

THE HON'BLE DR JUSTICE SHAMEEM AKTHER

SECOND APPEAL No. 1282 OF 2005

JUDGMENT:

1. The Second Appeal is filed by the appellants-defendants 1 and 2 against the judgment and decree dated 27.7.2005 in Appeal Suit No.47 of 2003 on the file of the VII Additional District Judge (Fast Track Court), Krishna at Vijayawada, whereby the judgment and decree dated 15.09.2003 in Original Suit No.35 of 2001 on the file of the Senior Civil Judge, Nandigama passing a preliminary decree for division of plaint schedule properties into 4 equal shares and to allot one such share to the parties to litigation, were confirmed.

2. The appellants herein are defendants 1 and 2, respondent no.1 herein is the plaintiff, and respondent no.2 herein is defendant no.3, in the suit. For better appreciation of facts, the parties are hereinafter referred to, as they are arrayed in the trial court.

3. The Second Appeal was admitted on the following substantial questions of law.

“Whether the appellate court had properly appreciated the questions of law relating to execution of Will and the requirement of stamp and registration thereof and whether the appellate court had arrived at a correct conclusion regarding the question of law relating to prove the execution of will Ex.B1 despite the fact that attestors, scribe clearly deposed favouring the execution of Ex.B1?”

4. To adjudicate the *lis*, it is necessary to refer to admitted and disputed facts.

(a) Parties to the litigation are children of Injam Ramaiah and Ramayamma. Plaintiff and defendant no.3 are sisters and defendants 1 and 2 are their brothers. Their father executed a will dated 07.03.1990 bequeathing his properties to his wife Ramayamma to be enjoyed by her with absolute rights. Accordingly, after his death, the said Ramayamma enjoyed the plaint schedule property with absolute right during her life time and she died on 27.7.1996 intestate leaving behind her the parties to the litigation as her legal heirs. Under Hindu Law, the parties to the litigation succeeded the plaint schedule property. Plaintiff requested the defendants 1 and 2 to divide the properties into four equal shares and give one such share to her. But, they did not do so. After issuing notice dated 19.5.1997, she filed suit for partition of suit schedule properties into four equal shares and to allot one such share to her.

(b) Defendant no.1 filed written statement and the same was adopted by defendant no.2. Defendant no.3 remained *ex parte*. It is contended in the written statement that their mother late Ramayamma executed an unregistered will dated 21.05.1994 during her life time in good state of mind bequeathing the suit schedule properties in favour of defendants 1 and 2 to be enjoyed by them with absolute rights

after her demise. In pursuance of the same, defendants became owners of the plaint schedule properties with absolute rights. There is no cause of action to file the suit since their mother has not died *intestate*. Hence, it is prayed to dismiss the suit.

5. Basing on the above pleadings, the trial Court settled the following issues for trial.

- 1) Whether the plaintiff is entitled for 1/4th share in the plaint schedule property ?
- 2) Whether the unregistered will dated 21.5.1994 is true, valid and binding on the plaintiff ?
- 3) To what relief ?

6. During trial, on behalf of the plaintiff, P.Ws.1 to 5 were examined and Exs.A1 to A4 were got marked, and on behalf of defendants, D.Ws.1 to 5 were examined and Exs.B1 to B9 were got marked. Exs.X1 and X2 were marked through P.W.5-expert.

7. The trial Court, upon appreciation of the evidence on record, decreed the suit passing a preliminary decree for division of the suit schedule properties into four equal shares and allotting one such share to the plaintiff. Challenging the judgment and decree of the trial Court, the defendant no.3 preferred A.S. No.47 of 2003 on the file of the VII Additional District Judge (Fast Track Court), Krishna Machilipatnam. Vide the impugned judgment and decree, the first appellate

court dismissed the appeal confirming the judgment and decree of the trial Court. Challenging the same, the present Second Appeal has been preferred by the defendants 1 and 2.

8. Heard both sides. Perused the record. Appeal against respondent no.2 was dismissed for default vide order dated 21.9.2011

9. It is contended by the learned counsel for the appellants that the conclusion on Ex.B1-will by both the courts below is erroneous; that both the courts below ought to have acted upon Ex.B1-will; that the courts below ought not to have relied on the evidence of P.W.5-expert, who compared the admitted signatures of mother of late Ramayamma (mother of the parties to litigation) on Ex.X1 with that of her disputed signatures in Ex.B1. Hence, it is prayed to allow the Second Appeal.

10. On the other hand, learned counsel for the respondent no.1/plaintiff would contend that Ex.B1-unregistered will is forged and fabricated; that the evidence of P.W.5-expert and recitals in Ex.X2-expert opinion substantiate the same; that Smt.Ramayamma, mother of the parties to litigation, died *intestate* and hence, the plaintiff, being her daughter, is entitled to seek partition of schedule properties and allotment of 1/4th share to her; that both the courts below rightly adjudicated the issues involved and arrived at concurrent

findings; that all factual aspects are involved in the matter and there are no grounds to disturb the concurrent findings arrived at, by both the courts below on factual aspects; that there is no substantial question of law to be adjudicated in the Second Appeal, and ultimately dismiss the Second Appeal.

11. In view of the submissions made by both the parties, the point that arises for consideration is whether there are any substantial questions of law to interfere with the impugned judgment ?

12. There cannot be any dispute that, under the amended Section 100 C.P.C., a party aggrieved by the decree passed by the first appellate court has no absolute right of appeal. He can neither challenge the decree on a question of fact or on a question of law. The second appeal lies only where the High Court is satisfied that the case involves a substantial question of law. The word 'substantial' as qualifying 'question of law', means and conveys of having substance, essential, real, of sound worth, important, considerable, fairly arguable. A substantial question of law should directly and substantially affect the rights of the parties. A question of law can be said to be substantial between the parties if the decision in appeal turns one way or the other on the particular view of law. But, if the question does not affect the decision, it cannot be said to be substantial question between the parties. Recording a

finding without any evidence on record; disregard or non-consideration of relevant or admissible evidence; taking into consideration irrelevant or inadmissible evidence; perverse finding- are some of the questions, which involve substantial questions of law.

13. The suit is filed for partition of the suit schedule properties into four equal shares and to allot one such share to the plaintiff, who is daughter of late Injam Ramaiah and Ramayamma. Plaintiff and defendant no.3 are sisters and defendants 1 and 2 are their brothers. It is her case that their father executed a will dated 07.03.1990 bequeathing his properties to his wife Ramayamma to be enjoyed by her with absolute rights. Accordingly, after his death, the said Ramayamma enjoyed the plaint schedule property with absolute right during her life time and she died on 27.7.1996 *intestate* leaving behind her the parties to the litigation as her legal heirs. To substantiate her case, she examined herself as P.W.1, got examined P.Ws.2 to 5 and got marked Exs.A1 to A.4 on their behalf. Exs.X1 and X2 were got marked through P.W.5, who is hand-writing expert.

14. Whereas it is the case of defendants that Smt. Ramayamma did not die *intestate*; she executed Ex.B1- unregistered will bequeathing the schedule properties in favour of defendants 1 and 2 to be enjoyed by them with absolute rights after her demise. In pursuance of the same,

defendants became owners of the plaint schedule properties with absolute rights. To substantiate their case, defendants 1 and 2 examined themselves as D.Ws.1 and 2, got examined D.Ws.3 to 5 and got marked Exs.B1 to B9 on their behalf.

15. The trial Court as well as the appellate Court elaborately dealt with the execution, and the binding nature, of so-called will Ex.B1 dated 21.05.1994, and relied on evidence of P.W.5-expert, recitals in Ex.X2-hand-writing expert opinion and other cogent evidence on record, and held that it is a bogus and sham document. There is concurrent finding of both the courts below to that effect. Both the courts below declared that the appellants/defendants 1 and 2 did not acquire title by virtue of Ex.B1 and the suit schedule property is open for partition between children of late Injam Ramaiah and late Ramayamma. Ex.B1 is an unregistered document. There cannot be any dispute that burden is on the appellants/defendants to prove that Ex.B1 is a genuine document. The expert opined that the disputed signature on Ex.B1 is not tallying with the signatures found on Ex.X1. There are no grounds to disbelieve Ex.X2-opinion given by P.W.5-expert after comparison of admitted signatures in Ex.X1 with that of the disputed signatures in Ex.B1. Considering these aspects, both the courts below rightly held that Ex.B1-will is a bogus and sham document and cannot be acted upon. The same is based on proper appreciation on evidence on record. Only

factual aspects are involved in this case. They have been answered by both the courts below.

16. On a perusal of the judgments of both the courts below, it is clear that both the courts elaborately discussed the evidence on record. Both the Courts below analysed the entire evidence on record and gave concurrent findings on the factual aspects. None of the findings is shown to be perverse. The findings are based on record and there is no infirmity. There are no grounds to take a different view. Under these circumstances, no question of law, much less substantial question of law, as contended by the appellant/plaintiff to deal with under Section 100 of the Code of Civil Procedure, 1908 comes up for determination. Therefore, there are no merits in the Second Appeal. The Second Appeal is devoid of merit and is liable to be dismissed.

17. In the result, the Second Appeal is dismissed. No costs.

Miscellaneous Petitions pending, if any, in the Second Appeal shall stand closed.

21.08.2018
DRK

(Dr.SA, J.)

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