

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

SECOND APPEAL No.247 OF 2010

JUDGMENT:

This Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') aggrieved by the judgment and decree dated 31.12.2009 passed in A.S. No.2 of 2006 on the file of the Additional Senior Civil Judge, Tenali (for short, 'first appellate court'), wherein the first appellate court, while dismissing the appeal, confirmed the judgment and decree dated 16.11.2005 passed in O.S. No.650 of 1999 on the file of the I Additional Junior Civil Judge, Tenali (for short, 'the trial court').

2. Heard the learned counsel for the appellant-4th defendant and the learned counsel for the 2nd respondent-1st defendant, apart from perusing the material on record. None appeared on behalf of the plaintiff-1st respondent.

3. For the sake of convenience, the parties hereinafter are referred to as they were arrayed before the trial Court.

4. Learned counsel for the 4th defendant-appellant would submit that the findings of both the Courts below are contrary to law and facts; the Courts below erred in decreeing the original suit for partition allotting 1/3rd share to the plaintiff in the suit schedule property; the Courts below have not properly dealt with the execution and registration of Ex.B.1-registered Will deed; the Courts below accepted the case of the 4th defendant that he along with his mother are in possession of the suit schedule property; both the Courts below ignored one important aspect that the father of the 4th defendant executed Ex.B.1-registered Will deed in favour of the 4th defendant and his mother-3rd defendant; and ultimately, prayed to allow the second appeal by setting aside the judgments of both the Courts below. In support of his contentions, he relied on the following decisions:

1) Major Singh v. Rattan Singh (Dead) by LRs and others¹.

2) Savithri v. Karthyayani Amma².

5. On the other hand, learned counsel for the 1st defendant-2nd respondent herein would contend that both the Courts below had assigned valid reasons with regard to the execution and registration of the Will deed and held that the 3rd defendant is not the wife of Chalamaiiah and Chalamaiiah did not execute any Will deed in favour of the defendants 3 and 4 bequeathing the suit schedule property to them; the substantial questions of law raised in this second appeal do not merit any consideration; and ultimately, prayed to dismiss the second appeal. He also relied on the following decisions:

1) Bhagwan Kaur v. Kartar Kaur and others³.

2) Gurdial Kaur and others v. Kartar Kaur and others⁴.

6. This Court, while admitting the second appeal on 19.03.2010, framed the following substantial questions of law for determination in this second appeal:

- a) Whether the suit for part partition is maintainable?
- b) Whether courts below committed any error in disbelieving the registered Will?
- c) Whether courts below are justified in observing that the suit schedule properties are ancestral properties?

7. To adjudicate the *lis* and to answer the substantial questions of law, it is necessary to refer to the pleadings of the parties.

¹ AIR 1997 SC 1906

² 2007 Law Suit (SC) 1159

³ (1994) 5 SCC 135

⁴ (1998) 4 SCC 384

(a) The plaintiff, defendants 1 and 2 and one Venugopalarao, who was adopted to his senior paternal uncle, are the children of Chalamaiah. The father of the plaintiff died intestate on 05.06.1999. The suit schedule property is the self-acquired property of father. The plaintiff is entitled for 1/3rd share in the suit schedule property. When the plaintiff demanded for partition, the 1st defendant contended that he is entitled for half share and 1/3rd share. The plaintiff and the defendant Nos.1 and 2 are in joint possession and enjoyment of the suit schedule property. The 3rd defendant was married woman having a son through her husband Nallajamula @ Malla Subbarao, who died in the year 1984 or 1985. During the lifetime of the father of the plaintiff, the 3rd defendant used to work as house-maid and there were rumours that she developed illicit intimacy with the plaintiff's father. Taking advantage of the same, the 3rd defendant and her son-4th defendant falsely claimed the suit schedule property and trying to disturb the possession of the plaintiff and defendants 1 and 2. As the defendants were not cooperating for amicable division, the suit is filed for division of the suit schedule property into three equal shares and for separate possession of one such share to the plaintiff free from the obstruction from anybody particularly from the defendants 3 and 4.

(b) Defendants 1 and 4 filed separate written statements. Defendants 2 and 3 filed separate memos adopting the written statements of defendants 1 and 4 respectively. It is contended by the defendants 1 and 2 that the father of 1st defendant used to manage the joint family property and requested the 2nd defendant to look after the properties. The defendants 3 and 4 set up a Will and entered into possession of the suit schedule property subsequent to the filing of the suit and damaging the property illegally without any right or interest. It is contended by the defendants 3 and 4 that the father of the plaintiff has got two sons and two daughters. The second son by name Venugopalarao went on adoption. Chalamaiah performed the marriage of the plaintiff, defendants 1 and

2 and he purchased the property in the name of his children with his money and the remaining property is Chalamaiah's separated property. He bequeathed the said property in favour of the defendants 3 and 4 by executing a Will on 27.01.1995 in a sound and disposing state of mind. The said Chalamaiah died on 05.06.1999. The Will came into force and the defendants 3 and 4 are in possession and enjoyment of the said property. The 3rd defendant is the wife of the said Chalamaiah and the suit schedule property was given for her maintenance and she is the absolute owner of the said property and the plaintiff, defendants 1 and 2 are not co-sharers.

(c) Basing on the pleadings, the trial Court framed the following issued for trial:

- (1) Whether the Will dated 27.01.1995 is true, valid?
- (2) Whether the plaintiff is entitled for partition of the plaint schedule property?
- (3) Whether the Court Fee paid by the plaintiff is correct?
- (4) Whether the plaint schedule property is the joint family property of 1st plaintiff, D1 and D2 and deceased Chalamaiah
- (5) To what relief?

(d) The trial Court after considering the evidence of P.Ws.1 to 3 on behalf of the plaintiff and the evidence of D.Ws.1 to 6 and the documents Exs.B.1 to B.13 and Exs.X.1 to X.8 marked on behalf of the defendants, passed a preliminary decree on 16.11.2005 holding that the plaintiff is entitled for 1/3rd share in the suit schedule property along with defendants 1 and 2. Aggrieved by the said judgment, the 4th defendant preferred A.S. No.2 of 2006 and the first appellate court dismissed the appeal by confirming the judgment and decree

passed by the trial Court. Challenging the judgment passed by the first appellate, the present second appeal is filed by the 4th defendant.

8. The record reveals that the 4th defendant filed written statement and the said written statement was adopted by the 3rd defendant. There is no specific mention in the written statement that the 3rd defendant was married to Chalamaiah. The 3rd defendant deposed before the trial Court as D.W.1 that she was married to Chalamaiah and her marriage took place 30 years prior to her deposition and none were examined. She did not even give the year of marriage. There is also specific evidence of D.W.1 that no person was present when she married to Chalamaiah. So, there will not be any evidence about the marriage between D.W.1 and Chalamaiah. Both the Courts below while dealing with this aspect, examined the oral and documentary evidence and held that there was no marriage between Chalamaiah and D.W.1. Ex.B.7-registration extract of sale deed dated 09.10.1985 executed in favour of the 3rd defendant in respect of some house property also reveals the name of her husband as Subbarao, but not Chalamaiah. According to D.W.1, Ex.B.7 was executed much after the alleged marriage. If really late Chalamaiah married the 3rd defendant (D.W.1), the name of Chalamaiah would have been figured as the husband of the 3rd defendant. There is also record to show that the 3rd defendant underwent family planning operation in Government Hospital, Tenali, on 24.06.1979, i.e., more than 24 years ago. In Ex.X.1-extract of family planning register, the 3rd defendant was described as "Malla Sambrajam, wife of Subbarao", but not as "Musunuru Sambrajam, wife of Chalamaiah". It is also a circumstance against the defendants 3 and 4. As per the loan documents marked as Exs.X.2 to X.7 dated 16.04.1989, the 3rd defendant availed loan from Andhra Bank, Chilumuru. In all those documents, the 3rd defendant/D.W.1 is described as Nallajamula Sambrajam, wife of Subbarao and they contain the photograph and thumb impressions of 3rd defendant.

9. The contention of the 3rd defendant is that Chalamaiah married her and she gave birth to the 4th defendant through Chalamaiah. The school admission register of the 4th defendant marked as Ex.X.8 reveals the name of the 4th defendant as "Malla Nagaraju, son of Subbarao". His father's name is not shown as 'Chalamaiah'. The 4th defendant did not enter into the witness box to rebut the same. Therefore, this document also falsifies the contention of the defendants 3 and 4.

10. It is apt to refer the decisions on which reliance is placed by the learned counsel for the 1st defendant-2nd respondent herein. In **Bhagwan Kaur's** case (3 supra), it is held by the Hon'ble Supreme Court that the endorsement made by the Sub-Registrar does not satisfy the requirements of Section 63 of the Indian Succession Act, 1925, and does not reach up to the level of proof required under Section 68 of the Indian Evidence Act, 1872, and mere registration of the Will is of no consequence. In **Gurdial Kaur's** case (4 supra), it is held by the Hon'ble Supreme Court as follows:

"The law is well settled that if there is a suspicious circumstance about the execution of the Will, it is the duty of the person seeking declaration about the validity of the Will to dispel such suspicious circumstances. In this connection, reference may be made to the decision of this Court in *Rani Purnima Debi v. Kumar Khagendra Narayan Deb* [AIR 1962 SC 567 : (1962) 2 MLJ (SC) 27]. It has been held in the said decision that if a Will being registered and having regard to the other circumstances, is accepted to be genuine, the mere fact that the Will is a registered Will will not by itself be sufficient to dispel all suspicions regarding the validity of the Will where suspicions exist. It has been held that the broad statement by the witness that he had witnessed the testator admitting execution of the Will was not sufficient to dispel suspicions regarding due execution and attestation of the Will. It has been specifically held that registration of the Will by itself was not sufficient to remove the suspicion. Relying on an earlier decision of this Court reported in *H.Venkatachala Iyengar v. B.N.*

Thimmajamma [AIR 1959 SC 443 : 1959 Supp (1) SCR 426], it has been held in the said decision that where the propounder was unable to dispel the suspicious circumstances which surrounded the question of valid execution and attestation of the Will, no letters of administration in favour of the propounder could be granted."

11. Both the Courts below while dealing with the genuineness of Ex.B.1-Will deed, held that it is a suspicious document and discarded the same assigning elaborate reasons. Whether the deceased-Chalamaiah bequeathed the suit schedule property under the Will is a factual aspect. Both the Courts below held that the Will is a suspicious document and discarded the same. There is no infirmity to take a different view.

12. Learned counsel for the 4th defendant-appellant has relied on the decision of the Hon'ble Supreme Court in **Major Singh's** case (1 supra) and **Savithri's** case (2 supra) and contended that according to the provisions of Sections 63 and 68 of the Indian Evidence Act, 1872, by examining the sons of scribes and attestors to identify signatures of their respective father, as they are no more, execution of Ex.B.1-Will deed is proved. The facts and circumstances of the above decisions are quite different from the facts and circumstances of the present case. Both the Courts have elaborately dealt with Ex.B.1-Will deed and its averments and recorded a specific finding with regard to the suspicious nature of Ex.B.1-Will deed. Both the Courts below ultimately held that Chalamaiah bequeathing the suit schedule property in favour of the 3rd defendant and her son-4th defendant is doubtful. Both the Courts below have dealt with the aspect with regard to the right of succession of the plaintiff as well as the defendants 1 and 2 over the suit schedule property and also held that the defendants 3 and 4 have nothing to do with the suit schedule property and the property was not bequeathed in their favour as contended.

13. It is appropriate to state that under Section 100 of the C.P.C., the jurisdiction of the High Court to interfere with the judgment of the Courts below is confined to substantial question of law. The findings with regard to the factual aspects by the first appellate court are final. Those findings of facts are not amenable to the jurisdiction of this Court by way of second appeal, more so, when there is no substantial question of law. In the circumstances of the case, this Court cannot re-appreciate the evidence and arrive at a different conclusion. Neither inadmissible evidence has been considered nor admissible evidence not acted upon. In view of the facts and circumstances of the case, the findings of the Courts below are not perverse. So, no re-appreciation of entire evidence is warranted in this Second Appeal. Viewing from any angle, this Court finds that the substantial questions of law framed in the second appeal are devoid of merits. No other substantial questions of law arise for determination. Therefore, the second appeal is devoid of merit and is liable to be dismissed.

14. In the result, the Second Appeal is dismissed confirming the judgment and decree dated 31.12.2009 passed in A.S. No.2 of 2006 on the file of the Additional Senior Civil Judge, Tenali. Miscellaneous Petitions pending, if any, shall stand closed. There shall be no order as to costs.

Date: 30.07.2018
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Dr. SHAMEEM AKTHER, J