

**THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY**

**A.S.NO.1665 OF 1998**

**JUDGMENT**

Assailing the judgment and decree dated 29.09.1997 passed by the court of Principal Subordinate Judge, Guntur in O.S.75 of 1982, in dismissing the suit for partition, delivery of separate possession and for mesne profits, the plaintiffs filed the present appeal.

For the sake of convenience, the parties will be referred to as in the suit.

The plaintiffs filed the suit against the defendants for partition of plaint 'A' and 'B' schedule properties into nine equal shares and for allotment and delivery of possession of four such shares to them and for ascertainment of mesne profits in Uma Printing Press and L. P. Gas business and also for costs.

As per plaint averments, the case of the plaintiffs is that late Garre Subba Rao Gupta (for short 'GSRG') married the 1<sup>st</sup> plaintiff as per Hindu sastras and caste customs in the month of April, 1966 at Vijayawada. They lived as husband and wife at Guntur. They were blessed with plaintiffs 2 to 4. Late GSRG begot two sons and three daughters, who are defendants, through his first wife, who died some years back. His first wife was a sickly woman. Late GSRG got the plaintiffs 2 to 4 admitted in the school and educated them and looked after them till his sudden demise on 28-01-1981. He did business in printing and publishing in the printing press, "Prabhat Press", as one of the partners thereof in the plaint 'A' schedule building. He earned huge profits in the printing press and in cooking gas businesses. He earned plaint 'A' and 'B' schedule properties and other properties. He executed a will on 10-12-1976 in a sound and disposing state of mind, in favour of plaintiffs, bequeathing a house in the 2<sup>nd</sup> lane, Brodipet, Guntur, in which the plaintiffs are residing. Late GSRG died intestate suddenly due to heart trouble, leaving behind him, plaintiffs and defendants, as his legal heirs of plaint 'A' and 'B' schedule properties. The plaintiffs and defendants are,

therefore, jointly entitled to plaint schedule properties and also his other properties, in equal shares. The 1<sup>st</sup> defendant, who is the elder son of GSRG, assumed management of the properties and businesses, though the plaintiffs are also in joint possession constructively. The 1<sup>st</sup> defendant is not paying the share of income of the business to the plaintiffs. He had collected the chit amounts, LIC policy amounts and deposits made in the bank by late GSRG. Defendants have to account for those amounts besides the income of the printing press and LPG business. The defendants have also to account for gold, silver and cash left behind by late GSRG, which came into their possession. The defendants did not co-operate with the plaintiffs in partition of the plaint 'A' and 'B' schedule properties in spite of the demands made orally and through registered notices. Hence the suit.

The 1<sup>st</sup> defendant in his written statement originally filed, contended that the surname of the plaintiffs is not 'Garre' and it was adopted by them with an ulterior motive to grab the properties of late GSRG, that in the correspondence between the parties before the filing of the suit, it was never disclosed that there was marriage between GSRG and the 1<sup>st</sup> plaintiff and even in the alleged registered will dated 10-12-1976, which was referred to in the plaint, there was no mention that the first plaintiff was the wife of the testator. Late GSRG was so enamored, that the 1<sup>st</sup> plaintiff could extract from him cash of Rs.35,000/- and jewellery worth Rs.50,000/-, besides a house in Brodipet, Guntur. That what all GSRG intended to provide to the 1<sup>st</sup> plaintiff, he has done. Late GSRG never did business in printing press. He was not an agent for LPG business. This defendant and his brother-in-law Sri Sanka Radhakrishna Murthy, jointly applied licence for the LPG business. Item No.2 of plaint 'B' schedule is joint business of himself and his brother-in-law. There are only two Godrej Almyrahs, one of which is gifted by his father-in-law to him. There are no wooden almyrahs, as shown under item No.4 of plaint 'B' schedule; that item No.5 of plaint 'B' schedule belongs to his wife; that item No.7 belongs to him; that item Nos.9 to 11, are the

exclusive properties of his mother. While late GSRG was in a sound and disposing state of mind, executed a will on 16-01-1981, bequeathing his properties to him and to the 2<sup>nd</sup> defendant. Late GSRG spent lot of money for the marriages of his children; the claim of the plaintiffs that GSRG died at their residence, is false; late GSRG had an heart attack and while he was being shifted to hospital from his residence, he breathed his last; that plaintiffs have no manner of right in the plaint schedule properties to claim for partition; and hence the suit may be dismissed with costs.

Defendants 2 and 3 filed memo adopting the written statement of 1<sup>st</sup> defendant.

1<sup>st</sup> defendant filed additional written statement. In the additional written statement, he contended that the 1<sup>st</sup> plaintiff never married late GSRG; that his mother died in the year 1971, that any marriage by GSRG, during the life time of his wife, is void and no rights are, therefore, vested to the plaintiffs; that Prabhath Press, which is item No.1 in the plaint 'B' schedule, does not belong to late GSRG; that it is a partnership concern and GSRG had only 0-30 ps. share in that business; that partition cannot, therefore, be effected as sought in the plaint; that GSRG owned and possessed of a terraced house situated in 2/11, Brodipet, Guntur, in which the plaintiffs have no right at all; that the said property is not included in the suit for partition and; that the suit is bad for partial partition of the property.

Defendants 2 and 3 filed memo adopting the additional written statement filed by 1<sup>st</sup> defendant.

1<sup>st</sup> defendant in his amended written statement further contended that the 1<sup>st</sup> plaintiff is not entitled to claim any share, as she is not the legally wedded wife of late GSRG; that on the death of his father GSRG, this defendant spent an amount of Rs.20,000/- for cremation and other obsequies; that after the death of his father, he also performed the marriage of the 5<sup>th</sup> defendant and for the said

purpose, he spent Rs.20,000/-; and that in case of passing a decree for partition, a provision has to be made for payment of the said amounts to him from out of the estate of late GSRG

Plaintiffs filed rejoinder to the amended written statement of 1<sup>st</sup> defendant, denying that 1<sup>st</sup> defendant spent the amount as claimed by him and that the said expenses were met from out of the fund of late GSRG, which was in the custody of the defendants and that, therefore, the question of making any provision in respect of the said amounts, does not arise.

Based on above pleadings, trial court framed the following issues for trial:

1. Whether the 1<sup>st</sup> plaintiff is the wife and plaintiffs 2 to 4 are the children of late Garre Subba Rao Gupta?
2. Whether the will dated 16-01-1981 set up by the defendants and purporting to have been executed by G.Subba Rao Gupta, is true?
3. Whether the plaintiffs are entitled to partition of the properties of late G.Subba Rao Gupta?
4. What are the properties of late G.Subba Rao Gupta liable for partition and whether the plaint schedules are correct?
5. To what relief?
6. Whether the will dated 10-12-1976 was executed by late Garre Subba Rao Gupta in a sound and disposing state of mind?
7. Whether the suit for partition of item 1 of plaint B schedule is maintainable?

Additional issues dated 14-02-1997 :

1. Whether the marriage of the 1<sup>st</sup> plaintiff with Sri Garre Subba Rao Gupta, is true and valid?
2. Whether the first defendant is entitled to Rs.20,000/-, which he claims to have spent towards the marriage expenses of the 5<sup>th</sup> defendant, is case of partition as claimed by him?

Further additional issue dated 19-03-1997:

Whether the 1<sup>st</sup> defendant had incurred Rs.20,000/- for the funeral expenses of his father and if so, whether he is entitled for the said amount from out of the estate of his deceased father?

In support of the case of the plaintiffs, P.Ws.1 to 3 were examined and Exs.A-1 to A-13 and Exs.X-1 to X-3 were marked. P.W.1 is the 1<sup>st</sup> plaintiff, P.W.2

is the Head Master of the school, who got marked Exs.X-1 to X-3 and P.W.3 is one of the attestors to Ex.A-3 will.

On behalf of the defendants, D.Ws.1 to 5 were examined and Exs.B-1 to B-11 and Exs.X-4 to X-11, were marked. D.W.1 is the 1<sup>st</sup> defendant. D.W.2 is the husband of the 3<sup>rd</sup> defendant and one of the attestors of Ex.B-5 will. D.W.4 is one of the attestors to Ex.B-5 will. D.W.5 is the son of the scribe of Ex.B-5, who identified his father's signature. D.W.3 is the manager of Karur Vysya Bank, Guntur Branch, who produced Exs.X-4 to X-11, term deposit receipts, which were in the name of the 4<sup>th</sup> plaintiff and which were en-cashed after maturity by the 1<sup>st</sup> plaintiff.

Appreciating the entire evidence on record, the trial court held that plaintiffs 2 to 4 are the children of late GSRG and 1<sup>st</sup> plaintiff, but their marriage is void. Accordingly, the trial court answered the issue No.1 in favour of the plaintiffs and additional issue No.1 framed on 14-02-1997, against the plaintiffs. Issue No.6, with regard to will dated 10-12-1976, the trial answered the issue in favor of plaintiffs. Issue No.7, with regard to suit being bad for partition raised by defendant No.1, was decided against the defendants. Issue No.2 with regard to will dated 16-01-1981, set up by the defendants, was answered in favour of defendants. The trial court answered issues 3, 4 and 5 with regard to relief seeking for partition of suit schedule properties, was answered against the plaintiffs. Additional issue No.2 dated 14-02-1997 and the issue framed on 19-03-1997, with regard to claim of 1<sup>st</sup> defendant that he incurred Rs.20,000/- towards marriage expenses of 5<sup>th</sup> defendant and Rs.20,000/- towards funeral expenses and that he is entitled to the said amount from out of the estate of the deceased, in case of partition suit being allowed; the trial court held that as the plaintiffs are not entitled to any share in the plaint schedule properties, no direction need be given to share the said expenses, and answered the issue accordingly.

Assailing the judgment and decree of the trial court in respect of issues, which went against the plaintiffs, the present appeal is filed.

Learned counsel for the respondents/ defendants filed a memo in the year 2014 stating that 5<sup>th</sup> defendant died. But the appellants, till date, have not taken any steps to bring her legal representatives on record. Hence, appeal against 5<sup>th</sup> defendants is dismissed as abated.

The learned counsel for the appellants/plaintiffs, contended that the trial court, without appreciating the evidence, erroneously held that there is no valid marriage between the 1<sup>st</sup> plaintiff and GSRG, merely on the ground the 1<sup>st</sup> plaintiff did not mention the date of marriage in the plaint and that she did not examine her mother, who attended the marriage. The learned counsel further contended that when the trial court, based on evidence, found that 1<sup>st</sup> plaintiff and GSRG lived together as husband and wife and that the society recognized them as such, and that there is a presumption of valid marriage between them, it ought to have held that there is valid marriage between them. The learned counsel further contended that the trial court found that plaintiffs 2 to 4 are the offspring of 1<sup>st</sup> plaintiff and GSRG. Therefore, they are entitled for a share in the schedule properties. But the trial court refused to grant decree for partition, relying on Ex.B-5 will set up by the defendants. He stated that Ex.B-5 will said to have been executed by late GSRG, is not true and genuine and there are several suspicious circumstances in executing it and it is a forged document. He stated that Ex.B-5 will said to have been executed by the defendants is not registered and it is not proved properly and hence no reliance can be placed on the said document. With these averments, the learned counsel prayed to allow the suit by setting aside the findings of the trial court to the extent, went against the plaintiff, and decree the suit in its entirety.

The learned Senior Counsel Sri P.Venugopal, appearing for the respondents / defendants, supporting the impugned judgment, submitted that the

alleged marriage of 1<sup>st</sup> plaintiff with GSRG was during the life time of first wife of GSRG and hence it is a void marriage. Hence, the said findings cannot be interfered with. He submits that the trial court found that plaint A schedule property, which is a house, is the self acquired property of late GSRG, and under Ex.A-3 - will, he bequeathed the said house in favour of plaintiffs. The defendants relied on Ex.B-5 will and proved the same in terms of Section 68 of the Indian Evidence Act, 1872 by examining the attestors D.Ws.2 and 4 and further, as the scribe was not alive, they have examined D.W.5, who is his son and he identified that his father scribed the said document.

The learned Senior Counsel submits that in the appeal, the plaintiffs are alleging that Ex.B-5 is forged. In the plaint pleadings, they have not taken the said plea and even in the rejoinder, they did not raise this plea. Therefore, they cannot be permitted to raise the plea of forgery for the first time in the appeal.

The learned Senior counsel submits that in Ex.B-5, the testator GSRG has specifically mentioned that the plaintiffs have no manner of right in his remaining properties other than the properties that were bequeathed to them under Ex.A-3. Item No.1 of the plaint B schedule property is a printing press and as per Ex.B-6 copy of deed of partnership executed between GSRG and defendants 1 and 2 dated 12.04.1978, GSRG has got 0.30 ps. share and defendants 2 and 3 got 0.40 ps and 0.30 ps. shares respectively. Under Ex.B-5 will, GSRG has bequeathed the said share in favour of D-1 and the defendants, as stated above, have proved the said will. Therefore, though plaintiffs 2 to 4 are offspring of GSRG, as he bequeathed his share in favour of D-1, plaintiffs 2 to 4 are not entitled for partition.

The learned Senior counsel further submits that the plaintiffs have sold away the house bequeathed to them under Ex.A-3 and now, though they have no share in other property of GSRG, which was bequeathed under Ex.B-5, are claiming partition, which the trial court has rightly rejected and hence the

impugned judgment and decree of the trial court does not warrant any interference. With these submissions, he sought to dismiss the appeal.

In view of the above rival contentions, the points that arise for my consideration in this appeal are:

1. Whether the finding of the trial court with regard to validity of the marriage between 1<sup>st</sup> plaintiff and GSRG, warrants any interference?
2. Whether the defendants could prove Ex.B-5 will, as per Section 68 of the Indian Evidence Act?
3. Whether the plaintiffs 2 to 4, who are the offspring of late GSRG and 1<sup>st</sup> plaintiff, are entitled to any share in item No.1 of plaint B schedule property, which is a printing press?
4. Whether the impugned judgment and decree of the trial court warrants any interference?

**Point No.1:** In the plaint it is stated that late GSRG married the first plaintiff as per Hindu rites in the month of April, 1966. Exact date of marriage was not stated in the plaint and as per the evidence of 1<sup>st</sup> plaintiff as P.W.1, she deposed that her marriage with GSRG took place on 16-04-1966. 1<sup>st</sup> defendant is the son of late GSRG through his first wife and he was examined as D.W.1. As per his evidence, his mother died in the year 1971 and this was not contradicted by the plaintiffs in the cross-examination. Therefore, any marriage between the 1<sup>st</sup> plaintiff and GSRG, during the life time of 1<sup>st</sup> wife of late GSRG, would be void and the trial court has rightly held against the plaintiffs and the finding of the trial court in this regard, does not warrant any interference. Point No.1 is answered in favour of respondents/defendants.

**Point No.2:** The case of the plaintiff is that late GSRG during his life time executed will on 10-12-1976 in a sound and disposing state of mind, bequeathing the house in the 2<sup>nd</sup> lane, Brodipet, Guntur and that they are residing in the said house. The will dated 10-12-1976, which is marked as Ex.A-3, was proved by the plaintiffs, by examining one of the attestors, as P.W.3.

The defendants relied on Ex.B-5 will dated 16-01-1981 and that their case is that late GSRG has executed the said will in a sound and disposing state of mind, bequeathing his properties to 1<sup>st</sup> and 2<sup>nd</sup> defendants.

Section 68 of the Indian Evidence Act, 1872 provides for the procedure for proof of execution of a document required by law to be attested. Section 68 of the Act, is extracted as under for better appreciation:

**68. Proof of execution of document required by law to be attested:--** If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Section 63 ( c ) of the Indian Succession Act, 1925, requires wills made on or after 1<sup>st</sup> day of January, 1927 by any Hindu, Buddhist, Sikh or Jain, to be attested and attestation is defined under Section 3 of the Transfer of Property Act.

It is well settled that will is not a compulsorily registerable document. In order to prove the execution of a will, which is required by law to be attested, as per Section 68 of the Indian Evidence, Act, which is extracted above, one of the attesting witnesses, has to be examined.

To prove Ex.B-5 will, defendants examined D.Ws.2 and 4, who are the attestors and as the scribe was no more, examined his son, as D.W.5. D.Ws.2 and 4 categorically deposed that late GSRG has executed the will in a sound and disposing state of mind and that they have attested the will. Nothing is elicited in their cross-examination to contradict their statement in the chief examination. D.W.5, deposed that his father scribed Ex.B-5 will and he identified the signature of his father. Further, in Ex.B-5 – will, there is a specific mention that plaintiffs have no manner of right in his remaining properties other than the properties that were bequeathed to them under Ex.A-3 will. Under Ex.A-3 will, late GSRG has bequeathed plaintiff A schedule house to plaintiffs. Considering the evidence of

D.Ws.2 and 4, the trial court rightly found that defendants established the genuineness of Ex.B-5 will dated 16-1-1981.

In the grounds of appeal, the appellants/plaintiffs have taken the plea of forgery and stated that the execution of said will under Ex.B-5 is surrounded by suspicious circumstances. The plea of forgery has not been taken by them either in the plaint pleadings or in the rejoinder filed to the amended written statement. Therefore, such a plea, which has not been taken in the pleadings by the plaintiff, cannot be permitted to be taken in the appeal. In order to contend that the execution of will is surrounded by suspicious circumstances, the plaintiffs have to take a plea and lead evidence to prove the same.

As already noted above, the defendants proved execution of Ex.B-5 will as per Section 68 of Indian Evidence Act, 1872, by examining the attestors and also the son of the scribe. The Apex Court in **DAULAT RAM vs. SODHA**<sup>1</sup> held as under:

10. Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the will has been validly executed and is a genuine document, the propounder has to show that the will was signed by the attestor and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so.”

In the present case, defendants proved Ex.B-5 will, and if at all the plaintiffs had taken the plea of forgery and that the execution of will is surrounded by suspicious circumstances, the burden shifts on them to prove the same. But as already noted above, they failed to take any such pleas and lead any

---

<sup>1</sup> (2005)1 SCC 40

evidence. Therefore, in these circumstances, the finding of the trial court that defendants proved Ex.B-5 will, does not warrant interference. Point No.2 is answered in favour of the defendants.

**Point No.3:** This issue is with regard to claim of plaintiffs 2 to 4 for partition in the properties of late GSRG in item 1 of plaint B schedule. Under Ex.A-3 will dated 10-12-1976 it has come on record that late GSRG bequeathed plaint A schedule house in favour of plaintiffs. The defendants proved execution of Ex.B-5 will dated 16-1-1981.

Based on evidence of P.W.1 and D.W.1 and Ex.A-3 will dated 10-12-1976 and Ex.B-5 will dated 16-1-1981, and also the school records of plaintiffs 2 to 4 under Exs.D-1 to X-3, produced by P.W.1, the trial court found that the 1<sup>st</sup> plaintiff and GSRG lived as husband and wife and that there is presumption of marriage and that plaintiffs 2 to 4 were born to them. Therefore, under Section 16 of the Hindu Marriage Act, 1955, the trial court rightly held that though the plaintiffs 2 to 4 are the ill-legitimate children of 1<sup>st</sup> plaintiff and GSRG, they are entitled to partition of the properties of late GSRG, if any, in existence, by the time of filing of the suit.

Item No.1 in plaint B schedule is a printing press. The defendants, through D.W.1, got marked Ex.B-6, which is the copy of deed of partnership executed dated 12.04.1978. The original is stated to have submitted in Income Tax Department. Though the counsel for the plaintiff raised objection for marking of document, the trial court marked and the plaintiffs have not challenged the same. Therefore, the trial court has taken the document into consideration while considering the claim of the parties. Under Ex.B-6, with regard to item 1 of plaint B schedule properties, late GSRG had got 0-30 ps. share and defendants 1 and 2 have got 0.40 ps. and 0.30 ps. shares respectively. Under Ex.B-5, late GSRG has bequeathed his share in item No.1 of plaint B schedule property in favour of D-1, and this Ex.B-5 was proved by defendants, as such plaintiffs 2 to 4 are not

entitled for partition of suit schedule property since, it is the admittedly self acquired property of GSRG. The trial court considering these aspects rightly answered this point in favour of the defendants, and the said finding does not warrant any interference. This point is answered accordingly.

Considering the above facts and circumstances, the trial court rightly dismissed the suit of the plaintiffs for partition and separate possession and the point No.4 is answered accordingly.

In view of the above facts and circumstances, I do not find any error or infirmity in the impugned judgment and decree of the trial court and the same is accordingly confirmed and the appeal is dismissed.

Miscellaneous petitions pending, if any, shall stand closed. No costs.

-----  
**A.RAJASHEKER REDDY,J**

DATE:21—02—2018

AVS

