
(2001) 03 AP CK 0043
In the Andhra Pradesh High Court
Case No : CCCA No. 2 of 1988

Mandala Madhava Rao

APPELLANT

Vs

Mandala Yadagiri and others

RESPONDENT

Date of Decision : 31-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 26, Order 41 Rule 27, 107
Succession Act, 1925 — Section 88

Citation : AIR 2001 AP 407 : (2001) 3 ALD 577 : (2001) 3 ALT 295 : (2001) 2 CivCC 387

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : Mr. C. Poornaiah, for the Appellant; M/s. P. Jagan Mohan Reddy, M.V. Ramana and Mrs. C. Jayasree Saradhy, for the Respondent

Judgement

1. This appeal by the first defendant in OS No.457 of 1983 (Old OS No.923 of 1980) is against the judgment in the said suit whereunder the Court of Additional Chief Judge, City Civil Court, Secunderabad decreed the suit of the plaintiff/ first respondent herein and passed a preliminary decree directing the plaintiff/ first respondent to be put in one such share. For the sake of convenience, the parties herein are referred to as they are arrayed in OS No.457 of 1983.

2. The plaintiff initially filed OS No.923 of 1980 on the file of the II Additional Judge, City Civil Court, Hyderabad (later transferred to the Court of Additional Chief Judge and renumbered as OS No.457 of 1983) for partition of the joint family property left behind by his father, one Mandala Papaiah. The case of the plaintiff is as follows. Mandala Papaiah and his four brothers constituted a Hindu joint family. They separated and divided their property. Thereafter, Mandala Papaiah was on his own and died on 1-11-1952 leaving behind his son Pentaiah by his first wife and the three sons and five daughters by his second wife. At the time of his death he had considerable movable and immovable assets. In 1953, his eldest son Pentaiah separated from the family and partition was effected and

a registered partition deed dated 29-9-1953 was executed. However, the plaintiff and his two brothers Narasimha and Madhava Rao continued to be joint in status. Narasimha died in the year 1978 leaving behind his wife, defendant No.2 and his son and daughter, defendants 3 and 4. The plaintiff and defendant No.1 and other defendants are equally entitled to separate share in the joint family property of Papaiah. The misunderstandings among the family members prompted the plaintiff to seek partition and efforts for an amicable settlement proved futile. He issued a legal notice to the defendants demanding partition and the first defendant sent a reply through his advocate with false pleas. Therefore, the suit for partition of the properties by metes and bounds by appointment of a Commissioner and for separate possession.

3. The first defendant filed a detailed written statement. The defendant No.2 also filed a written statement. But, defendants 3 and 4 adopted the written statement filed by defendant No.2. The first defendant in his written statement stated as follows. In 1953, Pentaiah and Narasimha played fraud on Venkatamma and brought into existence the partition deed. They misrepresented to illiterate Venkatamma that the document presented for registration is a Will deed to late Papaiah and obtained her signature. Later, Venkatamma came to know and the deed of partition was declared null and void. Late Papaiah executed a Will dated 1-5-1952. His Will was upheld in OS No.474 Of 1958 by the Court of the 1 Assistant Judge, City Civil Court, Secunderabad and in other suits. As per the Will, Papaiah had performed Pentaiah's marriage by spending an amount of Rs.4,000/-. Pentaiah was given 30 tolas (300 gm.) of gold ornaments and 105 tolas (1050 gm.) of silver ornaments and cash of Rs.5,000/-. He was residing separately and carrying on business as contractor prior to execution of the Will by Papaiah. The first daughter, Bala Narasamma was also given considerable properties at the time of marriage. Therefore, Papaiah made it clear that he does not want to give any share in the properties to Bala Narasamma and Pentaiah. As per the Will, Narasimha, the husband of the second defendant was also given gold, silver and cash besides securing employment in Government service. Yadagiri, the plaintiff was given in adoption to the paternal uncle four years prior to execution of the Will under adoption deed. The plaintiff was residing with his adoptive father as his son. Having regard to all this, Papaiah bequeathed his property to the first defendant giving life interest to Venkatamma on condition that she should perform the marriages of daughters and take care of the education, of the first defendant. Under the Will, a house bearing No.75 at Hyder Basti was given to Sabari Bai who was a lame girl. He further stated that there was no joint immovable property and that items 1 and 3 of suit schedule property belong to the first defendant and other defendants have no right in the property. Item 2 of the suit schedule property was given to Sabari Bai. The plaintiff forcibly occupied one vacant room in the premises at Maruthi Veedhi and let out to the tenant. Except this all the properties are in enjoyment of the first defendant. The suit schedule properties are absolute properties of the first defendant and his sister and they are not liable for partition.

4. The second defendant is wife of Narasimha, who is eldest son of Papaiah through his second wife. Defendants 2 and 3 are son and daughter of deceased Narasimha. The second defendant in her written statement in effect supported the case of the plaintiff. Her case is that she and her husband Narasimha were allowed to enjoy item No.2 of the suit schedule property in their own right without let or hindrance from any quarter, that they have been paying property tax for the same, that they have made lot of improvements by spending more than Rs.20,000/- and therefore item 2 of the suit schedule property is not liable for partition. Alternatively, she contended that if item 2 is considered liable for partition, she may be reimbursed to the extent of taxes paid as well as amount spent towards repair while working out equities. Ultimately she prayed for partition and allotment of item 2 of the suit schedule property to her and defendants 3 and 4. Defendants 3 and 4 filed Memo adopting written statement of second defendant.

5. On the above pleadings, the following issues were framed by the trial Court.

(1) Whether the plaintiff is entitled to partition of the plaint schedule properties as prayed for?

(2) Whether item No.2 of the plaint schedule is not liable to be partitioned?

(3) Whether the second defendant is entitled to the amount spent for repairs and for payment of property tax for item No.2 of the schedule property?

(4) To what relief?

6. The plaintiff examined himself as PW1 and marked Exs.A1 to A4. Ex.A1 dated 29-9-1953 is the true extract of the partition deed between the plaintiff and his brothers; Ex.A2 dated 27-8-1980 is a legal notice issued by the plaintiff and Ex.A3 dated 1-9-1980 is a reply notice issued by the first defendant. Four witnesses - DW1 to DW4 were examined for defendants. DW1 is the first defendant and DWs.3 and 4 are defendants 2 and 3 respectively. DW2 is son-in-law of later Papaiah. The original Will deed dated 1-8-1952 is marked as Ex.B1 and original deposition of Venkatamma in OS No.474 of 1958 was marked as Ex.B2. Exs.B1(a), B1(b) and B1(c) are certain portions in Exs.B1 and B2.

7. The lower Court on a consideration of the oral and documentary evidence held that the suit schedule property is liable for partition and that the second defendant is not entitled to any amount allegedly spent for repairs and for paying property tax for item 2 of suit schedule property. Accordingly, a preliminary decree was passed directing to divide the suit schedule property in three equal shares and directing the plaintiff to be given one such share.

8. In this appeal, the learned Counsel for the appellant/first defendant submits that Ex.A1 - partition deed and Ex.B1 - Will were misconstrued by the trial Court and that Ex.A1 is a fraudulent transaction in view of the positive recitals in Ex.B1. The learned Counsel further elaborates that under Ex.B1 Will only life interest was given to Venkatamma with a right to generate moneys from out of

the property for performing the marriages and for education of the children of Papaiah who were minors at that time. She was not given any absolute right and in fact Venkatamma was implementing the conditions in the Will in true spirit and was collecting rents and other moneys due to Papaiah. Under the Will, the entire property of Papaiah, except the house at Hyder Basti, was bequeathed to the first defendant. The Will also recites that the son through first wife, Pentaiah and the first son through Venkatamma were well settled and were given properties substantially by Papaiah whereas the plaintiff was given in adoption to the younger brother of Papaiah. The partition deed Ex.A1 is vitiated by fraud and misrepresentation and it is improbable that Venkatamma did not get anything from the partition. When Pentaiah was living separately even at the time of execution of the Will by Papaiah, there was no necessity for Venkatamma again to give property to Pentaiah. In 1958 itself in the suit OS No.474 of 1958 in her rejoinder to the written statement Venkatamma alleged that Ex.A1 partition deed is vitiated by fraud and misrepresentation. Though there was a lis between Narasimha and Venkatamma at that time, Venkatamma was not confronted with Ex.A1 while she was being examined as witness. PW1, the plaintiff in his cross-examination admits that fraud is played on Venkatamma. Therefore, the learned Counsel submits that the findings recorded by the trial Court are contrary to the evidence on record.

9. Sri C.P. Sarathy, the learned senior Counsel appearing for respondents 2 to 4 submits that Ex.A1 partition deed is valid and binding on all. As Narasimha, Yadagiri (plaintiff) and Madhava Rao jointly held the property, the partition of the same is justified. He also submits that under Ex.B1 Will Venkatamma got absolute ownership with power of sale and alienation with a clause that the remaining properties would go to the first defendant. Therefore, after becoming absolute owner, Venkatamma executed partition deed along with her two major sons Pentaiah and Narasimha and that the partition deed was acted upon and item No.2 was in occupation of Narasimha, the husband of defendant No.2. He would thus submit that the recitals in Ex.B1 and subsequent conduct of Narasimha and Venkatamma probabalise the case of the plaintiff.

10. Sri P. Jaganmohan Reddy, learned Counsel for the first respondent/plaintiff while adopting the arguments of the learned senior Counsel, Sri C.P. Sarathy, submits that the alleged admission of PW1 regarding fraud and misrepresentation cannot be given much weight having regard to the abundant documentary evidence to show that after the death of Papaiah, the properties were joint and Venkatamma executed partition deed.

11. In the light of the rival contentions of the learned Counsel, the following points arise for consideration.

(1) What is the true construction of the Will - Ex.B1 dated 1-5-1952 and whether the first defendant was given "vested remainder" bequeathing only life interest to Venkatamma?

(2) Whether Ex.A1 - partition deed is null and void being vitiated by fraud and misrepresentation played by Narasimha and Pentaiah on Venkatamma?

(3) To what relief?

In Re Point No. 1:

12. It is necessary to refer to the Will in some detail. Ex.B1 is admitted by all the parties to the suit and therefore it is not necessary to refer to the oral evidence. The plaint does not refer to the Will, but PW1 , DW1 and DW3 accept the contents of the Will. The only dispute is whether under the Will, Venkatamma was given absolute right to the property leaving vested remainder to the first defendant or Venkatamma was only given life interest for performing the marriages and for meeting the education expenses of the minor children of Papaiah.

13. In paragraphs 1 and 2 of the Will, the testator narrates his family position and also about the marriage of his daughter Bala Narasamma. The Will further states that Papaiah performed the marriages of Bala Narasamma, gave sufficient property to her by way of Gold, Silver, cash and a house. Paragraph 3 states that Pentaiah, the son through his first wife was also given Gold, Silver and cash at the time of his marriage and that ten years prior to execution of the Will, Pentaiah was residing separate from Papaiah carrying on his own business as a contractor for which Papaiah also gave an amount of Rs.5,000/-. In his own words, Papaiah states that Pentaiah and Bala Narasamma, the children through the first wife were given sufficient property and therefore he does not want to give anything to them as he got three sons and five daughters from Venkatamma". Paragraph 4 gives the details of the children through Venkatamma and also states that he performed the marriage of eldest daughter and Narasimha who are majors whereas the other six children are minors as on that date and that Pentamma was also given Gold and Silver ornaments and her marriage was performed by spending Rs.2,000/-. The son, Narasimha was given good education and at the time of his marriage costing Rs.4,000/-he was given Gold and Silver besides an amount of Rs.5,000/- for pilgrimage and also the fact that Narasimha got Government employment through the efforts of the testator. Narasimha is self-supporting and therefore the testator stated that the does not want to give any property to him as "other minor daughters and sons are to be maintained, educated and benefitted from his property". Paragraph 5 of the Will mentions about the other son through Venkatamma, Ihe plaintiff in the suit. It states that Yadagiri was given in adoption to Mandala Ramaswamy, the brother of Papaiah who executed adoption deed four years prior to Ex.B1 and that Yadagiri has no right in movable and immovable properties and therefore there is no question of giving anything to Yadagiri. Paragraph 6 lists out movable and immovable properties. Paragraph 7 consists of sub-clauses (a) to (g). In the beginning of paragraph of the Will, Papaiah expresses as under:

Hence I leave and bequeath my entire aforesaid movable and immovable

properties which I may die possessed of, to my wife Mandala Venkatamma only. Thus after my death my wife Mandala Venkatamma only will become exclusively absolute owner and possessor of all my said movable and immovable properties whichever I may die possessed of. However till my death I shall remain the owner and possessor of my said properties. But my said wife Venkatamma should manage the said properties, according to my directions hereinafter contained.

14. Sub-clauses 7(a), (b) and (d) specifically enumerate the duties to be performed by Venkatamma like giving good education to the first defendant and minor daughters, look after the maintenance and livelihood of the family and minor children and if she needs amount, she will have every right to sell immovable property to meet the expenses. Under sub-clause 7(e), the testator gives house bearing No.75 situated at Hyder Basti to Sabari Bat aged two years lamed by right leg. Sub-clause 7(c) authorises Venkatamma to recover all amounts due from one Chitrana Narsimhulu and also right to get the amount of 1/5th share from his brother for domestic purposes. Under sub-clause 7(g) Papaiah gives remaining property to Madhava Rao and the same reads as under:

That during her lifetime my wife Mandala Venkatamma shall enjoy the absolute ownership over all of my said properties and after her death whichever property may remain, will pass to my son Madhava Rao only. But till the death of my wife Mandala Venkatamma the said Madhava Rao will have no right or claim of ownership over any of the said properties.

15. Elaborate submissions have been made with regard to paragraph 7 and 7(g). The Counsel for the plaintiff and defendants 2 to 4 contend that as per paragraph 7 of the Will, absolute right was given to Venkatamma whereas the learned Counsel for the first defendant contends that Venkatamma was given a limited life interest and the property was bequeathed to the first defendant.

16. In determining the real intention of the testator the entire document has to be construed as a whole. No word, phrase or clause should be ignored. After reading the Will under consideration as a whole, the Court should arrive at the intention of the testator and if there are any ambiguous or mutually contradictory clauses appear in the Will, they should be interpreted and given meaning in accordance with the intention of the testator. For that purpose, effect should be given to every disposition contained in the Will. These legal principles are well settled.

17. In Ramachandra Shenoy and Another Vs. Mrs. Hilda Brite and Others, , the Supreme Court observed that "it is one of the cardinal principles of construction of Wills that to the extent that it is legally possible, effect should be given to every disposition contained in the Will unless the law prevents effect being given to it and that if there are two repugnant provisions conferring successive interests, if the first interest created is valid, the subsequent interest cannot take effect and in such a case the Court will proceed to the farthest extent to avoid

repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the Will. The Supreme Court in the said decision gave the following illustration.

It is for this reason that where there is a bequest to A even though it be in terms apparently absolute followed by a gift of the same to B absolutely "on" or "after" or "at" A's death, A is prima facie held to take a life interest and B an interest in remainder, the apparently absolute interest of A being cut down to accommodate the interest created in favour of B.

18. In *Navneet Lal alias Rangi Vs. Gokul and Others*, , the Supreme Court referred to earlier judgments in *Gnanambal Ammal Vs. T. Raju Ayyar and Others*, , *Ram Gopal Vs. Nand Lal and Others*, , *Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj Kuer*, , *Pearey Lal Vs. Rameshwar Das*, and *Ramachandra's* case (supra) and laid down the following principles for construction of a Will.

(i) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed;

(ii) In construing the language of the will the Court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense. But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document;

(iii) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory;

(iv) The Court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The Court will look at the circumstances under which the testator makes his Will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus; and

(v) It is one of the cardinal principles of construction of Wills that to the extent that it is legally possible effect should be given to every disposition contained in the Will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest

created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the Will.

19. In *Bhura and Others Vs. Kashiram*, , the Supreme Court reiterated the above principles.

20. Next, it is necessary to refer to Section 88 of the Indian Succession Act, 1925 (hereafter called "the Succession Act"), which reads as under :

Where two clauses or gifts in a Will are irreconcilable so that they cannot possibly stand together, the last shall prevail.

Illustrations.

(i) The testator by the first clause of his Will, leaves his estate of Ramnagar to A and by the last clause of his will leaves it to B and not to A. B will have it.

(ii) If a man at the commencement of his Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

21. Interpreting Section 88 of the Succession Act, in *V. Subbareddi v. Basivireddi* 1966 (1) AWR 272, this Court held that where an absolute gift of property is made under one clause of the Will and by a later clause the mode of enjoyment of that property or the right of management of it is sought to be curtailed, it can be held that restrictions sought to be placed on the enjoyment or management of the property are repugnant to be unqualified and absolute estate given by the previous clause of the Will, but the position will be far different in a case where two gifts, one wholly inconsistent with the other, are made under the Will in favour of two different persons in respect of the same property, the gift in favour of other person cannot be ignored. If the situation presents any difficulty, then only Section 88 of the Succession Act should be resorted to.

22. Keeping the above principles in view, if we read paragraph 7 and clause 7(g) together, it would be clear that Venkatamma was given a limited interest for the purpose of bringing up, for education and for marriages of minor children as well as maintenance of family. Clauses 7(a), (b), (c), (d), (e) and (f) make it clear that the anxiety of the testator was not to leave Venkatamma and her minor children in the lurch. Therefore, he took care to advise Venkatamma to collect rents and 1/5th share from his brother for the purpose of maintaining the family and educating the minor children. Though in paragraph 7, the words that "Venkatamma only will become exclusively absolute owner and possessor" appear, the effect of the same is taken away by sub-clause 7(g) where he states that after her death "property that remains will pass to my son Madhava Rao only". As held by the Supreme Court in *Ramachandra, Navneet Lal and Bhura's* cases (supra), when the Will gives gift to B after death of A, it should be always treated as life interest to A and absolute interest to B. Indeed, in *Bhura's* case, a

similar question arose in almost similar circumstances. The Supreme Court interpreted the Will therein as giving limited interest to A and absolute interest to B, who was the plaintiff. Therefore, under Ex.B1, Will, Papaiah gave life interest to Venkatamma and after her death vested remainder was given to Madhava Rao, the second defendant. Therefore, after the death of Venkatamma in 1977, Madhava Rao became the absolute owner by virtue of Ex.B1 Will.

23. Ex.A1 - partition deed was allegedly executed by Venkatamma on behalf of her two minor sons, Yadagiri and Madhava Rao agreeing to partition the property in favour of Pentaiah, As noticed above, Ex.B1 Will clearly states that even ten years prior to execution of Ex.B1 Will on 1-5-1952, Pentaiah was well settled and he was given substantial property and the testator's real intention was that he does not want to give anything out of his properties to Pentaiah. Though under the Will, Venkatamma was entitled to realise the amounts by way of sale of immovable property in order to meet expenses as per sub-clause 7(d) of the Will, the same cannot be treated as an absolute right of alienation and therefore it was incompetent for Venkatamma to agree for partition.

24. Point No.1 is accordingly decided in favour of the first defendant and against the plaintiff.

In Re Point No. 2 :

25. The submission of the learned Counsel for the appellant is that the partition deed Ex.A1, relied on by the appellant, was obtained by Pentaiah and Narasimha by playing fraud on Venkatamma. Papaiah died on 1-11-1952. Narasimha and Pentaiah made Venkatamma to believe that her husband's Will Ex.B1 was being registered and obtained her signature on the partition deed. At the earliest opportunity, Venkatamma strongly demurred Ex.B1 by filing necessary pleadings in the earlier suit. The proceedings - the judgment in OS No.474 of 1958 as well as rejoinder to the written statement in OS No.474 of 1958 filed by Venkatamma, were pressed into service. These documents were not marked before the trial Court. Therefore, the appellant filed a miscellaneous application, being CMP No.2896 of 2000, praying this Court to receive judgment in OS No.474 of 1958 and rejoinder by Venkatamma as additional evidence and mark them as Exs.A5 and A6. At this juncture, it is necessary to consider the CMP No.2896 of 2000.

26. It is well settled that an application for additional evidence under Order XLI, Rule 27 of the Code of Civil Procedure, 1908 (CPC) should be considered by the appellate Court along with the main appeal. In Mahavir Singh v. Naresh Chandra 2000 AIR SCW 4000, the Supreme Court considered the scope of Section 107 CPC and Order XLI, Rule 27 CPC and held that the expression "to enable it to pronounce judgments" contemplates a situation when the appellate Court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands and that the ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of Court delivering

it. The Supreme Court also observed that the words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate Court requires additional evidence, that Order XLI, Rule 26 CPC applies. Needless to point out that additional evidence can be adduced when the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the parties seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence such evidence was not within their knowledge or could not after the exercise of due diligence be produced by him at the time when the decree appealed against was passed and that the appellate Court requires document to be produced or any witness to be examined to enable it to pronounce the judgment. These principles should be kept in mind while considering CMP No.2896 of 2000.

27. In the affidavit accompanying the CMP it is stated that Venkatamma, second wife of Papaiah, specifically pleaded in OS No.474 of 1958 that Ex.A1 is the outcome of misrepresentation and fraud played on her and that Ex.B1 Will was upheld by the Court of I Assistant Judge, City Civil Court, Secunderabad. Therefore, it is stated that the documents are necessary for effective adjudication in the appeal and that they could not be filed during the pendency of the suit inspite of exercising due diligence. The respondents in the appeal have filed counter affidavit in CMP No.2896 of 2000. In the counter affidavit it is stated that the validity of partition deed was not decided in the earlier suit and that in the suit being OS No.474 of 1958 the discussion was confined to recovery of money under two pronotes on the basis of the Will and therefore the certified copy of the judgment and rejoinder are not relevant for disposal of the present appeal. It is also opposed on the ground that though the suit was filed in 1980 and the appeal was filed in 1988, the appellant did not exercise due diligence and therefore he cannot be permitted to bring additional evidence on record. However, the learned senior Counsel for the respondents in the appeal did not seriously oppose for the simple reason that Ex.B1 Will was pressed into service in OS No.474 of 1958 for proving the right of Venkatamma to collect the debts due to Papaiah. In this, it was also mentioned that on the basis of the Will only the plaintiff claimed that Venkatamma was given absolute right and therefore it is open to her to enter into partition with Pentaiah, son of Papaiah, through his first wife. Therefore, I am of the considered opinion that CMP No.2896 of 2000 should be allowed and certified copy of the judgment and decree in OS No.474 of 1958 on the file of the Court of I Assistant Judge, City Civil Court, Secunderabad stand marked collectively as Ex.A5 and the certified copy of the rejoinder filed by Venkatamma in the said suit as Ex. A6.

28. Now, I may consider the submission made by the learned Counsel for the appellant regarding Ex.A1, partition deed. The suit was opposed by the first defendant on the ground that under Ex.B1 Will after death of Venkatamma he became entitled absolutely to the entire property of late Papaiah except house

bearing No.75 of Hyder Basthi, Secunderabad, which was given to Sabari Bai, lame daughter of Papaiah and Venkatamma. Therefore, it was not open to Venkatamma to enter into a partition deed with Pentaiah, who was already separated as per the Will Ex.B1.

29. Ex.A6 is the rejoinder filed by Venkatamma in OS No.474 of 1958 on the file of I Assistant Judge, City Civil Court, Secunderabad. The suit was filed by her for recovery of an amount of about Rs.4,676/- due under two promissory notes executed by the first defendant therein, namely Chitrula Narasmihulu in the capacity of manager of Hindu joint family. The defendant in the said suit alleged that after the death of Papaiah, he repaid the amount to Mandala Narasimha, son of Papaiah, who was fourth defendant in the said suit, stating that Venkatamma is not entitled to file a suit for recovery of the amount, that the Will in her favour is not true and was brought into existence fraudulently subsequent to the death of Venkatamma and that defendants 1, 2 and 3 made repayments to Narasimha as Head and Kartha of the family being eldest son of Venkatamma. Though the suit was filed in 1958, Narasimha did not plead about any partition deed. On the other hand, Venkatamma filed a rejoinder to the written statement of Narasimha stoutly denying the claim of Narasimha to collect the amounts. She stated that under the last Will of Papaiah she alone is entitled to the suit amount, that Narasimha is living separately from the plaintiff, that, he due to enmity with the plaintiff colluded with defendants 1 to 3 and set up the plea of discharge of the promissory note amount, that the plaintiff is not bound by the actions of Narasimha, that she never authorised him to collect rents, that the partition deed dated 29-9-1953 is the outcome of misrepresentation and fraud played upon Venkatamma by Narasimha and Pentaiah, who conspired together, that as they were not given any property under Ex.B1 Will they made plaintiff to believe that Ex.B1 is to be registered, took her to the Office of Sub-Registrar on 5-10-1953 and made her to put her thumb impression on the partition deed dated 29-9-1953 and that the partition deed is against Ex.B1, Will and contrary to the wishes of Papaiah. This rejoinder shows that at the earliest opportunity Venkatamma denounced partition deed putting forth a sensible and reasonable case. It cannot be denied that Narasimha and Pentaiah were specially mentioned by Papaiah in his Will giving particulars of property which they got prior to execution of Ex.B1. Papaiah also categorically stated in the Will that Pentaiah and Narasimha were well settled, they were given sufficient amounts and therefore he does not want to give any property to them. The version of Venkatamma in the rejoinder is therefore convincing that Narasimha and Pentaiah conspired because they did not get any property under Ex.B1. Therefore, in all probability, the fourth defendant, Narasimha in OS No.474 of 1958 was afraid to confront with Venkatamma with the partition deed though she specifically took a plea in the rejoinder that partition deed Ex.A1 was obtained by misrepresentation and fraud.

30. The learned Counsel for the appellant also submits that the plaintiff as PW1 himself has admitted in the cross-examination that Ex.A1 was obtained by fraud

and misrepresentation. It is necessary to extract below that PW1 said in his cross-examination.

31. It is true that my father gave life interest to my mother in all the remaining properties as she was to bring up all the children. My mother accordingly brought up all the children and got them married and she enjoyed the remaining properties. My mother used to stay with first defendant herein. It is true that my father bequeathed the remaining properties other than House No.75 at Hyder Basthi to first defendant. My natural mother was illiterate. I was living in the house of my adopting father in 1953 when original of Ex.A1 was executed. I came to know subsequent to death of Ramaswamy that Pentaiah and Narasimha (husband of second defendant and father of third defendant) played fraud on my natural mother and got original of Ex.A1 executed. I do not know if Narasimha claimed share into the properties under Ex.A1 When Venkatamma was alive neither my natural mother nor first defendant questioned my adoption and I have been treated as outsider of their family.

32. The above evidence of PW1 does not admit two arguments. The plaintiff admitted that first defendant was given property absolutely and Venkatamma was given only life interest. It is also to the effect that Narasimha and Pentaiah played fraud on Venkatamma and obtained Ex.A1. It is no doubt true that an admission of a witness can always be explained by him by proper method. In this case, the learned Counsel for the plaintiff-first respondent is not able to explain the admission made by PW1 that Ex.A1 was obtained by misrepresentation or fraud. This admission, coupled with Ex.A6 (rejoinder) cfinchingly shows that Ex.A1 was obtained by fraud and misrepresentation. Ex.A1 is the basis for suit for partition. It is the case of the plaintiff in the pleadings that under Ex.A1 properties left behind by Papaiah were partitioned giving one share to Pentaiah, son of Papaiah, through his first wife and the three brothers namely, Narasimha, Yadagiri and Madhava Rao who lived jointly. Ex.A1 is now proved to be the outcome of fraud or misrepresentation. If Ex.A1 is ignored what remains is Ex.B1 Will. On Ex.B1 Will I have already held that Papaiah gave life interest to Venkatamma and vested remainder absolutely to Madhava Rao enabling him to inherit the property of Papaiah i.e., House No.75 at Hyder Basthi.

33. Point No.2 is answered accordingly.

34. In the result, for the aforesaid reasons and findings on Points 1 and 2, the appeal is allowed reversing the judgment and decree in OS No.457 of 1983 on the file of the Court of Additional Chief Judge, City Civil Court, Secunderabad and the said suit stands dismissed with costs throughout.