

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.315 OF 2013

JUDGMENT:

This Second Appeal is filed by the unsuccessful plaintiff assailing the decree and judgment dated 12.10.2012 in A.S.No.33 of 2010 on the file of the Court of XIII Additional District Judge, Krishna at Vijayawada, wherein and whereby the decree and judgment dated 14.12.2009 in O.S.No.10 of 2002 on the file of the Court of the Senior Civil Judge at Nuzvid, dismissing the suit filed by the plaintiff for partition, was confirmed.

2. For the sake of convenience, the parties will hereinafter be 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 sisters and daughters of one Ankusarao Subbaraju and Venkata Dhanalakshmi. The second defendant is the daughter of first defendant. The joint family properties of Subbaraju were partitioned among himself, his wife Venkata Dhanalakshmi and others and the same was reduced into writing by way of partition deed dated 20.07.1971. Ever since Subbaraju and Venkata Dhanalakshmi had been in possession and enjoyment of the properties fell to their share. The properties, which fell towards respective shares of Subbaraju and Venkata Dhanalakshmi are shown in 'C' schedule in the partition deed. The father of plaintiff and first defendant, at the time of their respective marriages, gave landed property towards pasupu kumkuma. The parents of the plaintiff and first defendant died intestate leaving certain properties i.e., Ac.4.22 cents of dry land

bearing R.S.No.328, Ac.3.49 cents of dry land bearing R.S.No.323, Ac.5.81 cents of wet land bearing R.S.No.306 and Ac.3.97 cents of dry land bearing R.S.No.117 of Chekkapalli Village. Venkata Dhanalakshmi died intestate on 23.12.1999 leaving her husband Subbaraju and two daughters i.e., plaintiff and first defendant as her legal heirs. All the assets and liabilities of late Venkata Dhanalakshmi devolved on her husband and two daughters equally. Subsequently, Subbaraju died intestate on 24.12.2001 leaving the plaintiff and first defendant as his Class-I legal heirs. Since the date of death of Subbaraju, the plaint schedule properties devolved on the plaintiff and first defendant equally and first defendant is not co-operating with the plaintiff for partition of the plaint schedule properties into two equal shares. Hence, the suit.

4. The first defendant filed written statement admitting the relationship between the parties *inter alia* contending that her mother late Ankusarao Venkata Dhanalakshmi executed a Will during her lifetime on 09.12.1999 in a sound and disposing state of mind bequeathing her properties covered under item No.3 of plaint schedule in favour of the defendants. It is further contended that her father late Subbaraju executed a Will dated 09.09.2001 in a sound and disposing state of mind bequeathing his properties covered under item No.1 of plaint schedule property in favour of his grand daughter by name Smt. Yarramsetti Chandravathi, w/o. Surya Prabhakara Naidu i.e., the second defendant. Item No.4 of the plaint schedule property might have sold away by late Subbaraju during his lifetime to the third parties as such, the said item is not available with any of the defendants. Item No.2 of the

plaint schedule properties was sold to Thota Krishna and Subbarao by the mother of the plaintiff without registered sale deed. It is further contended that item No.1 of the plaint schedule properties is only Ac.3.87 cents, which is in possession of Yerramsetti Chandravathi (second defendant). Item No.3 is in possession of the second defendant in pursuance of the Will dated 09.12.1999.

5. The second defendant filed written statement admitting the *inter se* relationship of the parties *inter alia* contending that late A.Subbaraju, who is her maternal grandfather, under a registered Will bequeathed the property belongs to him in favour of herself and her brother, Nataraju. In the said Will, late Subbaraju also bequeathed his share of house property in favour of his wife, Venkata Dhanalakshmi @ Dhanamma with life interest and vested remainder in her favour. Subsequently, Subbaraju revoked the earlier Will dated 11.09.1992 and executed the Will dated 09.09.2001 in favour of second defendant. The plaintiff and her husband are well aware of the execution of the above said Wills by late Subbaraju during his lifetime bequeathing item Nos.1 and 3 of suit schedule properties in favour of the defendants. The second defendant has been in possession and enjoyment of item Nos.1 and 3 of plaint schedule properties. Hence, the suit may be dismissed.

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

1. Whether the plaintiff is entitled to seek partition of plaint schedule properties?
2. Whether the plaintiff is entitled to seek future mesne profits?
3. Whether the Will pleaded by defendant is true, valid and binding?

4. To what relief?

Additional issues:

1. Whether Subbaraju invoked earlier Will dated 11.09.1992 and bequeathed his property to defendant as pleaded in the written statement is true?
2. Whether the plaint schedule boundaries are not true and correct?
3. Whether the item No.2 is not belongs to parties to the suit?
4. Whether the plaintiff is entitled to seek for partition?
5. Whether the plaintiff is entitled for past and future profits?
6. To what relief?

On 19.08.2009 the above issues were re-casted:

1. Whether the plaintiff is entitled for partition as prayed?
 2. Whether the plaint schedule property is really bequeathed to the defendants 1 and 2 under Wills dated 09.09.2001?
 3. Whether the property covered under item Nos.2 and 4 are exempted for partition?
 4. Whether the plaintiff is entitled for future mesne profits?
 5. To what relief?
7. Before the trial Court, on behalf of the plaintiff, PWs.1 to 3 were examined and Exs.A.1 to A.5 were marked. On behalf of the defendants, DWs.1 to 5 were examined and Exs.B.1 to B.14 were marked.
8. After considering the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that Exs.B.2 and B.3 Wills are true, valid and binding on the parties; therefore, the plaintiff is not entitled for the relief of partition; consequently, dismissed the suit. Feeling aggrieved by the decree and judgment dated 14.12.2009 in O.S.No.10 of 2002, the unsuccessful plaintiff preferred A.S.No.33 of 2010 on the file of the Court of XIII Additional District Judge, Krishna at Vijayawada. The first appellate Court, after reappraising the oral, documentary

evidence and other material available on record, without being influenced by the findings of the trial Court, arrived at a conclusion that Exs.B.2 and B.3 Wills are true and correct; therefore, the plaintiff is not entitled for partition of suit schedule property and dismissed the appeal. Feeling aggrieved by the concurrent findings of fact recorded by the Courts below, the unsuccessful plaintiff preferred the present second appeal.

9. Sri K.Chidambaram, the learned counsel for the appellant-plaintiff, strenuously submitted that the Courts below believed Exs.B.2 and B.3 Wills even though the defendants failed to dispel the suspicious circumstances surrounding the execution of the Wills. He further submitted that the findings of the Courts below that the suit is liable to be dismissed for non-impleading of the house property is not sustainable either on facts or in law. He also submitted that the findings of the Courts below that item Nos.2 and 4 of the suit schedule properties are not available for partition is not based on any material. He further submitted that the findings recorded by the Courts below are perverse and hence, liable to be set aside.

10. *Per contra*, Sri Srinivasa Rao Velivela, the learned counsel for the respondents, submitted that the defendants by examining the attesting witnesses dispelled the suspicious circumstances surrounding the execution of Exs.B.2 and B.3 Wills. He further submitted that the suit for partition is not maintainable without impleading all properties. He also submitted that the findings recorded by the Courts below are based on evidence. He further submitted that this Court shall not lightly interfere with the

concurrent findings of fact recorded by the Courts below in view of Section 100 of C.P.C.

11. Basing on the submissions made by the learned counsel for both parties and also the material available on record, the questions of law that arise in this second appeal are as follows:

1. Whether the defendants proved Exs.B.2 and B.3 Wills in accordance with law? and
2. Whether non-impleading of the house property that itself is a valid ground to dismiss the suit?

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

13. To substantiate the arguments, the learned counsel for the appellant-plaintiff has drawn the attention of this Court to **Krishna Kumar V. Shah and another v. Anila J. Shah and others**¹. As per the principle enunciated in the case cited supra, it is the duty of the propounder of the Will to dispel the suspicious circumstances surrounding the execution of the Will.

14. Learned counsel for the respondents – defendants has drawn the attention of this Court to the ratio laid down in **Kenchegowda (since deceased) by legal representatives v. Siddegowda alias Motegowda**². As per the principle enunciated in the case cited supra, a suit for partial partition in the absence of the inclusion of other joint family properties and the impleadment of the other co-sharers is not maintainable.

15. Let me consider the facts of the case on hand in the light of the above legal principles.

¹ 2016 (2) ALD 52 (DB)

² (1994) 4 SCC 294

16. The plaintiff and first defendant are daughters of late Subbaraju and Venkata Dhanalakshmi. The second defendant is daughter of first defendant. Late Subbaraju and Venkata Dhanalakshmi got the suit schedule property and some other properties under a registered partition deed Ex.A.3 dated 20.07.1971. Venkata Dhanalakshmi died on 23.12.1999 and Subbaraju died on 24.12.2001.

17. The entire controversy revolves around Exs.B.2 and B.3 Wills purported to have been executed by late Venkata Dhanalakshmi and Subbaraju in favour of defendant No.2. The case of the plaintiff is that her father did not execute Will in favour of the defendants. The case of the defendants is that late Subbaraju and Venkata Dhanalakshmi executed Wills in favour of second defendant. It is needless to say that the propounder of the Will has to dispel the suspicious circumstances surrounding the execution of the Will.

18. Item No.1 of the suit schedule property is an extent of Ac.4.22 cents of dry land in R.S.No.328 of Chekkapalli Village and item No.3 of the suit schedule property is an extent of Ac.5.81 cents in R.S.No.306 of Chekkapalli Village. An extent of Ac.2.81 cents of land covered under Ex.B.2 is part and parcel of item No.3 of the suit schedule property and the remaining extent of Ac.3.00 cents is covered under Ex.B.11 gift deed executed by late Venkata Dhanalakshmi in favour of the second defendant. As per the testimony of DWs.1 and 5, late Venkata Dhanalakshmi executed Ex.B.2 Will bequeathing an extent of Ac.2.81 cents in R.S.No.306 of Chekkapalli Village in favour of the second defendant. As per the testimony of DW.2, late Venkata Dhanalakshmi executed

Ex.B.2 Will on 09.12.1999 in favour of the second defendant in a sound and disposing state of mind. His testimony further reveals that himself and late Subbaraju are the attestors of Ex.B.2 Will. Learned counsel for the plaintiff cross-examined this witness at length in order to establish his testimony is not trustworthy. In the cross-examination, DW.2 in unequivocal terms deposed that late Venkata Dhanalakshmi subscribed her signature on Ex.B.2 in his presence. He also categorically deposed that one Muralidhar Rao is the scribe of Ex.B.2 Will. In the cross-examination of this witness, nothing is elicited to shake his testimony so far as execution of Ex.B.2 Will by late Venkata Dhanalakshmi in favour of the second defendant. In order to prove Ex.B.2 Will, the defendants mainly relied on the testimony of DW.3 (scribe).

19. As per the testimony of DW.5, on 09.09.2001 late Subbaraju executed a Will in favour of the second defendant. His testimony further reveals that late Subbaraju subscribed his signature on Ex.B.2 Will in his presence. His testimony also reveals that late Subbaraju revoked the earlier Will executed by him on 11.08.1992 (Ex.B.1) in favour of second defendant and one Nataraju, son of first defendant and brother of second defendant. The said Nataraju died on 18.01.2002. Ex.B.5 is the death certificate of Nataraju. The learned counsel for the plaintiff cross-examined DW.5 at length on various aspects to elicit that late Subbaraju did not execute the Will in favour of the second defendant. In the cross-examination of this witness, nothing is elicited to shake his testimony to doubt the execution of the Will by late Subbaraju in his presence. Ex.B.1 is the registered Will executed by late Subbaraju on 11.08.1992. In Ex.B.3, it is specifically mentioned

that Ex.B.1 Will executed by late Subbaraju on 11.08.1992 was revoked in view of the death of Nataraju. It is not in dispute that Nataraju died on 07.08.2001. In view of death of Nataraju, the possibility of revoking Ex.B.1 Will dated 11.08.1992 by late Subbaraju is more probable and believable. As per the testimony of DW.3, he scribed the Wills at the request of late Subbaraju and Venkata Dhanalakshmi. His testimony further reveals that DWs.2 and 5 signed on the Wills in his presence. In the cross-examination of this witness, nothing is elicited to discard the same.

20. It is an admitted fact that in the year 1983, the husband of the first defendant deserted her. The first defendant having no other alternative came to Chekkapalli Village along with her children. A perusal of the record reveals that late Subbaraju and Venkata Dhanalakshmi brought up the second defendant and son of the first defendant. The fact remains that the first defendant stayed along with late Subbaraju and Venkata Dhanalakshmi during their lifetime. In the cross-examination, PW.1 deposed that her father died in the year 1972 due to ill-health. She denied the suggestion that she is deposing falsely that her father died in the year 1972. The material placed before the Court clinchingly establishes that Subbaraju died on 24.12.2001. The plaintiff (PW.1) falsely deposed that her father died in the year 1972 even though he died on 24.12.2001. This itself indicates that the plaintiff is not stick on to the truth even with regard to the admitted facts. In the cross-examination, PW.1 in unequivocal terms deposed that her father executed Ex.B.11 gift deed dated 20.02.1998 in favour of the second defendant. On one hand, she is admitting that her father executed a gift deed in favour of the

second defendant on 20.02.1998 and on the other hand, she is deposing that her father died in the year 1972. The plaintiff has given two different versions with regard to the death of her father. This itself indicates the mindset of the plaintiff.

21. It is the case of the plaintiff that item Nos.2 and 4 of the suit schedule properties are also liable for partition. There is no dispute that originally these properties belong to late Subbaraju and Venkata Dhanalakshmi. It is the case of the defendants that during lifetime, late Subbaraju sold item Nos.2 and 4 of suit schedule properties to third parties. It is their case that third parties are in possession of item Nos.2 and 4 of the suit schedule properties. Except the self-served testimony of PWs.1 and 2, there is no other convincing evidence to show that items Nos.2 and 4 were in possession of the defendants as on the date of filing of the suit. If really item Nos.2 and 4 were in possession of the defendants as on the date of filing of the suit, what prevented the plaintiff at least to produce the revenue records to substantiate her stand? For the reasons best known, the plaintiff has not produced any document. As observed earlier, item No.1 of the suit schedule property is an extent of Ac.4.22 cents only. In the cross-examination, PW.1 in unequivocal terms deposed that her husband look after the litigation and other aspects. She further deposed that her husband is the competent person to speak about the family affairs. In order to appreciate the contention of the plaintiff, it is not out of place to extract hereunder the relevant portion of cross-examination of PW.2, who is none other than the husband of PW.1:

“At the time of death of my father in law he is owned and possession of Ac.4.00 of land and remaining land was sold my father in law for the purpose of family necessities and marriage.”

22. The very purpose of the cross-examination of the witness is to elicit the truth or to improbabilise the stand of the party on whose behalf the witness is called for. PW.2, who is the husband of the plaintiff, in unequivocal terms deposed that by the time of death, her father-in-law was having an extent of Ac.4.00 cents of land only. If that is so, by the time of death, Subbaraju was having item No.1 of the suit schedule property only. Any admission made in the cross-examination is a best piece of evidence. If the testimony of PW.2 is taken into consideration, his father-in-law was not having any land except item No.1 of the suit schedule property. If that is so, how the plaintiff has filed the suit seeking partition of item Nos.2 and 4 of suit schedule properties. PW.2 supports the version of defendants that late Subbaraju sold away item Nos.2 and 4 of suit schedule properties to the third parties.

23. The defendants have taken a specific plea in the written statement that the plaintiff filed the suit without seeking partition of the residential house, which is situated in Chekkapalli Village. It is not in dispute that the said house belongs to late Subbaraju. PW.1 in the cross-examination deposed that the house situated at Chekkapalli Village is now vacant and it is not in possession of anyone. She denied the suggestion that the said house is in possession and enjoyment of second defendant. This itself clearly indicates that by the time of filing of the suit, the plaintiff was very much aware of the house situated in Chekkapalli Village. The

material placed before the Court clinchingly establishes that the plaintiff filed the suit for partition without showing the house situated at Chekkapalli Village. The Courts below came to a conclusion that the suit filed by the plaintiff is not maintainable without seeking partition of the house situated in Chekkapalli Village.

24. At the time of arguments, the learned counsel for the appellant-plaintiff has drawn the attention of this Court to the finding of the first appellate Court at para 11 (iii) of the impugned judgment, which reads as follows:

“(iii) It is settled law that partial partition is bad, plaintiff knowingly not added house property as one of the items liable for partition in suit schedule properties attached to plaint. Therefore, suit of plaintiff is bad for joinder of all the properties.”

The contention of the learned counsel for the appellant-plaintiff is that the partial partition is maintainable under law; therefore, the findings recorded by the Courts below that the suit is bad for non-joinder of all properties is liable to be set aside.

25. In view of the principle enunciated in **Kenchegowda's** case (supra 2), I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the Courts below are liable to be set aside. If the findings of the Courts below are based on no evidence or based on evidence, which is not legally admissible, then those findings can be termed as perverse. As rightly pointed out by the learned counsel for the appellant, if the findings recorded by the Courts below are perverse, such findings are liable to be set aside. In the instant case, the trial Court as

well as the first appellate Court came to a conclusion that Exs.B.2 and B.3 Wills are true and correct and binding on the plaintiff. The findings recorded by the Courts below are based on evidence much less legally admissible evidence. In view of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act, one of the attestors of the Will has to be examined to prove the same. DWs.2 and 5 are the attestors and DW.3 is the scribe of Exs.B.2 and B.3 Wills respectively. As observed earlier, the testimony of DWs.2, 3 and 5 inspired the confidence of the Courts below. The Courts below have not committed any error much less legal error while placing reliance on the testimony of DWs.2, 3 and 5.

26. It is needless to say that this Court shall not lightly interfere with the concurrent findings of fact recorded by Courts below. The first appellate is the fact finding final Court. In the instant case, the concurrent findings recorded by the Courts below are supported by evidence much less legally admissible evidence.

27. In **Municipal Committee, Hoshiarpur v. Punjab SEB**³, 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. ...

³ (2010) 13 SCC 216

28. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the questions of law urged by the learned counsel for the appellant 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.

29. In the result, 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: 22.11.2017
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T. SUNIL CHOWDARY, J

