

THE HON'BLE JUSTICE SRI T. SUNIL CHOWDARY

SECOND APPEAL No.873 of 2016

JUDGMENT:

This appeal is filed under Section 100 of CPC, by the plaintiffs, assailing the decree and judgment dated 14.9.2016 in A.S.No.138 of 2009 on the file of the Court of VII Additional District Judge, East Godavari, Kakinada, wherein and whereby the decree and judgment dated 25.3.2009 in O.S.No.686 of 2007 on the file of the Court of II Additional Senior Civil Judge, Kakinada, dismissing the suit for partition, was confirmed.

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

3. The averments of the plaint are succinctly as follows: The first defendant is the wife of Chintala Venkata Ramana. They were blessed with two sons viz., Machara Rao (defendant No.2) and late Sai Babu, and one daughter Kayithi Vijaya (defendant No.3). Venkata Ramana died intestate in the month of January, 2007. Plaintiff Nos.1, 2 and 3 are wife, son and daughter of Sai Babu. Venkata Ramana got an extent of 112 Sq.yards wherein a house is situated from his mother-Raghavamma by virtue of gift-cum-settlement deed dated 22.8.1984. Raghavamma, who got the house site admeasuring an extent of 336 Sq.yards, executed a gift-cum-settlement deed dated 22.8.1984 in favour of her three sons viz., Venkata Ramana, Machara Rao (defendant No.2) and Ranga. Venkata Ramana and his brother have partitioned the property and had been enjoying the same. After death of Venkata Ramana, plaintiffs and defendants are entitled to the suit schedule property.

The plaintiffs got issued legal notice dated 09.8.2007 directing the defendant No.1, who is the wife of Venkata Ramana, not to alienate the suit schedule property and demanded 1/4th share. The defendants got issued reply notice dated 08.9.2007 with false and frivolous allegations. The defendants have created a Will as if the same was executed by Venkata Ramana bequeathing the property in favour of defendant No.2 and his family members. Hence, the suit.

4. Defendant No.1 filed written statement admitting the *inter se* relationship between the parties *inter alia* contending that Venkata Ramana executed the registered Will dated 27.5.1999 bequeathing the suit schedule property in favour of defendant No.2 and his family members, while he was in sound and disposing state of mind. Plaintiff No.1 and her husband requested the defendants to let out item No.3 of the suit schedule property on a monthly rent of Rs.500/-. Plaintiff No.1 and her husband committed default in payment of rent. When defendant No.1 demanded Sai Babu to vacate the property, the plaintiffs got issued legal notice with untenable allegations. The suit is bad for non-joinder of necessary parties i.e., wife of defendant No.2-Ananthalakshmi. The suit is bad for mis-joinder of parties i.e., defendant No.3, who is not a necessary parties to the suit. Defendant Nos.2 and 3 filed memo adopting the written statement of defendant No.1.

5. During the pendency of the suit, defendant Nos.4 to 6 were impleaded. They also filed memo adopting the written statement of defendant No.1.

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

1. Whether the plaintiffs are entitled to partition of plaint schedule properties, if so to what share?
2. Whether the plaintiffs are entitled to past and future profits? and
3. To what relief?

7. Before the trial Court, on behalf of the plaintiffs, P.W.1 was examined and Exs.A1 to A7 were marked. On behalf of the defendants, D.Ws.1 to 4 were examined and Exs.B1 to B4 were marked.

8. After having thoughtful consideration to the oral, documentary evidence and other material available on record, the trial court arrived at a conclusion that the suit schedule property is the self-acquired property of Venkata Ramana; therefore, he is entitled to execute Ex.B1 Will in favour of defendant No.2 and his family members. The trial Court also gave a specific finding that the defendants proved execution of Ex.B1 Will by Venkata Ramana in favour of defendant No.2 and his family members, and dismissed the suit. Feeling aggrieved by the judgment and decree of the trial Court, the plaintiffs preferred the appeal. The first appellate Court, after reappraising the oral and documentary evidence available on record, without being influenced by the findings recorded by the trial Court, arrived at a conclusion that the suit schedule property is the self-acquired property of late Venkata Ramana. The appellate Court also gave a specific finding that defendant No.2 proved the execution of Ex.B1 Will by Venkata

Ramana, and dismissed the appeal. Hence, the unsuccessful plaintiffs preferred the present second appeal.

9. Heard the learned counsel for the appellants, learned counsel for the respondents and perused the material available on record.

10. The questions of law urged by the learned counsel for the appellants are as follows:

(1) Whether the Courts below misconstrued Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act, while placing reliance on Ex.B1 Will? and

(2) Whether the findings recorded by the Courts below are perverse and are liable to be set aside?

11. Both the questions are interlinked with each other; hence, this Court is inclined to deal with the same simultaneously, in order to avoid recapitulation of the facts and evidence.

12. The following admitted facts, as emerged from the pleadings and evidence, are as follows: Originally the suit schedule property belongs to one Raghavamma, who is the mother of Venkata Ramana. Raghavamma executed a gift deed dated 22.8.1984 bequeathing an extent of 336 Sq.yards in favour of her three sons viz., Venkata Ramana, Machara Rao and Ranga. The three brothers had partitioned the property and each one got 112 Sq.yards of the property. Venkata Ramana got two sons i.e., defendant No.2 and Sai Babu, who is the husband of plaintiff No.1 and father of plaintiff Nos.2 and 3, and one daughter-defendant No.3. Venkata Ramana died on 03.1.2007.

13. The entire controversy revolves around Ex.B1 Will dated 27.5.1999 executed by Venkata Ramana bequeathing the suit

schedule property in favour of defendant No.2 and his family members. The suit schedule property was not inherited by Venkata Ramana through his father. The fact remains that Venkata Ramana got the suit schedule property under gift-cum-settlement deed. Any property got under a gift deed becomes self-acquired property of the donee. Thus, Venkata Ramana became the absolute owner of the suit schedule property. The Courts below, after considering the material available on record and other legal aspects, arrived at a conclusion that the suit schedule property is self-acquired property of Venkata Ramana.

14. It is the case of the plaintiffs that Venkata Ramana died intestate on 03.1.2007. It is the case of the defendants that Venkata Ramana executed Ex.B1 registered Will dated 27.5.1999 bequeathing the suit schedule property in favour of defendant No.2 and his family members. It is **needless** to say that propounder of the Will has to dispel the suspicious circumstances, if any, surrounding the execution of the Will. In the instant case, the burden of proof lies on the defendants to prove the execution of Ex.B1 Will. In order to prove Ex.B1 Will, defendant Nos.1 and 3 examined themselves as D.Ws.1 and 2 respectively. The defendants have examined the scribe and one of the attestors of Ex.B1 Will, as D.Ws.3 and 4 respectively. As per the testimony of D.W.1, her husband-Venkata Ramana executed registered Will on 27.5.1999 bequeathing the suit schedule property in favour of defendant No.2. As per the testimony of D.W.2, who is none other than the daughter of Venkata Ramana and D.W.1, her father executed Will in favour of defendant No.2. As rightly observed by

the Courts below, if D.W.2 denies the execution of the Will, she will also get a share in the suit schedule property. She categorically admitted that her father executed the Will knowing fully well that she will not get any share if she supports the execution of the Will. D.Ws.1 and 2 are family members; therefore, the possibility of deposing in such a manner to suit the claim of defendant No.2 cannot be ruled out completely.

15. As per the testimony of D.W.3, first he prepared draft Will and thereafter he scribed Ex.B1 Will at the instructions of Venkata Ramana. The testimony of D.W.4 clinchingly establishes that Venkata Ramana signed on Ex.B1 Will in his presence. His testimony further reveals that he subscribed his signature on Ex.B1 Will in the presence of Venkata Ramana. As rightly observed by the trial Court, nothing was elicited in the cross-examination of D.Ws.3 and 4 to discredit their testimony. D.Ws.3 and 4 are independent witnesses. There is no necessity for them to depose falsehood against the plaintiffs or in favour of defendant No.2. The testimony of D.Ws.3 and 4 remained un-challenge so far as the execution of Ex.B1 Will by Venkata Ramana in their presence. Venkata Ramana executed the Will on 27.5.1999 and died on 03.1.2007. Absolutely there is no evidence on record to establish that as on the date of execution of Will, Venkata Ramana was suffering from any ailment. The material placed before the trial Court clinchingly establishes that Venkata Ramana executed Ex.B1 Will in a sound and disposing state of mind. The trial Court as well as the appellate Court appreciated the testimony of D.Ws.3 and 4 in touchstone with Section 68 of the Indian Evidence Act

and Section 63 of the Indian Succession Act. The material placed before the Court clinchingly established that defendants have complied with the procedure as contemplated under law, in order to prove the Will. The trial Court as well as the appellate Court, basing on the material available on record, arrived at the conclusion that Ex.B1 Will was executed by Venkata Ramana, in a sound and disposing state of mind, bequeathing the suit schedule property in favour of defendant No.2 and his family members. If the findings recorded by 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 observed earlier, the findings recorded by the Courts below are supported by evidence much less legally admissible evidence. Therefore, I am unable to accept the contention of learned counsel for the appellants-plaintiffs that the findings recorded by the Courts below are perverse. The Courts below construed the scope of Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act in right perspective, while placing reliance on Ex.B1 Will. Therefore, I am unable to accept the contention of learned counsel for the appellants-plaintiffs that the Courts below have misconstrued the provisions of Section 68 of the Indian Evidence Act and Section 63 of Indian Succession Act.

16. 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

¹ (2010) 13 SCC 216

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.

17. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the points raised by the learned counsel for the plaintiff 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 in this appeal.

18. In the result, the Second Appeal is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

December 19, 2017
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T.SUNIL CHOWDARY, J

