

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

S.A.No.1346 of 2017

JUDGMENT :

This Second Appeal is preferred under Section 100 C.P.C. by the appellant challenging the judgment and decree dt.01.09.2017 in A.S.No.46 of 2012 reversing the judgment and decree dt.31.01.2012 in O.S.No.266 of 2009 on the file of Additional Senior Civil Judge, Chittoor.

2. The appellant herein is the 1st defendant in the above suit.
3. The respondent nos.1 and 2 filed the suit O.S.No.266 of 2009 on the file of the Additional Senior Civil Judge, Chittoor for partition of the plaint schedule property into four equal shares and allotment of two such shares to them and for separate possession of the same.
4. It is not in dispute that the appellant and the three respondents are the children of Sri C.R. Krishna Iyer and his wife, Smt. Sarojamma. The appellant is the son, and respondent nos.1 to 3 are the daughters of the said couple.
5. Sri C.R. Krishna Iyer died on 16.06.1994.
6. The respondent nos.1 and 2 / plaintiffs contended that Sri C.R. Krishna Iyer died intestate, and on his death their mother Smt. Sarojamma and themselves jointly succeeded to the plaint schedule property. They contended that Smt. Sarojamma died intestate on 14.03.2003, and on her death, the appellant and respondents became joint owners of the plaint schedule property, which is a RCC terraced house of area 1200 S.ft. in 242 Sq.Yds. of vacant site in Survey No.160/3 of Kuppam Town. They

contended that this house was leased out on rent, that the appellant was collecting rents on behalf of the heirs, that on account of hostile attitude of the appellant, the respondent nos.1 and 2 felt that it was no longer safe for them to remain in joint possession and keep the property undivided and so they got issued Ex.A.2 – Legal Notice to the appellant for partition. They alleged that the appellant did not respond and so they filed the above suit.

7. The 3rd respondent herein / 2nd defendant remained *ex parte*.

8. The appellant / 1st defendant however filed written statement stating that the 3rd respondent got married in 1984, that 1st respondent got married in 1992, that these marriages were performed by his father and they were given gold and money at that time. He contended that his father fell ill and executed an unregistered Will – Ex.B.1, dt.11.02.1993, bequeathing the plaint schedule property to him and he was residing therein along with his family. He further contended that he performed the marriage of the 2nd respondent by spending huge amount, that on account of pressure of debts, he had leased out the house to third parties after getting it mutated in his name. He denied that respondent nos.1 and 2 have any right over the plaint schedule property.

9. The trial Court framed two issues:

(1) *Whether the plaintiffs are entitled for partition of the plaint schedule properties and possession as prayed for ?; and*

(2) *To what relief ?.*

10. The respondent nos.1 and 2 examined PW.1 and marked Ex.A.1 to A.3, while the appellant examined DWs.1 and 2, and marked Exs.B.1 to B.3.

11. By judgment and decree dt.31.01.2012, the Trial Court dismissed the suit.

12. The Trial Court relied on a statement of PW.1 in her cross-examination that in the year 1993 their father, because of his ill-health, called all family members and after discussions, executed a Will in favour of the appellant and requested the appellant to perform 2nd respondent's marriage; and also her statement that the plaint schedule property is self-acquired property of their father. It also held that the evidence on record shows that the appellant performed the marriage of the 2nd respondent.

13. According to the Trial Court, since PW.1 / 2nd respondent admitted in her cross-examination that she cannot say particulars of persons to whom the property was leased out to, she cannot be said to be in joint possession of the property with the appellant. It also held that the Will Ex.B.1 was marked in the evidence of DW.1, and his evidence was not shaken by the cross-examination made on behalf of respondent nos.1 and 2. It also concluded that the evidence of DW.2, the attesor, corroborates the evidence of DW.1. It also held that the property being his self-acquired property, the father had every right and authority to bequeath it to the appellant. It therefore concluded that the plaint schedule property was not joint family property and that the appellant, by virtue of Ex.B.1-Will executed by his father, acquired title thereto. It therefore dismissed the suit.

14. Challenging the same, the respondent nos.1 and 2 filed A.S.No.46 of 2012 before the IX Additional District Judge, Chittoor.

15. By judgment and decree dt.01.09.2017, the lower Appellate Court reversed the judgment of the Trial Court. The lower Appellate Court held that a Will is to be proved as contemplated under Section 63 of the Indian Succession Act, 1925 as well as Section 68 of the Evidence Act, 1872; that examination of at least one of the attestors to the Will is necessary; that while DW.1 deposed that the Will was executed at his house, the attestor, DW.2, deposed that it was executed at the Sub-Registrar's Office, Kuppam, and there is also a discrepancy about the persons present at the time of execution of the Will; D.W.2 did not state that in his presence the executant put his signature and he saw the attestation of the Will; that the Will was marked during the evidence of the appellant and if really the PW.1 / 2nd plaintiff had admitted the Will during her cross-examination, the counsel for the appellant ought to have confronted Ex.B1 Will to the said witness and got it marked through her, but it was not confronted to PW.1; that the attestor has to say that he saw while the testator signed in the instrument and he must also depose that testator witnessed the attestation, and that this was not deposed by DW.2 in his evidence. It observed that there is also discrepancy with regard to purchase of stamp papers and held that the stray sentence in the cross-examination of PW.1 cannot be taken as an admission on her part about the execution of the will; and the appellant did not explain the suspicious circumstances. It therefore concluded that the Will was not proved, and the respondent nos.1 and 2 were entitled to relief of partition. It granted a preliminary decree with costs and directed that the plaint schedule property be divided into four equal shares, and the respondent nos.1 and 2 be given two shares, and the appellant and 3rd respondent be given the other two shares.

16. Assailing the same, the present Second Appeal is filed.

17. The counsel for appellant contended that the lower Appellate Court ought not to have reversed the well-considered finding of the Trial Court, and that the lower Appellate Court ought to have accepted that PW.1 had admitted execution of the Will in favour of appellant. He also contended that the finding of the lower Appellate Court that the requirements of Section 63 of the Succession Act were not proved is not correct, and its finding was perverse.

18. From the facts narrated above, it is clear that the property was the self-acquired property of Sri C.R. Krishna Iyer. The appellant and respondents, being his children, would succeed jointly to the said property after the death of his wife Smt. Sarojamma if the Will, Ex.B.1, set up by the appellant, is not proved.

19. No doubt, in the evidence of PW.1, there is a sentence which reads “*in the year 1993, their father, because of his ill-health called all the family members, and after discussions he executed a Will in favour of 1st defendant and requested the 1st defendant to perform her marriage*”.

20. While the Trial Court took this as an admission by PW.1, the Appellate Court took the view that there is no admission about the execution of Ex.B.1-Will, and that on a reading of the evidence of PW.1 in its entirety it appeared that the Court while recording evidence, by mistake did not record the suggestion in the negative form.

21. This finding cannot be found fault with, because admittedly the Will – Ex.B.1 was not marked in the cross-examination of PW.1 by the appellant,

but it was marked through himself as DW.1. If PW1 had admitted the execution of the Will, it should have been confronted to her and marked in her evidence, but admittedly it was marked through the appellant. Therefore, the Will – Ex.B.1 was not even confronted to PW.1.

22. That apart, the attesor – DW.2, did not state that he saw while the testator signed in Ex.B.1 – Will, and that the testator witnessed the attestation. Therefore, the lower Appellate Court rightly held that the requirement to prove the Will under Section 63 of the Indian Succession Act, 1925 was not fulfilled.

23. Also, the lower Appellate Court found on appreciation of evidence that there was discrepancy in the evidence of DWs.1 and 2 with regard to the place of execution of the Will as well as presence of persons at the time of its execution which was not satisfactorily explained by the appellant.

24. I am, therefore, of the view that there is no question of law, much less, any substantial question of law arising for consideration in this Second Appeal, warranting interference by this Court under S.100 CPC.

25. Accordingly, the Second Appeal fails, and it is accordingly dismissed at the stage of admission. No order as to costs.

26. As a sequel, miscellaneous applications, pending if any in this Second Appeal, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 15.02.2018

Ndr/*