deed Ex.A.2 on 30.06.2005, in respect of family property, in favour of third parties. There is no mention in Ex.A.2 sale deed about the previous partition. If really the partition, as pleaded by the defendants, had taken place, undoubtedly, the same might have been reflected in Ex.A.2. If the joint family properties were partitioned 25 years back, what prompted the plaintiff and defendants to jointly execute the sale deed in favour of third parties is not explained by the defendants. Similarly, there is no

mention in Ex.B.1 Will about the partition between Ramaswamy and his children. The documentary evidence placed by the defendants negatives their own contention about the previous partition. Basing on the oral and documentary evidence available on record, the trial Court arrived at a conclusion that the defendants failed to prove the factum of previous partition. The first appellate Court also, having reappreciated the oral and documentary evidence, came to the conclusion that the defendants failed to prove the factum of previous partition.

18 The findings recorded by the courts below are based on sound reasoning. The courts below have assigned reasons much less cogent and valid reasons to their findings. The first appellate Court is the fact finding final Court. Having regard to the facts and circumstances of the case, I have no hesitation to hold that the defendants failed to prove the factum of partition.

POINT No.2:

19 The crucial question that falls for consideration is “whether the Courts below have committed any error in disbelieving Ex.B.1 Will?

20 It is a settled principle of law that the propounder of the Will has to dispel the suspicious circumstances surrounding the execution of the Will if the opposite party denies the same in any manner whatsoever. This can be perceived from Section 68 of Indian Evidence Act and Section 63 of the Indian Succession Act. Once the propounder of the Will, prima facie, discharges the

burden cast on him/her, then the onus of proof shifts on to the opposite party. Unlike onus of proof, burden of proof remains static. In the instant case, the plaintiff has taken a specific plea that the Will alleged to have been executed by Ramaswamy is a rank forgery and Ramaswamy never executed the Will. Merely because the plaintiff has not used the legal phraseology in the plaint that itself will not absolve the 4th defendant in complying with the provisions of Section 63 of Succession Act and Section 68 of Evidence Act.

21 In order to prove the execution of the Will by Ramaswamy, the defendants mainly relied on the testimony of D.W.2 who is one of the attestors of Ex.B.1 Will. If the testimony of D.W.2 is taken into consideration, the scribe prepared the Ex.B.1 Will at the dictation of Ramaswamy at a stretch. In the Will Ramaswamy has given all the minute details, including the document numbers and other relevant aspects. There is no whisper in the testimony of D.W.2 that the scribe had verified the documents supplied by Ramaswamy and prepared the Will. Admittedly, Ramaswamy is a marksman. In such circumstances, the possibility of giving such minute details by Ramaswamy is somewhat cynical. This aspect was considered by the trial Court at para No.19 of the judgment.

22 As per the testimony of D.W.2, he is the close friend of Ramaswamy. In the cross-examination D.W.2 deposed that he does not know when Ramaswamy died. He also pleaded his ignorance with regard to the particulars of family members as

well as property owned by Ramaswamy. The 4th defendant, who is the beneficiary of the Will, was examined as D.W.3. In the cross examination D.W.3, in unequivocal terms, deposed that the attestors have no acquaintance with Ramaswamy prior to the execution of the Will. If there was no previous acquaintance between Ramaswamy and the attestors, as deposed by D.W.3, how Ramaswamy called D.W.3 to attest the document is not properly explained by the defendants. The manner in which D.W.3 deposed evidence was considered by the Courts below keeping in mind the relevant provisions of law. Admittedly, the Will was not produced before the trial Court along with the written statement. But the same was filed along with the chief examination affidavit of the first defendant. Non-production of the Will along with the written statement is one of the suspicious circumstances. There is no mention in Ex.B.1 about the details of the other family members of Ramaswamy. As per the testimony of D.W.3, Ramaswamy was completely bedridden for three years prior to his death due to paralysis. Ex.B.1 Will was alleged to have been executed in the year 1998. The material available on record clinchingly establishes that Ramaswamy stayed in the house of defendant Nos.4 and 5 in his last days. The Court shall not lose sight of this aspect while appreciating the genuineness or otherwise of the Will. If really the partition had taken place, as pleaded by the defendants, the same might have been reflected in Ex.B.1. Non-mentioning of the factum of partition and the details of other children of Ramaswamy in Ex.B.1 is one of the suspicious circumstances. In the cross-

examination D.W.2 in unequivocal terms deposed that 2nd page of the Will is with a different ink to that of the first page. The scribe has not mentioned the reasons for using different ink while preparing Ex.B.1. It is an admitted fact that the plaintiff and defendants have executed sale deed Ex.A.2 in respect of joint family property in favour of third parties on 30.06.2005. If really Ramaswamy had executed a Will in favour of the 4th defendant, what prevented them to mention the same in Ex.A.2 so as to give authenticity to this document? Non-disclosure of execution of Ex.B.1 Will by late Ramaswamy in favour of the 4th defendant in Ex.A.2 sale deed dated 30.06.2005 also creates a doubt with regard to the genuineness of Ex.B.1 Will.

23 The above referred facts clinchingly establish that the 4th defendant miserably failed to dispel the suspicious circumstances surrounding the execution of Ex.B.1 Will by late Ramaswamy. The trial Court considered the oral and documentary evidence meticulously and arrived at a conclusion that the 4th defendant failed to prove the execution of Ex.B.1 Will by late Ramaswamy. The first appellate Court, after reappreciating the oral and documentary evidence, came to the conclusion that the 4th defendant failed to dispel the suspicious circumstances surrounding the execution of Ex.B.1 Will, therefore, no credence can be attached to it. The findings recorded by the courts below are based on evidence, more so, legally admissible evidence. The first appellate Court is the fact finding final court. Whether Ex.B.1 is genuine one or not, is a

purely question of fact, which cannot be gone into by this Court, while exercising jurisdiction under Section 100 CPC.

24 It is needless to say that if the concurrent findings of fact recorded by two courts below are neither found to be contrary to the pleadings nor the evidence or any provisions of law, or so found perverse, then, in my considered view, such concurrent findings of fact cannot be interfered with. I find no merit in any of the arguments advanced by the learned counsel for the appellants, which are only based on facts and evidence. This Court cannot reappreciate the evidence again *de novo* while hearing this second appeal.

25 In **Municipal Committee, Hoshiarpur v. Punjab SEB**⁵, 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. ...

26 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 no question of law much less substantial question of law is involved in this second appeal and accordingly the same is liable to be dismissed.

⁵ (2010) 13 SCC 216

27 For the foregoing discussion, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs. Consequently, Miscellaneous Petitions, if any, pending in this Second Appeal shall stand closed.

Date: 20.12.2017
Kvsn

T. SUNIL CHOWDARY, J.

