

HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HONOURABLE SRI JUSTICE P. KESHA VA RAO

C.C.C. APPEAL No.365 OF 2018

% Date: 13.06.2019

Between:

K.V. RAtnamala W/o.K.V. Rambabu
Aged ;about 66 years, Occ: House wife,
R/o.Vidyanagar, Hyderabad

... Appellant

v.

\$ 1. Ch. Sivaramasastry S/o. late Achyuta Ramaiah,
Aged about 57 years, Occ: Service, R/o.Vidyanagar,
Hyderabad and others.

... Respondents

! Counsel for Appellant : Mr. P. Venkata Swamy

Counsel for 1st Respondent : Mr. J. Prabhakar

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> Head Note:

? Cases referred:

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JUDGMENT:

This regular appeal filed under Section 96 of the code of Civil Procedure, challenges a modified preliminary decree passed in a suit for partition.

2. Heard Mr. P. Venkata Swamy, learned counsel for the appellant and Mr. J. Prabhakar, learned counsel appearing for the 1st respondent.

3. The respondents 2 and 3 are dead. They were given up in a previous round of litigation in CCCA No.247 of 2016. Therefore, the above appeal is taken up for final disposal by consent of parties.

4. The 1st respondent herein filed a suit in O.S No.1107 of 2008 seeking partition and separate possession of his 1/5th share in a house property measuring just about 200 square yards, at Vidyanagar, Hyderabad. The 1st defendant in the suit was none other than the mother of the 1st respondent/plaintiff. The defendants 2 to 4 in the suit were the sisters of the 1st respondent/plaintiff.

5. The case of the 1st respondent/plaintiff in the suit was that his father Achyuta Ramaiah purchased an open plot of land way back in the year 1964 and sold a portion of the same to a 3rd party and constructed a house in the remaining portion. The father Achyuta Ramaiah admittedly died intestate in the year 1966 leaving behind

him surviving, his widow, who was the first defendant in the suit, three daughters, who were arrayed as defendants 2 to 4 and a son, who was the 1st respondent/plaintiff. The 1st respondent/plaintiff claimed that ever since the death of his father, all the legal heirs, namely, his mother and his three sisters lived along with him in the said property and that disputes arose between himself and his sisters forcing him to seek partition.

6. During the pendency of the suit, the mother (1st defendant) died and hence the shares of one son and three daughters got enlarged from 1/5th to 1/4th share. Thereafter, the trial Court passed a preliminary decree on 25.10.2010 declaring the entitlement of the 1st respondent/plaintiff to 1/4th share in the schedule property.

7. Admittedly, the preliminary decree passed on 25.10.2010 declaring the plaintiff's entitlement to partition and separate possession of his 1/4th share in the suit property was never challenged by any of the parties and the said preliminary decree attained finality.

8. After the preliminary decree, one of the sisters, by name, Swarajya Lakshmi, who was the 2nd defendant in the suit, died on 12.11.2013. We do not know whether the 2nd defendant left behind any class-I legal heir. If she had left behind any class-I legal heir, they would have succeeded to her 1/4th share. If she had not left behind any class-I heir, the entitlement of each of the surviving heirs of Achyuta Ramaiah would have got enlarged from 1/4th share to 1/3rd share.

9. After the death of the 2nd defendant on 12.11.2013 (3 years after the preliminary decree dated 25.10.2010), the 1st respondent/

plaintiff took out a very strange application in I.A. No.711 of 2015, seeking a final decree for his 1/3rd share. The application was filed under Order – XX Rule 18 CPC.

10. In the said application I.A. No.711 of 2015, the appellant herein who was the 3rd defendant in the suit set up 2 Wills, one executed by the mother (1st defendant) long before the first preliminary decree and another executed by the sister Swarajya Lakshmi (2nd defendant) after the preliminary decree. It was the claim of the appellant herein (3rd defendant) that even during the life time of the mother (much before the filing of the partition suit) the house property was divided into several portions and that the mother had bequeathed identified portions in favour of each of the 4 children by a Will dated 30-03-1993 and that the deceased 2nd defendant, in turn, had bequeathed her ½ undivided share in the first floor portion of the suit property in her favour, by a Will dated 28-10-2010. Without even taking the Will on record and marking the same as exhibit and without following the procedure prescribed by law, the trial Court passed a decree on 14.10.2016 appointing an Advocate Commissioner to effect partition of the plaintiff's 1/3rd share in the suit property.

11. Therefore, challenging the said order, the appellant herein came up with an appeal in CCCA No.247 of 2016. The said appeal was allowed by a Bench of this Court by a judgment dated 14.02.2018 on the short ground that without even marking the Wills set up by the appellant herein as exhibits, the trial Court could not have decided the

issue. The operative portion of the judgment in CCCA No.247 of 2016 reads as follows:

“Accordingly, the appeal is allowed, the judgment and decree of the Court below are set aside and I.A. No.711 of 2015 is remanded back to the trial Court for a fresh disposal. It will be open to the parties to lead evidence on the limited question of the truth and validity of the Will set up by the appellant, as the first preliminary decree has already attained finality. I.A. No.711 of 2015 will be treated as an application for modification of the first preliminary decree. After giving an opportunity to the appellant to prove the Will in accordance with law and after giving opportunity to the 1st respondent, if necessary, to lead rebuttal evidence, the Court below shall dispose of the I.A. in accordance with law within a period of three (3) months.”

12. After remand, the appellant herein examined herself as RW-1 and examined one of the attestors of the Will dated 28-10-2010 as RW-2. The registered Will dated 30.03.1993 purportedly executed by the mother of the parties (1st defendant) was marked as Ex.R-1. The registered Will dated 28.10.2010 purportedly executed by the 2nd defendant was marked as Ex.R-2. The death certificate, cremation certificate and death intimation issued to the Municipal Corporation in respect of the deceased 2nd defendant were marked as Exs.R-3 to R-5. The trial Court framed four issues as arising for consideration. They are as follows:

1. Whether respondent No.2/defendant No.2 has executed the registered Will deed dated 28.10.2010 (Ex.R2) in favour of respondent No.3/defendant No.3?
2. Whether respondent No.2/defendant No.2 has right to bequeath the property covered by registered Will deed dated 28.10.2010 (Ex.R2) and if so, the said property is the separate and absolute property of respondent No.3/defendant No.3?
3. Whether the undivided 1/4th share of respondent No.2/defendant No.2 declared by the preliminary decree dated 25.10.2013 in O.S No.1107 of 2008

shall devolve upon the petitioner/plaintiff, respondent No.3/defendant No.3 and respondent No.4/defendant No.4 equally? And if so, their shares in the suit schedule property are to be altered/modified accordingly?

4. To what relief?

13. On issue No.1, the trial Court came to the conclusion that the deceased 2nd defendant had in fact executed Ex.R-2 Will dated 28.10.2010. This is in view of the fact that one of the attestors of the will was examined as RW-2 and there was no effective denial from the side of the 1st respondent/plaintiff.

14. On issue No.2 the trial Court came to the conclusion that the 2nd defendant did not have a right to dispose of a specific portion or a divided portion, when she merely had a preliminary decree for partition of her 1/4th share. As a consequence of the findings on issue Nos.1 and 2, the trial Court came to the conclusion that the 1st respondent/plaintiff was entitled to a modified preliminary decree to the extent of 1/3rd share in the suit schedule property. Accordingly, a modified preliminary decree was passed by a judgment dated 20.08.2018. It is against the said judgment and decree that the 3rd defendant in the suit has come up with the above regular appeal.

15. The case of the appellant/3rd defendant is that even when the mother was alive, and much before the filing of the suit for partition, the mother, (who was the 1st defendant in the suit) herself had executed a registered Will dated 30.03.1993 clearly demarcating the portions of property that could be allotted to the son and three daughters and that the property was thus already divided among the

legal heirs way back in the year 1993. Subsequently, the 2nd defendant also executed a registered Will dated 28.10.2010 bequeathing her share in the divided portion in favour of the appellant. Therefore, it is the contention of the appellant that the impugned judgment and decree are contrary to law, weight of evidence and the probabilities of the case.

16. From the above contentions, we think that the following points arise for consideration in the above appeal:

1. Whether the appellant was entitled to rely upon the Will dated 30.03.1993 (Ex.R-1) purportedly executed by the deceased mother (1st defendant)?

2. Whether Ex.R-2 Will dated 28.10.2010 is true and valid and binding on the 1st respondent/plaintiff?

3. Whether the judgment and decree of the trial Court are in accordance with law?

Point 1:

17. The first point need not detain us for long. Ex.R-1 Will dated 30.03.1993, was never set up in the first instance, to have the suit for partition dismissed at the threshold. Under Ex.R-1, the mother had divided the house property into several portions and allotted one portion each to the son and three daughters. If this Will is true and valid, the first preliminary decree for partition passed way back on 25.10.2010 itself would become invalid. But, the first preliminary decree passed on 25.10.2010 was never challenged by any of the parties including appellant herein. The 1st preliminary decree has attained finality. Therefore, any document that would annul the effect of the first preliminary decree passed on 25.10.2010 cannot be looked

into, especially when there is no challenge to the first preliminary decree.

18. In any case, Ex.R-1 cannot be taken to be either true or valid. The reasons are (1) that admittedly the father Achyuta Ramaiah died intestate leaving behind his widow and four children and hence, the mother did not have an exclusive right over the entire property to dispose it of by Will and (2) that the Will Ex.R-1 was also not proved in accordance with the provisions of Section 68 of the Evidence Act. None of the attestors of the Will was examined. Therefore, point No.1 is answered against the appellant and it is made clear that the first preliminary decree dated 25.10.2010, is binding on all the parties.

Point No.2:

19. On the second issue, the trial Court came to the conclusion that Ex.R-2 is true and that it was executed by the 2nd defendant. Two reasons are stated by the trial Court for holding Ex.R-2 Will to be true. They are (1) that one of the attestors of the Will was examined as RW-2 in accordance with Section 68 of the Evidence Act and (2) that instead of disputing the very execution of the Will, the focus of cross-examination on the part of the 1st respondent/plaintiff, was only on whether the Will was executed under coercion or undue influence.

20. Both the above reasons stated by the Trial Court appeal to us. Instead of denying the very execution of the Will, the 1st respondent/plaintiff suggested to RW-1 and RW-2 that the Will brought-forth by undue influence and coercion. Therefore, the trial

Court was right in coming to the conclusion that Ex.R-2 Will was in fact executed by the 2nd defendant and that it was true.

21. Despite holding that Ex. R-2 was actually executed by the 2nd defendant, the trial Court came to the conclusion that Ex.R-2 cannot be valid and binding on the parties. This is for the simple reason that what the testator had on the date of execution of the Will was only an undivided 1/4th share in the entire suit schedule property. But, what was bequeathed under Ex.R-2 was the half undivided share that the 2nd defendant purportedly got in the first floor of the property under the registered Will dated 30.03.1993 executed by the mother. But the execution of Ex. R-1 will was neither pleaded nor proved in the trial before the 1st preliminary decree was passed. Therefore no rights flowed under Ex. R-1 Will to enable the 2nd defendant to execute Ex. R-2 Will.

22. A question may arise as to whether Ex.R-2 can be given effect, at least to the extent of the 1/4th share that the 2nd defendant was declared to have under the first preliminary decree dated 25.10.2010. But, it appears to us that we cannot even do that, in view of the fact that the 2nd defendant has claimed a right to bequeath under her Will, a portion specifically allotted to her under the Will of her mother dated 30.03.1993. Since Ex.R-1 Will dated 30.03.1993 purportedly executed by the mother never saw the light of the day till the first preliminary decree was passed and also until the expiry of about seven years of the passing of the first preliminary decree, the same cannot form the basis of any right. Therefore, we are of the

considered view that the trial Court was right in holding that Ex.R-2 Will is not valid and binding on the other parties to the litigation. Hence, point No.2 also has to be answered against the appellant.

Point No.3:

23. As a consequence of our findings on issue Nos.1 and 2, we are to hold that the impugned judgment and decree are valid and they do not call for any interference. Hence, the appeal is dismissed. However, there will be no order as to costs.

The miscellaneous petitions, if any pending, shall stand dismissed.

V. RAMASUBRAMANIAN, J

P. KESHA RAO, J

June 13, 2019
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