THE HON'BLE SRI JUSTICE N.R.L.NAGESWARA RAO

A.S.NOS.113 AND 398 OF 1995

COMMON JUDGMENT:-

Both appeals arise out of a common judgment in O.S.No.63 of 1984 on the file of the Court of Subordinate Judge, Rajahmundry.

The suit one was filed for partition and accounts and the allegations in the plaint goes to show that the first defendant is the wife and the plaintiff and defendant No.2 are the daughters of one late Peddayya, who died in the year December 1979 intestate having possessed of items 1 to 13 and an un-divided half share in items 14 and 15 of the suit schedule properties. The defendants 1 and 2 and plaintiff have become entitled equal share. The 3rd defendant is the husband of the second defendant and was managing the property. He did not render proper accounts and therefore, the suit was filed for partition and accounts.

The first defendant filed a written statement admitting the relationship and ownership of the property by late Peddayya and further pleaded that at the time of marriages, the plaintiff and second defendant were given some property. Late Peddayya acquired Ac.18.00 of land and he gave a Tractor and other valuable property to the husband of the plaintiff, which was subsequently sold. Peddayya was suffering with paralyses and he was bed ridden on 10-02-1979. He executed a will conveying his properties with life estate to the first defendant and thereafter to the children of second defendant. Subsequently, the first defendant has relinquished her rights in favour of the sons of second defendant to enjoy "B" Schedule properties. Therefore, the claim of the plaintiff for partition of the properties and accounts is not tenable; the suit is bad for non-joinder of the necessary parties.

After filing of this written statement, the plaintiff has filed an amendment application disputing the alleged will and also the relinquishment by first defendant in favour of the children of the second defendant.

Defendant Nos.4 to 6 who are children of second defendant are added as parties to the suit since they claimed rights under the will and relinquishment deeds. The defendant Nos.7 and 8 were also added as parties as they are said to be having un-divided half share in items 14 and 15 of suit schedule properties.

The 6th defendant filed a written statement repeating the allegations made by the first defendant and the rights derived by defendant Nos.4 to 6 under the will and the relinquishment deeds.

The defendant Nos.7 and 8 filed a written statement contending that items 14 and 15 of the plaint "A" Schedule property belonged to Peddayya and the 7th defendant and Peddayya shifted to Dhavaleswaram whereas 7th defendant was residing in item No.14 and enjoying the item No.15 exclusively as per the family arrangement. Therefore, the properties exclusively belong to the 7th defendant. It was also pleaded that the will dated 10-02-1979 clearly goes to show that Peddayya bequeathed his un-divided half share to the 7th defendant and consequently he has become entitled to the property. The defendant Nos.7 and 8 have made constructions in those properties. Therefore, the plaintiff is not entitled for any rights in items Nos.14 and 15.

The written statement filed by first defendant was adopted by defendant Nos.2 and 3 and the written statement filed by 6th defendant was adopted by defendant Nos.4 and 5.

On the basis of the above pleadings, necessary issues

have been framed by the lower court and on behalf of the plaintiff PWs.1 to 4 were examined and marked Exs.A-1 to A-4. On behalf of the defendants Dws.1 to 7 were examined and marked Exs.B-1 to B-46.

After considering the evidence on record, the learned Senior Civil Judge disbelieved the will and granted partition of item Nos. 3 to 10, 12 and 13 and dismissed with regard to item Nos. 1, 2, 11, 14 and 15 of the plaint schedule properties. Aggrieved by the said judgment, the defendant Nos.1 to 6 have filed Appeal, being A.S.No.113 of 1995 and plaintiff has filed cross-appeal being A.S.No.398 of 1995 in so far as it relates to disallowing of the claim for partition of the entire properties.

Now the points that arise for consideration are:-

1. Whether the will said to have been executed by Peddayya in favour of defendant Nos.4 to 6 is valid?
2. Whether the plaintiffs are entitled for the partition of the entire schedule properties?

POINTS:-

There is not of much dispute between the parties about the relationship and also the properties owned by Peddayya. In case the will set up by the first defendant is not believed, naturally all the properties are liable for partition. There cannot be any dispute about the fact that the first defendant, being the profounder of the will, has to prove the same. The will is an unregistered will, which is Ex.B-1 dated 10-02-1979. The present suit was filed in 1984. The relinquishment deeds Exs.B-2 to B-4 are said to be executed in 1980. As can be seen from the evidence of DW.1, who is the second defendant, her father was attacked with paralysis eight(8) or nine(9) months prior to his death and eleven (11) months after execution of the will, her father died. She also further stated that Pws.1 and 2 are aware of the will and they never raised the dispute.

The evidence of DW.1 only goes to show that Ac.5.00 of land was given to PW.1. Her claim is that as PW.1 has taken some gold chain belonging to her and when she demanded for return of the same, the present suit was filed knowing the execution of the will. In cross-examination, she stated that the will was executed about eight (8) months prior to the first attack of paralysis. Her evidence does not show that her father lived with her or any of her children served him prior to his death. She did not personally see the will and according to her, her sons brought the will to the house along with the dead body and the will was with her mother. Evidently, Dw.2, 6th defendant, is very young and is a beneficiary under the will. Though his mother was not present he claims that he was present at the time of the execution of the will. He also stated that two or three months after Ex.B-1, his father was attacked with paralysis. The deceased was evidently residing at Davaleswaram and he shifted to Kongodu after purchase of the lands. The deceased was said to be aged about 70 years by the date of the will. His clear admission is he and his brothers did not look after the cultivation of the lands of the deceased at Kongodu during his life time. He also admits that the deceased was hale and healthy by the date of Ex.B-1 and the recitals in Ex.B-1 about his illness for about two years are not correct. The scribe-PW.3 is said to have prepared a draft and title deeds were looked into. According to him, first defendant was having custody of the will after its execution and first defendant gave the will. This statement is quite contrary to the evidence of DW.1 who stated that the will was brought by her sons along with the dead body. From his evidence, it is quite clear that he claims to be more associated with the will. The evidence of Dw.3 who is the scribe goes to show that he drafted the will and at the time when it was drafted, first defendant, DW.2 and the Village

Munsiff were present apart from the attesters. He also states that the property given to 7th defendant was also mentioned in the will. His evidence shows that he is not a licensee document writer and he was said to be a temporary village karanam. His evidence does not show as to why Peddayya excluded the plaintiff and her children. DW.4 is said to be attester on the will. His evidence is also on the same lines as that of Dws.2 and 3. The evidence of this witness and the scribe clearly goes to show that Peddayya was not unwell and if that is so, there is no reason as to why he should suddenly execute the Ex.B-1 will.

Added to that, there is no material to show that after the death of Peddayya the will was presented before any competent authority and mutation was sought on the basis of the said will. If Peddayya was really doing well and there was no contemplation of his death in the near future, naturally the will would have been registered and none of the witnesses have given any explanation as to why the registration of the will was not thought of. Apart from the reliability of the evidence of PWs.1 to 3 about the ill-health of the deceased and his soundness of the mind, the evidence of Dws.1 to 4 cannot be taken as reliable. On the other hand, the evidence of PW.4 goes to show that he was a Medical Officer in rural dispensary and he know the deceased and the deceased was said to have attacked with paralysis one year prior to the death and his mental condition was weak. Therefore, taking into consideration the totality of the circumstances and also there being no special reason for excluding the other legal heirs and when the evidence does not clearly show whether second defendant or her children exclusively attended on the deceased, I feel the unregistered will has been rightly rejected by the lower court and no other view is possible.

So far as the claim of the plaintiff with regard to items

14 and 15 are concerned, from the evidence of PW.1 it is quite clear that even during the life time of her father, there was a partition between the her father and his brothers. The fact that defendant Nos.7 and 8 are in continuous possession and enjoyment of the properties exclusively even during the life time of the father of the plaintiff and the father of the plaintiff never claimed rights over that property, clearly goes to show that the father of the plaintiff had no share in those items. When constructions were made by defendant Nos.7 and 8 in the said property, there was no objection either from the father of the plaintiff or his heirs. Reliance is sought to be made about the recitals in the will that the undivided share of the plaintiff should go to defendant No.7 is of no help since the execution of the will itself is not admitted by the plaintiff and that may be a convenient recital to make believe the will and to get the support of defendant No.7. Therefore, in view of the above circumstances, the lower court has rightly rejected the claim of the plaintiff for items 14 and 15 of the suit schedule properties. Therefore, there are no merits in both the appeals and points are accordingly answered.

Accordingly, both appeals are dismissed. Each party is directed to bear his own costs.

N.R.L. *NĀGESWARA RĀO*,J

29-11-2011
TSNR