

* SMT JUSTICE T. RAJANI

+ APPEAL SUIT Nos.1229 and 1494 of 1998

% Dated: 05.01.2018

G. Nagasayanam and others.

... APPELLANTS

AND

\$ N. Mangatayaramma and others.

... RESPONDENTS

! Counsel for Appellants : MR. O. MANOHER REDDY
MR. K.BHEEMA RAO

^ Counsel for Respondents: SMT. D. BHAGYA LAKSHMI
MR. N. RANGA REDDY
MR. S.D. GOWD
MR. A. HANUMANTHA REDDY
MR. MAHESWARA RAO KUNCHEAM
MR. C. RAMACHANDRA RAJU
MR. K. SITA RAM
MR. N. PREM RAJ
(PARTY-IN-PERSON)

< GIST:

> HEAD NOTE:

? Cases referred:



IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHARA
PRADESH

* * *

APPEAL SUIT Nos.1229 and 1494 of 1998

Between:

G. Nagasayanam and others.

..APPELLANTS

and

N. Mangatayaramma and others.

... RESPONDENTS

Date of Judgment pronounced on : 05.01.2018

SMT JUSTICE T. RAJANI

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/No
2. Whether the copies of judgment may be marked
to Law Reporters/Journals: : Yes/No
3. Whether the Lordship wishes to see the fair copy
of the Judgment? : Yes/No

T. RAJANI, J

SMT JUSTICE T. RAJANI

APPEAL SUIT Nos.1229 and 1494 of 1998

COMMON JUDGMENT:

This case is a depiction of several aspects of life, glaring of which is the old age and helplessness of a person by name Nimmala Peddana (hereinafter referred to as 'Peddanna'), who, in fact, is the cause of this litigation, having executed two wills, one in favour of the husband of the first plaintiff, who is his grandson and the other in favour of defendants 1 and 2, who are his sons.

2. The plaintiff along with her children, plaintiffs 2 to 6, filed the suit O.S.No.31/1978, seeking for a declaration that the plaintiff A schedule property belongs to her and for recovery of the same from the possession of defendants and for rendition of accounts by the defendants in respect of the rents realized from items 2 to 6 and in the alternative a decree for partition and separate possession of 2/3rd share in the suit schedule property.

3. The plaint came to be amended several times, due to the death of some of the parties and also after the written statements of the defendants were filed. The suit schedule property, according to the plaintiffs, is a self-acquired property of Peddanna. The plaintiffs are wife and the children of one Bhujanga Rayudu (hereinafter referred to as 'Rayudu'), who died on 08.08.1976 in Guntakal, under suspicious circumstances. The properties mentioned in plaint A schedule are the self-acquired properties of Peddanna, who was in inimical terms with defendants 1 and 2. There were several criminal and civil disputes

between Peddanna and the defendants. Peddanna was very much attached to Rayudu and both of them were sailing together while the defendants were raged against them. Peddanna was living with Rayudu. Peddanna wanted to disinherit his sons and leave all the property to Rayudu and the plaintiffs and with that view, Peddanna executed a registered will dated 05.07.1969, disinheriting his two sons and bequeathing his property to Rayudu and his children. Later, a codicil was also executed by him, with a clarification about the shares that are to be bequeathed to Rayudu and his sons i.e. in the ratio of $\frac{1}{4}$: $\frac{3}{4}$. Rayudu was dealing with radios and allied accessories at Anantapur and he was financed by Peddanna for the said business. Even after shifting to Guntakal, he continued with the same business.

The first defendant has a concubine by name Gajula Lalithamma and a son by name Sivaiah through her. Due to them, he neglected the interest of the first plaintiff's husband and consequently, Peddanna had to take care of him and his children. On the death of Rayudu, his $\frac{1}{4}$ th share devolved on the plaintiffs. By virtue of the death of Peddanna on 05.06.1975, the plaintiffs became entitled to his property. The alleged will set up by the defendants dated 10.03.1975 is not true and is obtained by fraud and coercion on Peddanna. The defendants trespassed into the properties of Rayudu and they were not allowing the plaintiffs to take possession of the same. The sales in favour of defendants 4 to 273 were effected after the cancellation of power of attorney dated 14.08.1968, by Peddanna, under a registered cancellation dated 04.06.1969. The same was intimated to one Narayanaswamy, who is one of the defendants,

through a legal notice. After the cancellation of the power of attorney, the sales were effected by defendants 1 and 2, in collusion with Narayanaswamy, to deprive the plaintiffs of their rights over the suit schedule property. Hence, the sales are not binding on the plaintiffs. The first defendant is realising rents from the houses shown as items 3 to 6 and is not accounting for the same.

4. The case of the first defendant, as put forth in his written statement, is that item 3 of the plaint A schedule, which is a house bearing No.20/49 is owned by himself and defendant No.2 jointly and Peddanna did not have any right over it. So also item 5, which is house bearing No.10-127 (item No. 5 is in fact 10-126, as mentioned in the plaint) which exclusively belongs to his wife, Lalithamma and item 6 property does not exist at all. The criminal case filed by Peddanna was a false case, filed with the evil advice of Narayanaswamy, who has grouse against the defendants. The case ended in discharge of the accused. Again Peddanna filed a suit in O.S.No.93 of 1973 under the advice of the second defendant, with whom this defendant had some misunderstandings and the same was dismissed for default on 10.02.1975. This defendant, as manager of the joint family, was attending on his father and was providing funds for his expenses. Peddanna was not attached to Rayudu. They never sailed together. Rayudu himself was being looked after by this defendant. The alleged will dated 05.07.1969 is not true. Peddanna did not execute any such will or codicil. It must have been brought into existence by pressure on Peddanna, by the first plaintiff. However, the said will is not the last will of Peddanna. He cancelled the

said will and codicil and executed a fresh will on 10.03.1975, which is to the knowledge of the plaintiffs. The will is in favour of the defendants and plaintiffs 2 to 5 and this defendant and the second defendant were appointed as guardians of plaintiff 2 to 5. Rayudu was addicted to drinking and became mad. He was got treated by this defendant. The first plaintiff had a dominating influence over Rayudu. She took him and all the children to Guntakal where one of her brothers was living. Rayudu was running a radio shop for some time in Anantapur when he was normal. This defendant financed his business to an extent of Rs.20,000/- and odd. He was looking after the family of Rayudu. Lalithamma is not the concubine but the wife of this defendant and Sivaiah is his son. This defendant has been in possession of the property as manager. Hence, there is no question of trespass. This defendant did not sell any portion in Sy.No.124. There is no mismanagement or maladministration of the family properties and he is not obliged to hand over any money to the plaintiffs. This defendant offered a legitimate share of Rayudu and to deliver the same to the plaintiffs. The first plaintiff, along with defendants 1 and 2, executed an undertaking before the panchayatdars, but she went back and has filed this unjust suit.

5. In the additional written statement, filed by the first defendant, it is contended that the plaintiffs are not entitled to $\frac{2}{3}^{\text{rd}}$ share, as the properties are joint family properties and late Peddanna had only $\frac{1}{3}^{\text{rd}}$ share in the joint family properties but not in all the suit properties. The plaintiffs 2 to 5 would be entitled only to $\frac{2}{9}^{\text{th}}$ share.

6. Defendant No.2, in his written statement, pleads ignorance of the will dated 05.07.1969 and the codicil dated 16.07.1974. Further he states that the said will and codicil came into existence as a result of fraud and misrepresentation by some interested parties, taking advantage of some misunderstandings prevailing at that time between Peddanna and defendants. The litigations referred to in the plaint are during that unfortunate period. The defendants were living separately due to their positions in Government service, but they continued to remain jointly and it is with this joint effort the properties were acquired by Peddanna not for himself but for the members of the joint family. Item 3 of the schedule property was purchased by the defendants not for themselves alone but even to the benefit of their father and from that it is clear that the properties are not self-acquisitions of late Peddanna and, therefore, he had no right to will away other than his share. It is only after realizing his folly that late Peddanna executed another will on 10.03.1975, conferring rights not only to the defendants but also to Rayudu.

7. Defendant No.119 filed a written statement that she is the purchaser of an extent of 4570 sq. yards in plot No.20, Sy.No.126 under a sale deed dated 21.08.1970. Defendant No.133 is also a purchaser of Ac.0.10 cents in plot No.105 and 106 in Sy.No.126 under registered sale deed dated 28.07.1971. Defendant No.173 is the purchaser of some property under the registered sale deed dated 17.12.1976. Defendant No.201 is the purchaser from Lalithamma of house bearing (Old No.5-336) new 11-126 and present D.No.16-462. Lalithamma got the said property under a gift deed dated 02.11.1970

executed by the first defendant. Hence, it is contended that the plaintiffs have no right in the said properties. Defendants No.169 filed a written statement stating that he purchased an extent of 20 cents in Sy.No.124 from defendants 1 and 2 under sale deed dated 16.12.1976.

8. Defendant No.168 is the President of Judicial Club, Anantapur, who entered into agreement with Peddanna, Rayudu and defendants 1 and 2 for an extent of 15 acres in Sy.No.126 and 3.70 acres in Sy.No.124. An agreement was executed by Peddanna, Rayudu and defendants 1 and 2. The purchasers were put in possession of the plots. As Peddanna was old, defendant No.2 was managing the family affairs. He entered into agreement of sale of land in Sy.No.124. The suit was filed by this defendant for specific performance of the agreement of sale dated 14.08.1968 and 27.01.1970, which is pending in O.S.No.103 of 1975. Para 8 of the plaint shows that the plaintiffs have consented for the sale of the land in favour of the judicial club and they asked for rendition of accounts for the monies received by defendants 1 and 2. Having asked for the same, they cannot try to recover the property from the hands of the purchasers. Both are inconsistent with each other.

9. Defendants 223 and 224 filed a common written statement. They are the grandsons of Lalithamma. They contend that items 1 and 2 of plaint A schedule are joint family properties of defendants 1 and 2 and Peddanna. Items 3 and 4 do not belong to joint family and they are separate properties of the first defendant. The first defendant gifted the properties to these defendants by means of registered gift

deed dated 25.05.1984. Item 5 is not a joint family property and it belongs to Lalithamma, which she sold away on 16.12.1978. Item 6 is not in existence.

10. Defendant No.174, in his written statement, states that he purchased an extent of Ac.0.10 cents in Sy.No.126 from defendants 1 and 2 under a sale deed dated 16./12.1976 and has been in possession of the same since then. He adopts the other pleas taken by defendant No.170. Defendant No.236 is the purchaser of Ac.0.15.68 cents in plot Nos.38 and 39 in Sy.No.126 from the first defendant under a sale deed dated 11.-09.1985. Defendant No.249 is the purchaser of Ac.0.05 cents of plot in Sy.No.126 under a registered sale deed dated 13.08.1984. Defendant No.232 is the purchaser of Ac.0.05 cents in plot No.39E in Sy.No.126 and Ac.0.02 cents in plot No.39F from the GPA of the first defendant under a sale deed dated 21.09.1990. Defendant No.247 is the purchaser of Ac.0.05 cents in plot No.37 in Sy.No.126 and Ac.0.06 cents in plot No.37 in Sy.No.125 under registered sale deeds dated 10.01.1985 and 11.04.1990 respectively. Defendant No.227 is the purchaser of Ac.0.05 cents in plot No.39D in Sy.No.126 and Ac.0.04 cents in plot No.39F in Sy.No.126 from the first respondent under registered sale deeds dated 08.01.1986 and 13.08.1990 respectively. Defendant No.226 is the purchaser of Ac0.04 cents in plot No.39A in Sy.No.126, from the first defendant and Ac.0.04 cents from one Sugunamma, who purchased from the first defendant under a sale deed dated 27.06.1991, which is plot No.39A of Sy.No.126. Defendant No.253 is the purchaser of Ac.0.05 cents in plot No.36 in Sy.No.126 from the first defendant and

two sons adjacent to her plot under a sale deed dated 13.07.1989. Defendant No.170 is the member of Anantapur Judicial Club, who denies that the property is self-acquired property of Peddanna. Defendant No.50 is also a purchaser of plot No.30 under a sale deed dated 29.04.1970.

11. Based on the pleadings and additional pleadings, the trial Court framed the following issues:

1. Whether the suit properties are the self-acquired properties of late N. Peddanna?
2. Whether items 3, 5 and 6 of plaint A schedule belonged to late N. Peddanna?
3. Whether the will dt. 5-7-69 is true, valid and binding on the defendants and whether it is the last will and testament of late Peddanna?
4. Whether the codicil dt. 16-7-74 is true, valid and binding on the defendants?
5. Whether the will dated 10-3-75 by late N. Peddanna is true and valid?
6. Whether the plaintiffs have title to the suit properties?
7. Whether the defendants are liable to render account to the plaintiffs?
8. Whether the suit as framed is not maintainable?
9. Whether the suit properties are not correctly valued and whether the court fee paid is not correct?
10. To what relief?

Additional issues framed on 8-10-87:

1. Whether the marriage between late Lalithamma and 1st defendant is valid and to be acted upon?
2. Whether the alleged gift deed with regard to items 3 and 4 dt. 25-5-84 is hit by lispendense?
3. Whether the said Lalithamma has got any right and title to sell item No.5 and item No.6 and is also hit by lispendense?

Additional issues framed on 17-2-1994:

1. Whether the sale deeds in favour of defendants 4 to 273 are valid and binding on the plaintiffs?
2. Whether D-1 is liable to account for rents realised by him from items 3 to 6 of plaint schedule property since 1976?

Additional issues framed on 18-11-1994:

1. Whether the alienations in favour of defendants 226, 227, 236, 247 and 249 are true, valid and binding on the plaintiffs?

Additional issues framed on 26-2-1996:

1. Whether late D-1 executed will in favour of D-223 and D-224 and whether the same is valid?
2. Whether plaintiffs sold house sites, if so whether this amount can be brought to the court for working out equities?

12. The court below, by considering the material on record, decreed the suit, impugning which these appeals are preferred. AS.No.1229 of 1998 is preferred by defendant Nos.4, 7, 9, 18, 19, 22, 30, 32, 35, 39, 45, 46, 51 and 52 and one R. Lakshamma, who is a third party purchaser. AS.No.1494 of 1998 is preferred by defendant Nos.3, 223, 224 and 269.

13. The grounds on which the two appeals are filed are almost the same. They being, that the plaintiffs filed the suit, admitting the alienations and asking for the relief of accounting with respect to the various amounts received with regard to the alienations in favour of the defendants 4 to 273 and others and hence, the question of granting a declaration of title to the properties does not arise; the case of the plaintiffs that the suit schedule properties are self-acquired properties of Peddanna is not true; the Court below ought to have

seen that the sale deeds Exs.A1 to A4 are not at all self-acquired properties of Peddana and they are the joint family properties; the Court below lost sight of the fact that if the properties are self-acquired properties, it takes the character of joint family properties when they are put into the common hotch-potch; the Court below failed to see that as early as on 22.05.1947, late Peddanna and defendants 1 and 2 mortgaged the property treating it as joint family properties; the Court below ought to have seen that the houses were purchased on 12.08.1994 under Ex.B66 and that they have been treated as joint family properties; the Court below ought to have seen that under Ex.B28 a suit was filed by Balanna on 24.06.1949 claiming the properties as partnership properties of himself and defendants 1 to 3; the Court below ought to have seen that Peddanna filed a written statement admitting that the properties are joint family properties; the Court below ought to have seen that even under Ex.A10, when Peddanna and defendant No.1 executed a power of attorney in favour of the defendant No.2 and Bhujanga Rayudu, he referred to the properties as joint family properties; the letters written by Bhujanga Rayudu clearly show that he had lot of love and affection towards his brother i.e. second son of Appanna though his wife Lalithamma; the Court below ought to have held that the judgment in OS.No.103 of 1975 passed by the Principal Senior Civil Judge does not operate as *res judicata* and that the suit ought to have been dismissed.

14. The counsel on either side, by way of their written submissions, put forth their contentions. Instead of burdening this judgment with repetition, which may result if the arguments are mentioned here,

the arguments would be answered in the course of the judgment, when the relevant aspects come up for consideration.

15. The points that arise for consideration in these appeals are;

1. Whether the issue of the genuineness of the will can be decided afresh, ignoring the finding of the Court in O.S. No.103/75, on the said point.
2. Whether the entire suit property devolves on the plaintiffs, by virtue of the Will in favour of Bhujanga Rayudu and his sons.

POINT No1:

16. The main contention of either side is that the will executed in their favour is the genuine will executed by Peddanna. The will in favour of the husband and the children of the first plaintiff is anterior in date, to the will that is executed in favour of defendants 1 and 2. The contention of the counsel for the respondents is that, by virtue of putting forth the will and claiming right under the said will, defendants 1 and 2 stand admitting that the property constituted by the will, which is the same as constituted by the will in favour of the plaintiffs, is the self-acquired property of Peddanna. There is certainly some strength in the said argument. The documents, which are filed by either side and which are numerous, would only reflect the lack of clarity that was there, in the family, as regards the property held by each of them. There is a relinquishment deed by one Obul Dasu, in the year 1939, who is the brother of Peddanna, relinquishing his share in the joint family property. The property, which is constituted by the relinquishment deed, would then be in the nature of self-acquisition by

Peddanna, since it is relinquished in favour of Peddanna alone and not in favour of the successors of Peddanna or to put it in the hotch-potch.

17. Peddanna is said to be doing yarn business from the year 1938 itself, which is reflected in Ex.B.28, plaint filed by Obul Dasu in OS.No.41 of 1949, which is not refuted in Ex.B.29, the written statement of Peddanna. Hence, it is possible that the yarn business of Peddanna is done with the help of the joint family income, derived from joint family property. The fact that Obul Dasu made a relinquishment in favour of Peddanna as regards the joint family property, would imply that there was joint family property for the family of Peddanna and that it is equal to the property constituted by the relinquishment deed, if not more. Hence, unless there is clear evidence to say that the yarn business started and continued by Peddanna was only with the income derived from the self-acquired property, it cannot be concluded that it is run only with the help of the self-acquired property of Peddanna, more so when no self acquired property is proved to be there for Peddanna, prior to 1939.

18. Defendants 1 and 2 have been, admittedly, doing jobs, hence, possibly, there would be separate properties for defendants 1 and 2. But there is no such claim made, clearly, by defendants 1 and 2. As already observed, the contention of the counsel for the respondents is that by virtue of accepting the authority of Peddanna in making the will, in respect of the properties constituted by the will, defendants 1 and 2 would stand giving up their claim against the said properties as their self-acquired properties. The documents filed on either side, would reflect the changing of faiths within themselves. GPA was

executed in favour of D1, D2 and Bhujanga Rayudu. It was cancelled, expressing distrust on all, without exempting Bhujanga Rayudu, which means that he was also not taken as a trust worthy person. But, the will was executed in his favour, which implies, trust was against reposed in him. Another will was executed in favour of D1 and D2, which, if true, would show that there was change in the priorities of Peddanna. In the mortgage deeds, property was claimed as joint family property. In the inter se litigation, Peddanna claimed the same property as self acquired, thereby making it difficult, to rely on any of those documents. The documents do not offer any guidance to decide the nature of the property. No separation and segregation was maintained between the joint family property and the self acquired property of Peddanna. In order to hold that, by virtue of it, the property can be considered as having been thrown in the hotch potch, different intentions get reflected in the *inter se* litigation.

19. All said and done, the issue with regard to the two wills and the nature of the property constituted by the will got decided in O.S.No.103 of 1975, which is a suit filed by S. Narayanaswamy, who is one of the purchasers of the property in Sy.No.126. Incidentally, the issue of validity and the genuineness of the two wills came up for consideration and the Court has framed the issues with regard to the same and decided the same. Point No.1, which was decided by the Court below, is 'whether the suit property covered under Exs.A2 to A14 is the self-acquired properties of Peddanna or it is the joint family property.' While deciding the said point, the Court below observed that Ex.A74 therein recites that it is Peddanna, who purchased the property

from his own funds and likewise Ex.A75 sale deed also refers that it is Peddanna, who purchased the property from his own funds and there is no mention that the property in the above sale deed was purchased from out of the joint income or the joint family funds and as such, the earliest of the documents, which is more than 30 years ancient document, categorically recites that the property is the self-acquired property of Peddanna and a stray incident like the recital in Ex.A1

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does not mean and connote that it is a joint family property. It was observed that the plaintiff therein filed certified copy of the will, executed by Peddanna, bequeathing his property in the name of defendants 1 and 2 and its original was got produced in the Court by giving a memo by the defendants counsel D4 to D9 and if Ex.A110 original and the certified copy of Ex.A86 contents are referred we may also get some information whether Peddanna has got joint family property or it is self-acquired property. Observing as such, the Court below took up an exercise of comparing the admitted and disputed thumb impressions, of Peddanna and came to the conclusion that the will, which was executed in favour of defendants 1 and 2 is not a genuine will. There is a categorical finding by the Court that the recitals in the document executed by Peddanna make it crystal clear that the property is the self-acquired property of Peddanna and not the joint family property. It also considered that Peddanna also asserted during his life time, that the property and the houses are all self-acquired property and that he exposed the fraudulent intention of

his sons, defendants 1 and 2, by publishing pamphlets and by filing civil suits and criminal cases against his sons.

20. Whether the exercise of comparing thumb impressions is proper or not and whether the approach of the Court below in O.S.No.103 of 1975 is correct or not, cannot be agitated in this appeal, as the parties allowed the said observations and findings to become final.

21. Though in the written arguments, filed by respondents 1 to 6 herein, it is stated that an appeal was preferred against the judgment in O.S.No.103 of 1975, no evidence with regard to the same is brought forth and it is mentioned in the written arguments of respondents 1 to 6 that the appeal is still pending. Hence, taking up the issue, which is already decided and against which an appeal is preferred, would amount to violating the principle of *res judicata* incorporated in Section 11 of the Code of Civil Procedure.

22. The counsel for the respondents relied on certain rulings on the principle of *res judicata*. But the said rulings are rendered in a situation where it had to be held that *res judicata* does not apply to those facts. They are not helpful to the respondents herein and it is not understandable as to why they are relied upon, while in fact operation of the principle of *res judicata* would help the respondents.

23. The genuineness of the two wills cannot be gone into by this Court, for the reasons mentioned above. The Court below also went on the same lines, apart from discussing the evidence on record, and concluded that the issue was already decided in O.S.No.103 of 1975 and hence, a different view cannot be taken in the suit.

The point is accordingly answered.

POINT No.2:

24. The suit properties are dry land in Sy.No.124, Ac.14.80 cents; dry land in Sy.No.126, Ac.43.35 cents; house bearing No.28/49 in Old Town, Anantapur; house bearing No.28/50 in Old Town, Anantapur; house bearing No.10/52, Old Town, Anantapur, house bearing No.10/126 in Rajaji Street, Anantapur; house situated in Sy.No.124 D.No.1/182-B in Anantapur, plot in Sy.No.121 paiki Ac.0.50 cents. These are the properties in plaint A schedule. In B schedule wearing apparel of value Rs.300/- is mentioned and the boundaries of house bearing No.28/49, 28/50 and 28/52 were also given in B schedule.

25. The will in favour of the husband of the first plaintiff does not specify the properties. It is by way of codicil dated 16.07.1974 that the properties were specified. The properties under the codicil are Ac.14.80 cents in Sy.No.124; Ac.43.35 cents in Sy.No.126; house bearing Nos.28/52, 28/49, 28/50, 10-126 and Ac.0.50 cents in Sy.No.121 together with house, pit for well and the well situated in the street. By virtue of the decision in O.S.No.103 of 1975, the properties that were specifically mentioned in the will were declared as self-acquired properties of Peddanna and the will and the codicil were upheld to be genuine. Hence, there need not be any difficulty in concluding that the plaint A schedule properties, under items 1 to 5 and 7 are self-acquired properties of Peddanna and they are bequeathed to the husband and the children of the first plaintiff and that they would be the absolute owners of the said property.

26. In the will Peddanna mentions not only the above properties, but also the properties which are in his possession by the time of his demise. He bequeaths those properties also in favour of the husband of the first plaintiff and their sons. The court, in OS 103 only upheld the will, by virtue of which the properties mentioned therein, so far as the description of which is clear, would devolve on the beneficiaries under the will. But with regard to house situated in Sy.No.124 with D.No.1/182-B in Anantapur, the same is not mentioned in the codicil. Hence the issue that comes up for consideration is, firstly, whether the said property is in existence, if so whether it was in possession of Peddanna and secondly, whether merely by virtue of being in possession, it can be considered as the self-acquired property of Peddanna. The codicil, apart from clarifying that the property mentioned therein would fall upon the legatees, mentions that all the other properties, which are in his possession by the time of his death, would also devolve upon the legatees therein. But the said recital of the codicil is vague. The nature of the property, which is in possession of Peddanna, has to be proved. Simply by making a recital in codicil that all the properties, which are in his possession by the date of his demise, would devolve upon the legatees, he cannot bequeath those properties, unless he has a right to bequeath them, as an absolute owner.

27. The first plaintiff, in her evidence, does not speak about the house in Sy.No.124 with D.No.1/182-B, being in possession of Peddanna and that the same is a self-acquisition of Peddanna. There is no evidence adduced by the plaintiffs with regard to the said house.

The first defendant denies the existence of the said house, by taking such a contention in his written statement. Ex.A51 is the general power of attorney by Lakshamma, in respect of House No. 1/182-B. Hence it would prima facie prove Lakshamma as the owner of the said house. Though D1 denied the existence of the said house, the same stands to be a false contention, in the light of Ex.A51, which shows that it exists. But the burden of the plaintiff continues till it is proved that the said house is the self acquired property of Peddanna and that it was in his possession by the date of his demise. Ex.A51 is dated 22.02.1988. According to the evidence of P.W.1, Peddanna died in the year 1975. Hence the right of Peddanna over the said property and also his possession over the said property in the year 1975, has to be proved by the plaintiffs. Lakshamma is examined as D.W.2. Her evidence is that her husband constructed a house in the garden belonging to the family, at Anantapur, with the help of his retirement benefits. But she asserts that all the suit properties were purchased by Peddanna and D1 and D2, jointly. D.W.1, who is the grand son of Lalithamma, could not say whether D1 and D2 were in or not in, a position to purchase any properties out of their salaries. DW.2 could not state about the details of the properties and whether the house that she spoke of is the same as mentioned in plaint A schedule, with No.1/182-B. The existence of the house stands proved by Ex.A51. Hence, in the absence of any proof, with regard to the same being under the possession of Peddanna by the date of his demise and that he is the owner of it, the probability which can be gathered from Ex.A51 is, that it is the property of Lakshamma, since she was projected as the owner and the same is not disproved

by the plaintiffs. Plaintiffs do not explain about Ex.A51 and say that the said house, though was shown as the property of Lakshamma, in fact belongs to Peddanna and that it was in his possession. Hence no finding can be given on the said house.

28. The Court below observed that item No.6 is a land, which is not correct. It also observes that there is no evidence that item number 6 is in possession of Peddanna. The Court observes that in OS.No.103 of 1975, the Judge gave a finding that the suit properties are self acquired properties of Peddanna. But it was not conscious of the fact that the properties in that suit and this suit are not the same. That suit was filed by Narayana Swamy, who purchased land in Sy.No.126 only. Hence the question of holding item No.6 in this suit, as self acquired property of Peddanna, in that suit, does not arise. Under the misconception that item No.6 in this suit, was the suit property of OS.No.103 of 1975, the Court below declared it as the self acquired property of Peddanna, which cannot be sustained. It has to be held as property of Lakshamma, as Ex.A51, which is filed by the plaintiffs themselves, would probabalize the ownership of Lakshamma over it.

29. So far as wearing apparel is concerned, there is absolutely no evidence adduced by the plaintiffs.

30. In conclusion, items 1 to 5 of the suit schedule properties can be held as devolving on the plaintiffs/respondents 1 to 6 and item No. 6 can be held as belonging to Lakshamma/D3. The plaintiffs would be entitled for recovery of the said items, from the defendants.

31. The arguments of the counsel for the appellants, revolving around the proof of the will and the judgments relied in support of the same, would become irrelevant, due to the decision on the will having become final in OS.No.103 of 1975, and hence are not referred to.

In the result, the appeals are partly allowed, by setting aside the impugned judgment, to the extent of declaring item No.6 as the self acquired property of Peddanna and declaring it as devolving on the plaintiffs. The rest of the judgment shall remain intact. It has to be, however, made clear that the findings of the Court below and this Court, as regards the properties constituted by the will in favour of the plaintiffs, are concerned, would be subject to the result of the judgement in appeal, if any, filed against OS.No.103 of 1975.

As a sequel, the miscellaneous applications, if any pending, shall stand closed. There shall be no order as to costs.

January 5, 2018
DSK

T. RAJANI, J