

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

AS No.458 of 1999 and AS No.798 of 1998

COMMON JUDGMENT:

AS No.458 of 1999 is filed by the plaintiffs questioning the judgment and decree dated 02.03.1998 in OS No.139 of 1991 passed by the Additional Senior Civil Judge, Gudur.

The suit OS No.139 of 1991 is filed for partition of the suit schedule properties. In addition to this, another suit OS No.8 of 1995 was filed (old OS No.241 of 1991 on the file of the District Munsif Court, Gudur) for an injunction. A common judgment was passed by which the suit for partition in OS No.139 of 1991 was decreed and the suit for an injunction in OS No.8 of 1995 was dismissed. Questioning the said judgment and decree in OS No.139 of 1991, two appeals are filed by the plaintiffs as appellants in AS No.458 of 1999 and by the second defendant as appellant in AS No.758 of 1999. The submissions are common in both the appeals as the findings that are questioned are from one case/judgment only.

The case of the plaintiffs in the suit OS No.139 of 1991 is that one Sri Bathina Konda Reddy is the owner of the suit schedule properties. He had six sisters. They are

the plaintiffs 1 and 2, the first defendant, the mother of defendants 2 to 4 called Tulasamma, the mother of defendants 5 to 8 called K. Sundaramma and K. Ramamma. Defendants 2 to 4 and defendants 5 to 8 are the children of two sisters. The case of the plaintiffs as can be seen from the record is that the property belongs to B. Konda Reddy. He died intestate on 30.06.1991 and thus all the sisters are the legal heirs who are entitled to a share of the plaint schedule properties. This is the sum and substance of the case.

In addition, a suit for an injunction was also filed and in that suit the present second defendant relied upon a Will and after he obtained a temporary injunction order, as per the averments, he broke open the locks of the Konda Reddy's house etc., and also made unauthorized opening in the dividing wall between the properties. The present plaintiffs question the Will dated 17.06.1991 and state that it is a created Will and was not executed by B. Konda Reddy.

The first defendant filed a written statement stating that defendants 2 to 8 are not necessary and proper parties; that they do not have any share in the suit schedule properties; and that plaintiffs 1 and 2 and

herself (first defendant) only are entitled to the suit schedule properties.

The second defendant filed a written statement stating that the item-3 of plaint-A schedule belongs to him exclusively; that he was living with late Sri B. Konda Reddy who was unmarried since many years; that the said Konda Reddy performed his marriage in 1969 and that on 17.06.1991 Konda Reddy executed a will bequeathing his properties to the plaintiffs and defendants, as mentioned therein; that the second defendant had collected all the outstanding including the Fixed Deposits etc., that the Will executed by Konda Reddy is a genuine document; that the plaintiffs are not joint possession etc. Thereafter, the second defendant amended his written statement stating that Konda Reddy adopted him as his son, since the second defendant was excluded from his natural family. The second defendant was given the properties of Konda Reddy under a Will dated 17.06.1991.

The defendants 3 and 4 filed a written statement supporting the Will dated 17.06.1991. Defendant No.5 filed a written statement, which is adopted by defendants 6 to 8 contending that the Will dated 17.06.1991 is a rank forgery.

After the pleadings were filed, the following six issues were framed by the lower Court in the suit for partition and later the two additional issues were also framed.

- i. Whether the plaintiffs and defendant No.1 are only the legal heirs to the late Sri Bathina Konda Reddy who died on 30.06.1991?
- ii. Whether the Will, dated 17.06.1991 alleged to have been executed by the late Bathina Konda Reddy is a forged and concocted document?
- iii. Whether the plaintiffs are entitled for 2/3rd share in the plaint A and B schedule properties, after custody the 2nd defendant from A and B schedule properties?
- iv. Whether the plaintiffs are entitled to 2/3rd share in the plaint 'C' schedule properties?
- v. Whether the plaintiffs are entitled for future profits in respect of 'A' schedule properties to be determined by way of separate proceedings in the above suit.
- vi. To what relief the plaintiffs are entitled?

Additional issue-1: Whether late Bathina Konda Reddy adopted the second defendant as his son?

Additional issue-2: Whether the late Bathina Konda Reddy agreed before the parents of the second defendant that the second defendant should succeed to estate of Konda Reddy after his demise?

The parties went to trial on the basis of these pleadings and issues. For the plaintiffs, PWs.1 to 3 were examined and Exs.A.1 to A.11 were marked. For the defendants, DWs.1 to 7 were examined and Exs.B.1 to B.32 were marked. After the joint trial, the suit for an injunction in OS No.8 of 1995 was dismissed and the suit for partition in OS No.139 of 1991 was decreed. Questioning the said judgment and decree, the suit for partition viz., OS No.139 of 1991, the present appeal has been filed by the plaintiffs.

This Court has heard the learned counsel for both the parties.

The first issue that has to be decided logically is whether the plaintiffs and first defendant are the only legal heirs of late Sri Bathina Konda Reddy who died on 13.06.1991. The lower Court also decided the same at the very outset. After this, the point that would arise for consideration is whether Konda Reddy adopted the second defendant as his son. Once, these two issues are decided then the question would follow is whether the Will executed by Konda Reddy is genuine or not. These three points are the points that essentially arise for consideration.

The first point that is therefore to be decided is issue No.1 viz., whether the plaintiffs and first defendant are the only legal heirs. Not much argument was also advanced on this point. As rightly noticed by the lower Court, the sisters are shown in entry No.2 of clause (2) of the Schedule to Hindu Succession Act. All of them are class-II heirs. The sons of the sisters are shown in entry No.4. Therefore, being the closest legal heirs of late Konda Reddy, the sisters are entitled to succeed to his estate subject to the decision on the other point. Therefore, it is held that the plaintiffs 1 and 2 and first defendant are the legal heirs of late Konda Reddy. The decision of the lower Court on this point is confirmed.

The second point that arises for consideration is whether B. Konda Reddy adopted the second defendant as his son and whether the said adoption is proved. As can be seen from the pleading, it is noticed that initially, the second defendant, who claims to be the adopted son, filed a written statement. The theory of adoption was not propounded in the initial written statement. After the trial commenced, an amendment was sought and the same was allowed. In this amendment, it is pleaded that as Konda Reddy was issueless and unmarried, he adopted the second defendant. The other contestants

denied this adoption and therefore, the additional issue - whether Konda Reddy adopted the second defendant as the son, came to be framed.

As can be seen from the pleading, the full details of the adoption are not mentioned. The performance of a ceremony or function for the adoption is not pleaded or proved. As the direct evidence of the giving/taking or of the performance of the ceremony of adoption is not there, the lower Court proceeded to look into the surrounding circumstances to see if the adoption was proved. Even in the course of hearing before this Hon'ble Court, the learned counsel could not really demonstrate that the second defendant was actually adopted and that he was living with Kona Reddy over a period of time. He relied upon the surrounding circumstances and argued that Konda Reddy performed the marriage of the second defendant; that he had left his native village and fully moved to Konda Reddy's village; that Konda Reddy purchased property in the name of the plaintiffs and that Konda Reddy also attested the sale deed Ex.B.20-sale deed executed by defendants 5 and 6 in their favour in 1968. In addition, he was also argued that original Will is in the custody of the second defendant. Therefore, he argued that the surrounding circumstances had proved

that the adoption has taken place. However, in reply to this, the learned counsel for the plaintiffs argued that PW.1 clearly admits that there is no recorded proof filed to show that he was adopted. He also pointed out that the second defendant did not mention in other suits that he was adopted by B. Konda Reddy. In addition, it is also pointed out that B. Konda Reddy attested a Will executed by the mother of second defendant in favour of other sons and excludes the second defendant. This Will is absolutely silent on the so-called adoption. If the mother wanted to exclude the second defendant because he was adopted by B. Konda Reddy, she would have been mentioned the fact in the Will itself. Similarly, Ex.B.1 is a registered partition of 1971 by which defendants 3 and 4 have divided properties and it is not mentioned that the second defendant was adopted by Konda Reddy. Thus, as pointed out by the learned counsel for the plaintiffs, none of the contemporaneous documents support the theory of adoption of the second defendant. Therefore, when direct evidence is missing of the alleged adoption, the lower Court concluded that the adoption has not been proved by looking into the antecedent circumstances. This Court also followed the same rationale and after examining the evidence notes that this point is correctly answered by

the lower Court. Hence, this Court concurs with the judgment and decree of the lower Court on this point.

The next point that arises for consideration logically is about the Will that is executed is filed and marked as Ex.B.1. The point that arises for consideration is whether Ex.B.1 is a validly executed document or not. The contention of the learned counsel for the second defendant is that his client has discharged the duty cast upon him by filing the document and by examining the attestors of the said Will. The learned counsel submits that by examining DWs.4 and 5, the second defendant has discharged his burden. The scribe of this Will, which was marked as Ex.B.1 is one A.V. Subbaiah. He was not examined because according to DW.2, he has lost his memory and is unable to depose in a court of law. It is also mentioned that he was aged about 88 years.

In reply to this, the learned counsel for the plaintiffs argued that the suspicious circumstances surrounding the execution of the Will are not removed. He argues that a duty is cast upon the propounder of the Will to remove all doubts/suspicious circumstances. The learned counsel pointed out that DW.5 is a co son-in-law of the second defendant. DW.6 is a brother-in-law. In addition the learned counsel pointed out that there is a cramped

writing under Ex.B.1 and it is not free flowing script and therefore, it is not a voluntary executed Will. In addition, the reason for non-examination of the scribe falls to the ground, according to the learned counsel for the plaintiffs, because the scribe is not actually afflicted with any disease or injury. Ex.A.1 sale deed dated 10.07.1997 is filed, which shows that the scribe of the Will-Ex.B.21 is also the scribe of the present document. He was healthy enough to scribe this document in July 1997. In addition, Ex.A.11-deposition in the suit OS No.128 of 1992 was filed. Oral evidence was given by the scribe of the present Will in the Court of the Additional Subordinate Judge, Gudur in a suit OS No.128 of 1992. This deposition shows that by December 1997 the scribe was hale and hearty and also capable of deposing in a Court of law. It is thus clear that this witness is kept away from the Court. An adverse inference has to be drawn for this.

The proximity between the date of alleged Will 17.06.1991 and the date of death (30.06.1991) are highlighted. In addition, it is also pointed out that Konda Reddy being a wise man who has executed the documents earlier would have taken care to get the Will registered if he had executed it. It is also pointed out

that an expert was appointed at the instance of the second defendant to examine the Will and the expert gave an opinion that the signature of the Will is forged but the expert is not really examined in this case. This Court is not commenting on the expert's opinion but this Court agrees that the propounder of the Will failed to remove the suspicious circumstances. In **Jagdish Chand Sharma v. Narain Singh Saini**¹, the Hon'ble Supreme Court spoke of the need for stringent requirement of proof. This Court concurs with the findings of the lower Court that the suspicious surroundings of the Will have not been really disputed. This Court therefore holds and concurs with the finding of the lower Court that the Will is not a genuine Will. As a consequent of this, it has to be held that Konda Reddy died intestate.

In view of the above findings, the crucial question that arises and which falls for consideration is about the shares of the parties. This Court already held that the second defendant has not been adopted by Konda Reddy and that the Will-Ex.B.12 is not a genuine document. Therefore, the plaintiffs 1 and 2 and first defendant alone are entitled to a share in the properties in the plaint A, B, and C schedule properties.

¹ (2015) 8 SCC 615

This appeal has filed essentially questioning the elimination of item No.3 of the plaint-A schedule. Item-3 of the plaint-A schedule property is a vacant site of 15 ankanams situated at to the western side of item No.1. Absolutely, no documentary evidence has been produced as rightly noticed by the lower Court to show that this property is the property of late B. Konda Reddy. During the course of the submissions, the learned counsel also relied upon Ex.B.20, but this property merely describes that northern boundary of the properties sold under Ex.B.20, as the property belongs to B. Konda Reddy. In the absence of any proof to show that this property only belonged to the Konda Reddy, this Court is unable to come to any conclusion contrary to what was noticed by the lower Court. The plaintiffs did not establish that this property was acquired by or is part of the property of Konda Reddy. It is a fact that the second defendant did not file any document to show that this property is the exclusive property. The primary burden was not discharged by the plaintiffs. Therefore, this Court is bound to agree with the findings of the lower Court on this crucial issue, which is the crux of the appeal.

In the result, this Court finds that there are no merits in the appeal AS No.458 of 1999. Accordingly, the same is dismissed.

AS No.758 of 1999

This appeal is filed by the second defendant questioning the findings of the judgment and decree dated 02.03.1998 in OS No.139 of 1991 passed by the Additional Senior Civil Judge, Gudur.

The arguments that are advanced are on the very same grounds urged in the earlier appeal. The sum and substance of the arguments is that the Will is wrongly rejected and that the adoption was also wrongly rejected. These issues are dealt with points 2 and 3. The fact remains that the adoption has not been proved. None of the contemporaneous documents proved the factum of this adoption. The Will has also not been proved as required under law, in the sense that the suspicious circumstances surrounding the same are not explained properly.

This Court therefore finds no reason to allow AS No.798 of 1998. The discussion made in the earlier appeal is applicable to all the points that are urged by the learned counsel in this appeal also.

For all these reasons, this Court is of the opinion that both the appeals are to be dismissed. Accordingly, AS No.458 of 1999 and AS No.758 of 1999 are dismissed. In the circumstances of the case, there shall be no order as to costs.

Miscellaneous Petitions, if any pending in these appeals shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 18.12.2018
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