

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

APPEAL SUIT No.252 of 2012

JUDGMENT:

The first appeal is filed by the 2nd defendant among the two defendants including the appeal 2nd respondent, aggrieved by the decree and judgment of the trial court dated 03.01.2012 in O.S.No.1130 of 2006 in the suit of the 1st respondent/sole plaintiff for partition of the plaint schedule property into 3 equal shares and allot one such share to the plaintiff and for profits, that was preliminary decreed in granting 1/3rd share as entitled by the plaintiff by awarding costs and to determine profits by separate application. The plaint schedule is the house property bearing No.21-17, ward No.12, Gollapudi, Krishna District bounded by East-E.Suryanageswara Rao, South-Property of AK.Gilani, West & North-Road.

The plaintiff and 1st defendant are the sisters of the 2nd defendant and they are children of Uppalapati Venkanna Raju and Krishnaveni of whom Krishnaveni, who died on 10.01.1992 predeceased her husband-Venkanna Raju on 01.11.1994 intestate covered by Ex.A1 death certificate leaving behind the plaintiff and 2 defendants supra and so far as the property of their mother of 580.80 square yards of K.Kandrika they have all entered sale agreement-cum-GPA with one K.Venkateswara Rao dated 17.12.2004 (Ex.A2).

The case of the plaintiff is that with a promise to divide was postponing the plaint schedule property despite notice of the plaintiff dated 14.10.2006 (Ex.A3) with return cover of 1st defendant Ex.A4 and by setting up in his reply (Ex.A5) similarly by

defendant No.1 in Ex.A6 an unregistered will (Ex.B1) said to have been executed by their father on 27.09.1994 bequeathing the plaint schedule property in favour of the 2nd defendant, that said will is untrue and forged and brought into existence by 2nd defendant to deprive the plaintiff and the 1st defendant their legitimate shares in the property of their father died intestate and their father Venkanna Raju undergone treatment at Hyderabad and never looked after by the 2nd defendant and their father even not liked him to make any bequeath.

The 2nd defendant in his written statement in tune to the reply notice of him stated that their father Venkanna Raju executed will dated 27.09.1994 before his death testate on 01.11.1994 in sound and disposing state of mind bequeathing the plaint schedule property in favour of the 2nd defendant and thereby the 2nd defendant became owner of the plaint schedule property and enjoying as such since death of his father with exclusive possession and constructed the first floor over the ground floor in the year 2002 with loan obtained from the SBI, Gollapudi Branch and the suit claim of the plaintiff is untrue and plaintiff not entitled to partition and plaintiff and the 1st defendant not entitled to any share who are his sisters and sought for dismissal.

The 1st defendant in her written statement almost supported the case of the 2nd defendant saying their father executed will dated 27.09.1994 in favour of the 2nd defendant bequeathing the plaint schedule property and plaintiff and the 1st defendant are attestors to it and the will came into force after death of their father on 01.11.1994 and the 2nd defendant became absolute owner and constructed first floor even to the knowledge of the

plaintiff exclusively enjoying and the suit claim of the plaintiff is untrue.

The trial Court framed the 3 issues as to whether the plaintiff is entitled to partition of the plaint schedule property for 1/3rd share and for profits and whether the will said to have been executed by their father Venkanna Raju bequeathing the plaint schedule property to the 2nd defendant on 27.09.1994 is true and the 2nd defendant thereby became absolute owner to non-suit the plaintiff and to what result?

In the course of trial, on behalf of the plaintiff besides herself came to the witness box as PW.1 cause examined one K.Mallikarjun Prasad, G.Ravi and V.Muralidhar as PWs.1 to 4 of whom PW.2-bank official, PW.3-railway employee are the witnesses produced the specimen signature of their father and PW.4 is the handwriting expert. The plaintiff placed reliance on Exs.A1 to A6 supra and Exs.X1 to X7 viz., Ex.X1 is the certificate issued by the SBI, Ex.X2 is the Xerox copy of the will supra (original is Ex.B1), Ex.X3 is Xerox copy of the sale deed standing in the name of their father Venkanna Raju (original is Ex.B2) dated 26.12.1980, Ex.X4 is withdrawal form of Venkanna Raju dated 04.07.1994, Ex.X5 is pension filed of Venkanna Raju who worked as Switchman in Railways of 1986 and Ex.X6 is specimen signature of Venkanna Raju in Form-8 of the pension file attested by the Gazetted Officer on 25.03.1986 and Ex.X7 is the opinion of the handwriting expert dated 30.10.2010 (PW.4 supra). On behalf of the defendants, besides Exs.B1 & B2 referred supra, Exs.B3 to B8 are the letters written by the sister of DW.1-D.1, DW.2 is D.2 and DW.3 is one of the attestors of the said will (colleague of 2nd defendant-DW.2 as

admitted in his evidence) and DW.4 is the Bank Manager of SBI, Vijayawada. The trial Court held that even the letters placed reliance on by the defendants covered by Exs.B3 to B8 particularly Exs.B3 to B5 written by plaintiff to 1st defendant about the harassment meeting by the husband and she attended the gruhapravesam function of the 1st floor constructed by the 2nd defendant on the plaint schedule ground floor house and there is nothing mentioned of her relinquishment of right but for to say she did not claim any partition in the plaint schedule property and their relationship was cordial. Even bank granted loan based on the said will to the 2nd defendant for the construction of the 1st floor and even the house property mutated in the name of the 2nd defendant those does not extinguish the right of the plaintiff nor confer right on the defendants unless the Ex.B1-will is proved and in this regard though in the Ex.B1-will the signature of the 2nd attester appears to that of the plaintiff, the signature of the executant (testator) their father on the will when compared with the admitted signature obtained not tallied. The 2nd defendant would have taken steps immediately after filing of the suit to send Ex.B1-will to expert with admitted signatures of plaintiff, but he admits at the 11th hour after receipt of expert report turned futile in view of the dismissal of I.A.No.378 of 2011 confirmed in the CRP.No.4181 of 2011 maintained by him by the High Court and thereby the plaintiff is entitled to the relief of partition for the will not proved and equally entitled to the profits.

It is impugning the said trial Court's decree and judgment with the findings therein, the present appeal is filed with the contentions raised in the grounds of appeal that the preliminary

decree and judgment of the trial Court for partition of the plaintiff schedule property into 3 equal shares by allotting one such share with profits to determine by separate application is contrary to law, weight of evidence on record and probabilities of the case and outcome of ill-appreciation and in a wrong perspective and by giving importance to the trivial issues and minor discrepancies and ignoring the vital and important aspects from evidence and by assigning no ground to disbelieve the evidence of 1st defendant, own sister of the plaintiff and the 2nd defendant to collude with the 2nd defendant or to forge the signature in Ex.B1-will and D.1-sister of plaintiff and D.2 proved her signature on the will as attesor and also of the plaintiff even plaintiff not chosen to her attestation falsely and trial Court ought to have allowed the petition of the 2nd defendant to compare the signature of the plaintiff on Ex.B1-will as attesor with the admitted signatures of the plaintiff for expert opinion for ends of justice and the other attesor to the will also deposed in proof of the due execution of the will as DW.3 and the trial Court failed to see that because the will is genuine, the plaintiff also attested along with their sister-DW.1 and the trial Court should have seen that plaintiff received half share in the sale proceeds of her mother property covered by Ex.A2 and once such is the case, she could not keep quiet without seeking partition earlier till filing of the suit and giving of notice in 2006. The long silence of the plaintiff for about 12 years after death of their father died testate by execution of Ex.B1-will in filing the suit for partition in 2006 preceded by notice in 2006 that too having attended the house warming ceremony of 1st floor in 2002 should not have been allowed the construction of the 1st floor and house warming

ceremony knowingly and to attend the same as she got any share and had there father did not died testate that shows her conduct in filing suit claim falsely and there are no suspicious circumstances around Ex.B1-will that could be brought on record to disbelieve. The lower Court erred in holding non-mention of name of the scribe to typed the will as if a suspicious circumstance when will is otherwise proved as per the law duly and the trial Court should not have been relied on the expert opinion Ex.X7 of PW.4 as gospel truth that too when it is an opinion evidence and the expert in his cross examination what he deposed itself is suffice not to rely and trial Court ignored his cross examination evidence having not discussed and before giving any credibility to his opinion and evidence. The findings of the trial Court in ignoring the evidence of the attestors DWs.1 & 3 not proved of the Ex.B1-will is unsustainable and there is nothing to disbelieve DW.3 merely because he is co-employee of DW.2 besides D1-DW.1 sister of both plaintiff and 2nd defendant from their evidence proving the due execution of the will and the bequeaths made by the father of the plaintiff and defendants in favour of 2nd defendant and mere presence of D.2 at the time of execution of Ex.B1-will by their father not sufficient to say there is propounder's influence for bringing the will. The trial Court's observation of what DW.3 deposed of he attested before Venkanna Raju testator signed on Ex.B1 is hyper technical and thereby sought for set aside the trial Court's decree and judgment by allowing the appeal dismissing the plaintiff's suit.

The counsel for the appellant/2nd defendant reiterated the same, whereas the learned counsel for the plaintiff/1st respondent supported the trial Court's decree and judgment.

Heard both sides at length and perused the material on record.

It is true the first appellate Court being the final fact finding Court is bound to appreciate both the facts and law afresh and the entire matter is at large in deciding the appeal. It is also true as per Section 105 CPC the appellant irrespective of the interlocutory application filed to send the admitted signatures of the plaintiff with specimen signatures to handwriting expert and the disputed signatures as one of the attestors of Ex.B1-will from its dismissal including in revision having entitled to take as one of the grounds in appeal and so taken as ground No.6 in the appeal is entitled to urge the Court as one of the attacks in the appeal to its consideration. No doubt merely because some other view is possible even the first appellate Court entitled to re-appreciate the facts and law cannot reverse the findings of the trial Court, but for from the discussion with any finding from any material as to how the trial Court erred in its conclusion for modification or the reversal of the trial Court's decree and judgment by interference with the findings to the conclusion that too as contemplated by Order 41 Rule 31 CPC by formulation of the points for consideration and meeting of the same by assigning reasons to it.

Having regard to the above, the points for consideration in deciding the first appeal are the following:

1) Whether the Ex.B1 will is proved by the 2nd defendant as beneficiary of it from the say of father of the plaintiff and the

defendants executed the unregistered will on 27.09.1994 about a month before his death on 01.11.1994 and in a sound and disposing state of mind as last will and testament and if so, the plaintiff is not entitled to any relief of partition of the plaint schedule property for any share including for any profits? If so, the decree and judgment of the trial Court granting 1/3rd share to separate on final decree application including to determine profits in final decree proceedings and with costs is unsustainable and requires interference by this Court and if so, to what extent and with what observations?

2) To what result?

As the points formulated supra are interconnected all are dealt with together to avoid repetition. No doubt as contemplated by Section 63 of the Indian Succession Act so far as proof of will concerned, the person who wants to rely on the will must prove the due execution and attestation of the will by examination of one of the attestors and even the presumption of 30 years old document no way applicable to the wills and even an admission or non-denial of the will does not exempt the proof, but for to say though not the attestor deposed about the due execution with literal wording of the attestation it can be inferred from the reading of the evidence of the attestor if deposed as to due attestation as also held by this Court by scanning the law in SA.No.654/1997 between **T. Ramesh Vs. Laxmamma**¹ dated 20.06.2017. It is for the person who propounded the will not only to prove due execution and attestation, but also to dispel the suspicious circumstance shrowded if any around the will otherwise the due

¹ 2017 (4) ALT 628

execution and attestation like any compulsory attestable document of evidence adduced is enough as held in the expression of **Ramesh** supra referring to several expressions of the Apex Court. It is important to say even taken for arguments sake that the signature as of the attestors referred that of the plaintiff in Ex.B1-will that itself is not enough to say that the will is proved in the absence of due attestation as contemplated by Section 63 of the Indian Succession Act by examination of one of the attestors at least and as such, but for to appreciate from the evidence of D1 as DW.1 and DW.3, two out of the three attestors including alleged that of the plaintiff to Ex.B1-will, as to there is proof of due execution of the will by the father of the plaintiff and defendants by name Venkanna Raju on 27.09.1994 and in a sound and disposing state of mind before his death on 01.11.1994 and as last will and testament and as to there is any propounded influence and there are any suspicious circumstances and the same could be dispelled and cloud cleared and whether the evidence of DWs.1 & 3 proves due attestation by due execution of they saw the testator signing and while their signing seen by the testator. Here so far as DW.3 evidence concerned, in his cross examination he deposed that it is after he attested the executant put his signature that itself no compliance. The due attestation contemplated by Section 3 of the Transfer of Property Act and the evidence of at least one of the attestors of due attestation as required compulsory by Section 63 of Indian Succession Act. Thus leave about a stray sentence is not enough but for to appreciate the evidence as a whole even from that reading besides this stray sentence there is no clear evidence from reading of the evidence of DW.3 as a whole of he saw when

testator was signing and later he signed in the presence and seen by the testator, as attesor. Once such is the case, leave about DW.3 is not even an independent witness for co-employee with D2-DW.2 since 1990 in same office and is interested there is no proof of due attestation of the will by DW.3 as one of the attestors of the will. Though it was not stated in so many words by the trial Court this conclusion arrived by the trial Court is sustainable from what is discussed supra in not giving credence to the evidence of DW.3. Leave it apart, from there is only evidence of D1-DW.1 the other attesor to the will who is no other than sister of plaintiff and D.2. There is nothing to belie her evidence for she is otherwise also entitled to share had there been no bequeath by their father in favour of D.2 no Ex.B1-will as a testament. However, the fact remains that even from the reply notice given by her (D.1) without even notice served on her itself shows something fishy as a circumstance in saying of sailing with D.2 to the claim of their father executed Ex.B1-will in his lifetime that was attested by D.1 and plaintiff besides another person. It is not only that will is not just created though unregistered and no reason for non-registration leave about a mere non-registration no way fatal but for if at all proved of due execution and attestation. The other circumstance of any propounder's influence cloud cleared in showing the intention of the testator as one of the important tests of the polestar and nectar of the instrument as held in **Doe Long Vs. Laming (2 Burr. at pp.11-12) by Lord Wilmot, C.J.** and as also stated in Halsbury's 4th Edition Volume 50 page 239 head note 408 of testator's intention is criteria that to be determined from the evidence adduced properly and of its admissibility and the

will has four essentials of the intention of the testator must be by a legal declaration and with respect to his property that can be bequeathed and it expresses his desire of that declaration of intention how the property to take effect after his death with other essential quality of testamentary disposition is ambulatoriness of revocability during lifetime of the testator and as the will speaks from the grave of the executant of the will cannot be called upon to admit or deny its execution much less to explain any circumstance raising suspicion surrounding the execution and testamentary capacity and condition with reference to sound and disposing state of mind besides intention for duty of the Court itself to appreciate by sitting in the arm chair of the executant/testator to ascertain the intention from the contents of the words used and surrounding circumstances so that it is on the executant's death the vigor and effect of the will and the bequeaths come into force subject to proof of the will by examination of at least one of the attestors out of at least 2 attestors as contemplated by Section 63 of Indian Succession Act of not mere examination but due attestation to speak that the will was attested by the attesting witness who saw the testator while signing the will or testator must personally acknowledge the signature of the will that of him in the presence of the 2 attesting witnesses and they themselves signed the same in the presence of the testator when seen by him and without that attestation even execution of the deed of the will is not valid to enforce the bequeaths.

Here the presence of the D.2 at the time of the so called execution of the will along with D.1; it discloses clearly the propounder's influence for the beneficiary is D.2 and the cloud

shrouded with suspicion is not dispelled, including from evidence of DWs.1 & 2. No doubt there is one of the strong circumstance to say with reference to Exs.B3 to B8 letters of which Exs.B3 to B5 written by the plaintiff to the 1st defendant-DW.1 one of which referring to her attended the 1st floor gruhapravesam function of the 2nd defendant to the suit house where with the loan obtained by the Bank in 2002 by the 2nd defendant that is also deposed by DW.4-the Bank Manager and she did not object for construction of the 1st floor and she did not seek for partition earlier and did not give any notice even in claiming partition at least in the ground floor for even taken from her non-raising objection to the 1st floor constructed by the 2nd defendant before division of the property between the plaintiff and the defendants from her taken to proceed of there is death of their father intestate. However that is not the sole criteria, but for to say the plaintiff is not entitled to equity for any share over the 1st floor that proves the 1st floor with own funds exclusively constructed by the 2nd defendant including from said letter of her to 1st defendant about the construction within her knowledge and she attended for his gruhapravesam and house warming ceremony. In fact that aspect is not taken into consideration by the trial Court while if at all decreeing the plaintiff's suit for partition for 1/3rd share at best only in the ground floor and the site with no right over 1st floor; to say so far as open space or air space open to sky over ground floor concerned, there is a deemed waiver and estoppel or relinquishment to that extent in permitting construction of the 1st floor by the 2nd defendant and that no way deprives the plaintiff of the entitlement of share over the site and ground floor of the

building as rightly concluded by the trial Court that itself no way disentitle the partition relief for 1/3rd share by plaintiff nor to take as the so called will propounded by the 2nd defendant even supported by the 1st defendant is as if proved as if the last will and testament duly executed by the testator in sound and disposing state of mind with intention of bequeathing the entire property in favour of the 2nd defendant with no right to give to the plaintiff and 1st defendant even from the written statement and evidence of 1st defendant also as DW.1 there is relinquishment or waiver in supporting the contest of D.2 that no way deprives the claim and right of the plaintiff for her undivided interest over the site and ground floor of the house covered by the plaint schedule property.

Having regard to the above and in the result, the appeal is only partly allowed by holding that the Ex.B1-will is not proved as last will and testament of the father of the plaintiff and defendant and as duly executed in sound and disposing state of mind by clearing any cloud of suspicious circumstances and propounder's influence from the so called presence admittedly of D.2 and for not proved of due execution and due attestation as contemplated by Section 63 of the Indian Succession Act and Section 3 of Transfer of Property Act as referred supra and however so far as 1st floor constructed by the 2nd defendant by availing bank loan in the year 2002 for which the plaintiff did not object and it is not the case of the plaintiff of there was any oral arrangement of plaintiff and 1st defendant to take ground floor and 2nd defendant to take 1st floor, from her deemed relinquishment. So far as the site open to sky over the ground floor concerned from allowing the 2nd defendant to construct the 1st floor for his exclusive entitlement from which she

cannot claim any right over the 1st floor of the building, but for over the ground floor of the building and in the site and only to that extent the trial Court decree for partition of the 1/3rd share of the plaintiff is confirmed however with no profits and with no costs. The plaintiff is at liberty to file final decree application if not already filed to workout for separation of her 1/3rd share in the plaint schedule property to the extent of the site and in the ground floor of the house therein and with no right over the 1st floor of the house or on its terrace open to sky.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

Date: 05.06.2018
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JUSTICE Dr. B.SIVA SANKARA RAO

