
(2014) 06 AP CK 0154
In the Andhra Pradesh High Court
Case No : A.S. No. 2889 of 1996

Ravi Raja Babaiah

APPELLANT

Vs

Vemulapalli Rajeswari Devi

RESPONDENT

Date of Decision : 02-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 1 Rule 9
Evidence Act, 1872 — Section 123(2), 68

Citation : (2014) 5 ALD 642 : (2014) 5 ALT 8

Hon'ble Judges : M.S. Ramachandra Rao, J

Bench : Single Bench

Advocate : V.S.R. Anjaneyulu, Senior Counsel, Advocate for the Appellant; P. Veera Reddy, Karri Murali Krishna and M. Sreenivasa Rao, Senior Counsels, Advocate for the Respondent

Final Decision : Dismissed

Judgement

M.S. Ramachandra Rao, J.—This appeal is filed challenging the judgment and decree dt. 06-09-1996 in O.S. No. 179 of 1984 of the I Additional Subordinate Judge, Vijayawada.

2. The appellants herein are the defendants in the above suit. The respondent/plaintiff herein filed the above suit for partition of the plaint schedule properties into three equal shares, to allot one such share to her with separate possession, to grant future profits from the date of suit till the date of delivery of her share and for costs.

3. The parties will be referred to as per their array in the trial Court.

4. The respondent/plaintiff is the daughter of Ravi Raghavayya, while 1st appellant/1st defendant is the elder son and the 2nd appellant/2nd defendant is the younger son of the said Raghavayya. The said Raghavayya died on 29-05-1982.

The Plaintiff

5. The plaintiff contended that the plaint schedule properties are the absolute properties of Raghavayya; that he died intestate; on his death, his entire estate devolved upon the plaintiff and defendants 1 and 2 who are Class-I heirs as per the provisions of the Hindu Succession Act, 1956; and the plaintiff and defendants 1 and 2, therefore, have equal shares therein. She contended that Raghavayya was attached to her as she is the only daughter; that he was afflicted by paralysis on the right side of his body prior to his death; that the right part of his face, mouth, right hand, right leg were badly affected and he became immobile; that he became unconscious and in that state of health while in coma, he died at Vijayawada on 29-05-1982. She contended that even while Raghavayya was alive, he was in a mentally paralyzed and unconscious state and had absolutely no control over his mental and physical functions and he was incapable of executing any document or documents in view of this state of health from January 1982. She alleged that when she demanded the defendants for partition of the property through her husband and relatives, the defendants did not cooperate with her, that she got issued a legal notice Ex. A-1 dt. 07-03-1983 to defendants and they replied it vide Ex. A-2 dt. 22-03-1983 with false allegations by setting up Ex. B-1 Will dt. 24-05-1982 and Ex. B-2 settlement deed dt. 15-03-1982 allegedly executed by Raghavayya in their favour. She alleged that the said Will is a rank forgery and had not seen the light of the day so far. She contended that no such Will was executed by Raghavayya and that the gift deed relied upon is also an invalid document. Therefore, seeking partition and separate possession of her 1/3rd share, she filed the suit on 15-03-1984.

6. Plaint A schedule consists of agricultural lands in Mopidevi village of Krishna District; Plaint B schedule consists of agricultural lands in Mopidevi lanka village of Krishna District; Plaint C schedule consists of agricultural lands in Puligadda village of Krishna District; Plaint D schedule consists of agricultural lands in Majeru village of Krishna District; Plaint E schedule consists of vacant site in Gunadala village; Plaint F schedule consists of vacant site in Challapalli village; Plaint G schedule consists of Petrol Pumps etc. including certain businesses and vehicles apart from shares and cash; and Plaint H schedule consists of a vacant site of extent of 750 sq. yds in Kukkatapally Panchayat of Ranga Reddy District.

The Written Statement of 1st Defendant:

7. The 1st defendant filed a written statement admitting the relationship between the parties but denying that Raghavayya died intestate. He pleaded that late Raghavayya executed Ex. B-1 Will dt. 24-05-1982 in a sound and disposing state of mind. He contended that the allegations in the plaint relating to the ill health of late Raghavayya were deliberately exaggerated and denied the allegation that the mouth, right part of the face, right hand and right leg of Raghavayya were badly affected and he became immobile and unconscious and died on 29-05-1982 in a coma. He contended that Raghavayya had a paralytic stroke on 16-12-1981; that he did not become unconscious; he was provided treatment at Vijayawada and Guntur and taken in a good condition to Mopidevi on account of

good climatic conditions on the advice of doctors; at Mopidevi, he was treated by D.W. 3; Raghavayya never lost his consciousness except on 29-05-1982 on which date he died. He denied that he was in a coma and continued to be so till his death. It is contended by 1st defendant that since the right side of the body of Raghavayya was affected by paralysis, he put his thumb impression on the Will.

8. It is also contended that plaintiff and her husband took large sums of money from late Raghavayya and firms for their family and businesses; that the marriage of the plaintiffs first daughter was performed by Raghavayya with his funds; the 2nd and 3rd daughters of the plaintiff were not married; in order to avoid long and futile litigation among his children, Raghavayya executed Ex. B-1 Will making a provision for 2nd and 3rd daughters of plaintiff by giving them each Rs. 50,000/- payable at the time of their marriages and also bequeathing Ac. 0.14 cts of site in Mopidevi to the plaintiffs apart from other legacies; and that whatever was not specifically mentioned in the Will was to go to both defendants equally. He contended that Raghavayya sent for the scribe of the Will D.W. 1 and the doctor D.W. 3 and got the Will written at Mopidevi and attested by D.W. 3 and D.W. 4; and the said Will is true, valid and binding on the plaintiff. He further stated that plaintiff and her husband were aware of the Will and in fact it was also presented for registration.

9. According to defendant No. 1, plaintiff and her husband wanted the defendants to make immediate payment of the legacies relating to their 2nd and 3rd daughters, but the defendants refused to oblige them on the ground that the said payments would be made at the time of their marriages as per the instructions of the testator.

10. The defendant No. 1 further stated that Raghavayya had executed Ex. B-2 Gift deed in favour of defendant No. 2 on 15-03-1982 with regard to a site measuring 533 sq. yds in R.S. No. 391/2 of Gundala village and registered the same by delivering the property thereunder to defendant No. 2; that the plaintiff and her husband were fully aware of the execution of this deed by late Raghavayya; and she is not entitled to claim 1/3rd share or any other share in the share of Raghavayya except the legacies created in her favour and in favour of her 2nd and 3rd daughters.

11. The contents of the schedules were also disputed. It was stated that a tractor and car mentioned in plaintiff's schedule were bequeathed to 2nd defendant; that the tractor was a 1968 model not in a moving condition and it was got repaired at very heavy expense. Even the car mentioned in the said schedule was a 1967 model got repaired by 2nd defendant by spending huge amounts.

12. He contended that that late Raghavayya was a partner in M/s. Rajeswari Traders, a firm which was closed in 1982 since there was no business and that the accounts of the said firm were also settled. He pleaded that assets and liabilities on the profits of the share of Ravi Raghavayya in the firm M/s. Ravi Raghavayya and sons were bequeathed under Ex. B-1 Will to 2nd defendant and

he was directed to take all that remained after income tax and other liabilities were discharged. He pleaded that there were two oil tankers of the firm of M/s. Ravi Raghavayya and sons; one of them was under hire purchase agreement to the State Bank of India, Government, Vijayawada-2 and the other one was very old and was disposed of at nominal price since it was found to be a liability. Another small car was also sold and transferred since it was an old one lying in the shed for a period of one year. It was pleaded that the deposit and current account balance in the State Bank of India, Mopidevi was transferred even during the life time of Raghavayya to 2nd defendant to enable him to spend money for his litigation and other expenditure. He further contended that the suit itself is of a speculative character, deliberately designed by the plaintiffs husband with a view to have fraudulent profit from the defendants under threat of litigation and blackmail.

The Adopting Memo of 2nd Defendant

13. The 2nd defendant had filed a memo adopting the written statement of 1st defendant.

The Issues:

14. On the above pleadings, the trial Court framed the following issues:

1. Whether the Will dt. 24-05-1982 is true and valid?
2. Whether plaint schedule properties are true and correct in their measurements, description and valuation?
3. Whether the plaintiff is entitled to the partition of the plaint schedule properties?
4. Whether the plaintiff is entitled to the rendition of accounts either for the mesne profits on the properties or for the profits of the business concerns Ravi Raghavaiah and sons Agency and Rajeswari Traders?
5. Whether the plaintiff is entitled to recover any share in any items of the preparations described in A to D schedules?
6. Whether the valuation of the plaint schedule properties and the Court fee paid thereon is not correct?
7. To what relief?

15. Before the trial Court, the plaintiff examined P.Ws. 1 and 2 and marked Exs. A-1 and A-2. Defendants examined D.Ws. 1 to 4 and marked Exs. B-1 and B-2.

The Trial Courts Judgment

16. By judgment and decree dt. 06-09-1996, the trial Court decreed the suit by directing partition of the plaint schedule properties into three equal shares and directing allotment of one share to the plaintiff. It directed the plaintiff to file a

separate application for determination of mesne profits.

17. The trial Court held, on appreciation of evidence, that Ex. B-1 Will dt. 24-05-1982 is not a true and valid document. It held that D.W. 3, the family doctor of Raghavayya and defendants did not seem to have maintained any record regarding the treatment he gave to late Raghavayya; two other doctors who gave treatment to late Raghavayya viz., Dr. Y. Madhusudhanara Rao of Vijayawada and Dr. Kodanda Raju of Guntur were not examined by the defendants to throw light on the exact physical and mental condition of Raghavayya after he was attacked by paralysis; the medical record of Raghavayya was not brought before the Court; that the evidence of D.W. 1 that Raghavayya dictated the terms of the Will orally to him is contrary to the evidence of P.W. 3; since Ex. B-1 runs into 7 full pages with number of items, survey numbers and boundaries apart from terms regarding bequests, it was impossible to believe that on 24-05-1982, Raghavayya, who was not in a position to speak, but was communicating only through gestures, gave information mentioned in Ex. B-1 in a short time of about one hour. It also did not believe the evidence of D.W. 1, the scribe, that he did not prepare any draft of the Will Ex. B-1 and that he wrote directly as per the terms dictated by Raghavayya, in view of the evidence of D.W. 3 that late Raghavayya gave information only through gestures. It held that the version of defendants that there was improvement in the health of Raghavayya on account of the treatment he received at Guntur and Vijayawada is not true since recitals of Ex. B-1 Will show that there was no improvement in his health. It noted that Ex. B-1 Will was presented for registration on 21-02-1983 by 2nd defendant, but was withdrawn by 2nd defendant as per the endorsement made by the concerned Sub Registrar on the reverse side of page-2 of Ex. B-1. It held that although 2nd defendant had stated that he had withdrawn Ex. B-1 Will without registration on account of the notice given by plaintiff to him, the said notice was given by plaintiff to defendants on 07-03-1983 but the Will had been withdrawn without registration on 21-02-1983 itself. It further held that the defendants were not able to establish that the description of the properties in the plaint schedule were incorrect; that although 2nd defendant claimed that he got plaint E schedule property under the gift deed Ex. B-2 dt. 15-03-1982 executed by late Raghavayya, he had not adduced any evidence in proof of the said gift deed and therefore, the plaintiff is entitled to decree of partition with and mesne profits.

The Appeal in This Court

18. Challenging the same, this appeal is filed by the defendants.

19. Pending appeal, 1st appellant-1st defendant died and appellants 3 to 5 were brought on record as his legal representatives.

20. Heard Sri V.S.R. Anjaneyulu, learned Senior Counsel for the appellants and Sri P. Veera Reddy, learned Senior Counsel, representing Sri Karri Murali Krishna and M. Sreenivasa Rao, learned counsel for the respondent.

The Contentions of The Counsel for Appellants

21. Learned counsel for the appellants contended that there was no rejoinder filed by plaintiff to the plea in the written statement of 1st defendant setting up the Will and the gift deed; that plaintiff had not sought relief of declaration that Ex. B-2 gift deed is void; that other beneficiaries of the Will i.e. the children of defendants 1 and 2 were not impleaded; that although only a photo copy of Ex. B-2 was marked through D.W. 4, no objection to its marking was taken by plaintiff; that plaintiff having pleaded in the plaint that Ex. B-1 Will is a forgery, failed to prove the same by leading any evidence in support of it; while in the plaint, plaintiff pleaded that Raghavayya continued to be in an unconscious state after suffering the paralytic stroke till he died on 29-05-1982, the plaintiff changed her version in her chief examination by stating that he was conscious for nearly a month prior to his death and in her cross examination by stating that he was in a coma for a period of 10 or 15 days prior to his death; that this was contradicted by D.W. 3, the family doctor of Raghavayya, who categorically stated that Raghavayya was fully conscious at the time of execution of the Will Ex. B-1 and no suggestion was given to D.W. 3 that Raghavayya was in coma on the date of execution of Ex. B-1; that both D.Ws. 1 and 2 stated that Raghavayya was not in coma on the date of execution of Ex. B-1 and was in a sound state of mind; that P.W. 2's evidence that he saw Raghavayya prior to his death and that Raghavayya was not in a position to talk with others and not even in a position to recognize persons, cannot be believed since he is closely related to the plaintiff; that D.W. 2 was in service with Raghavayya for a long time and there was nothing wrong in Raghavayya asking D.W. 2 to attest the Will; that documents were given to D.W. 1 by Raghavayya prior to drafting of the Will and the particulars of the properties/businesses were incorporated in the Will; that no specific question was put to D.W. 1 that he did prepare a draft Will and only a general question whether he was in the habit of preparing and draft Will was asked, and therefore the observation of the trial Court that it is difficult to draft the Will within a period of one hour without there being a draft Will, cannot be accepted. He also contended that plaintiff as P.W. 1 had admitted that Ac. 10.00 cts of land had been given to her husband by Raghavayya during his lifetime and that after the death of Raghavayya, defendants had given Ac. 15.00 cts to her and to her husband in all about Ac. 25.00 cts; apart from that the eldest daughter of plaintiff was married by Raghavayya; plaintiff already owned about Ac. 12.00 cts of land at Kotha Majeru village of Machilipatnam Mandala and from 2nd defendant, she received about Rs. 5.00 lakhs; in addition Rs. 50,000/- each was given to the two married daughters of plaintiff by Raghavayya apart from Ac. 0.14 cts of site to the plaintiff under Ex. B-1 Will, the possession of which was with the plaintiff; and therefore there was no uneven distribution of assets by Raghavayya under the Will. It is also contended that the children of defendant nos. 1 and 2 were bequeathed certain items under Ex. B-1 Will; and while 5th appellant has been impleaded in the appeal as legal representative of the deceased 1st defendant and is now no doubt represented, Venkata Raghava

Prasad, son of 2nd defendant, who is also a beneficiary under the Will has not been impleaded in the suit or in the appeal; and if the Will is set aside now behind his back, it would cause injustice to him. It was further contended that there is no specific pleading as to why Ex. B-2 is invalid and in the absence of any rationale suggested by the plaintiff as to why it is invalid, the trial Court could not have held that Ex. B-2 is not proved. Several cases were also cited by the counsel for the appellants in support of his contentions.

The Contentions of The Counsel for Respondent

22. The learned counsel for the respondent-plaintiff on the other hand contended that the judgment and decree of the trial Court are correct and valid reasons have been given by the trial Court for granting decree in favour of plaintiff. He pointed out that Ex. B-2 Gift deed allegedly executed by Raghavayya shows that at the time of its execution his age was 78 years, but Ex. B-1 Will which was allegedly executed 3 months later, shows he is aged 76 years; that Raghavayya had suffered a paralytic stroke on 16-12-1981 and continued to be ill till 29-05-1982 on which date, he died; the execution of the Will Ex. B-1 was five days prior to the death of Raghavayya; that P.W. 1 had stated that Raghavayya was shifted to the hospital on 23-05-1982 a day before execution of Ex. B-1; a suggestion was given to P.W. 1 that he was taken to the hospital on 25-05-1982 but neither the case sheet nor the discharge summary given by the hospital to Raghavayya was filed and non production of this material throws a serious doubt as to the circumstances in which the Will was allegedly executed by Raghavayya. He also contended that no neuro-physician was examined by defendants as to the mental condition of Raghavayya, that D.W. 3 is not a neuro-physician or an expert in treatment of paralysis and his evidence cannot be accepted as a gospel truth. He further contended that in Ex. B-2 gift deed dt. 15-03-1982, there is a recital that Raghavayyas health did not improve in spite of treatment at Vijayawada by Dr. Y. Mahusudhana Rao; even Ex. B-1 recites that he was being treated at Vijayawada and Guntur, but his health did not improve; and therefore it has to be construed that the Raghavayyas illness was of such a nature that he was not in a sound in mental condition to execute Ex. B-1. He contended that Ex. B-1 contains the right hand thumb impression of the Raghavayya and not the left hand thumb impression; that the trial Court rightly held that the evidence of D.W. 1, its scribe that Raghavayya dictated the terms of the Will is contradicted by evidence of D.W. 3 that he was only making gestures and was not able to speak; that D.Ws. 2 and 4 stated that Raghavayya was in a position to read newspaper but Ex. B-1 Will recites that contents of the Will were read over and explained to him and if Raghavayya was in a position to read newspapers, there was no necessity to read the contents of the Will to him. He contended that the presentation of the Will Ex. B-1 for registration on 04-11-1982, six months after its execution, before the concerned Sub Registrar and its withdrawal on 21-02-1983 is also a suspicious circumstance; the evidence of the scribe D.W. 1 is not creditworthy; D.W. 2 has been in a continuous employment of 2nd defendant-D.W. 4 and his evidence is biased and therefore, the execution of the

Will by Raghavayya cannot be believed. He further contended that there is no plea of non-joinder of parties raised in the written statement and no issue was framed; even the Will Ex. B-1 was not filed along with written statement on 29-12-1984; that there was no mention of any other beneficiaries other than the defendants in the written statement filed by 1st defendant; it was produced on 19-07-1994 and plaintiff was deprived of information about the other legacies under the Will; the defendants cannot take advantage of their own wrong and plead non-joinder. He also contended that Ex. B-2 is invalid since there is no evidence to show that Raghavayya was in sound state of mind when he executed it. The learned counsel for the respondent cited several decisions in support of his submissions.

The Points for Consideration

23. The following points arise for consideration in the appeal:

- a) Whether the trial Court is correct in holding that Ex. B-1 Will dt. 24-05-1982 allegedly executed by late Raghavaiah is not true, valid and binding on the plaintiff?
- b) Whether the suit is liable to be dismissed on the ground of non-joinder as a party of the son of the 2nd defendant by name Venkata Raghava Prasad, who is a legatee under Ex. B-1 Will dt. 24-05-1982?
- c) Whether the trial Court was correct in holding that Ex. B-2 settlement deed dt. 15-03-1982 allegedly executed by Raghavaiah is not proved?

The Analyses by This Court

Point (a):-

24. Before I deal with evidence on record, I will briefly consider the law relating to proof of Wills.

25. A Will is one of the most solemn documents known to law. The executant of a Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is therefore essential that trustworthy and unimpeachable evidence should be produced before the Court to establish the genuineness and authenticity of the Will. In order to determine its validity, it would be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself and also to look into surrounding circumstances as well as inherent improbabilities.

26. In order to assess whether a Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signature to the testament of his own free Will; that he was at the relevant time in a sound disposing state of mind, 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 fraud is on the person who alleges it be so. Since a Will is a compulsorily attestable document in view of Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution.

27. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testators mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there may be other indications in the Will to show that the testators mind was not free. In such a case, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be take into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances, the Court would grant probate, even if the Will might be unnatural and might cut off, wholly or in part, near relations.

28. Even if there is an uneven distribution of assets under the Will, that itself would not be a circumstance to show that the Will is unnatural since it lies within the pure discretion of the testator. Where disinheritance is amongst heirs of equal degree and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the Court below failed to be alive to it, then its orders are susceptible to correction in appeal.

29. Deprivation of the natural heirs by a testator cannot be treated as suspicious because the whole idea behind execution of a Will is to interfere with the normal line of succession. Courts does not sit in appeal over the right or wrong of a testators decision and its role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of his free and sound disposing state of mind. If a Will appears on the face of it to have been duly executed and attested in accordance with the requirement of the statute, a presumption of due execution and attestation applies.

30. In the matter of proof of document as in the case of the proof of Wills, it is idle to expect proof with mathematical certainty. The test to be applied always is the test of satisfaction of a prudent mind in such matters.

31. In cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and defendant. What generally is an adversary proceeding becomes in such cases a matter of the courts

conscience and then the true question which arises for consideration is whether the evidence let by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the Will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.

32. Coming to the facts of the appeal, according to plaintiff, late Raghavaiah did not execute any Will such as Ex. B-1 since he was unconscious and in a coma ever since he suffered a paralytic stroke on 16-12-1981 paralyzing the right side of his body and that he was having no control over his mental and physical functions and was incapable of executing it. In addition she also pleaded that the Will Ex. B-1 is a forgery.

33. No doubt in her chief examination, she stated that he was only unconscious for a month prior to his death and in the cross examination she stated that he was unconscious for a period of 10 to 15 days prior to his death and thus contradicted her plea in the plaint that he was unconscious ever since he had a paralytic stroke i.e. from December 1981.

34. Still the crucial question is whether he was in a sound state of mind and health on 24-05-1982 when he allegedly executed it. Admittedly he died on 29-05-1982 while Ex. B-1 is alleged to have been executed by him on 24-05-1982, five days prior to his death.

35. A look at Ex. B-1 Will shows it runs into six pages and gives particulars of the several properties bequeathed thereunder in great detail. It mentions his age as 76 years and also the fact that for about 4 months prior thereto, he was suffering from paralysis, was undergoing treatment in Vijayawada, Guntur and other places from renowned doctors but since his health was not good, he decided to execute it. Under this Will, the plaintiff was given only Ac. 00.14 cts of site in Mopidevi village and her 2nd and 3rd daughters Rs. 50,000/- each to be paid at the time of their marriages stating that Raghavaiah himself had got her 1st daughter married.

36. When the plaintiff issued legal notice Ex. A-1 dt. 07-03-1983 seeking partition of the plaint schedule properties, the defendants got issued a reply notice Ex. A-2 dt. 22-03-1983 mentioning about a Will dt. 24-05-1982 and a gift deed dt. 15-01-1982 but the copy of the Will and the gift deed were not sent along with the reply notice to the plaintiff. Ex. B-1 Will was produced by the defendants through D.W. 1, the alleged scribe of Ex. B-1 on 19-07-1994 i.e. 12 years after its alleged execution by Raghavaiah on 24-05-1982. No explanation is forthcoming from the defendants why it was not produced along with the written statement filed by 1st defendant on 29-12-1984 or along with the memo filed by 2nd defendant adopting the written statement of 1st defendant on 26-02-1985.

37. According to the defendants, Raghavaiah had allegedly executed Ex. B-2 gift deed on 15-03-1982 in favour of 2nd defendant gifting E schedule properties to

him, but in the said document his age is mentioned as 78 years.

38. The defendants have not explained how his age in Ex. B-1 Will (executed allegedly on 24-05-1982, two months after the execution of Ex. B-2) could be 76 years i.e. two years less than the age of 78 years mentioned in Ex. B-2.

39. Ex. B-2 also contains a recital that Raghavaiah was suffering from ill health on account of paralytic stroke and although he was being treated for the past three months at Vijayawada by Dr. Madhusudhana Rao in his hospital, his health had not improved. We have already noticed a similar recital in Ex. B-1 that in spite of getting treated in Vijayawada and Guntur by renowned doctors, his health was not good.

40. The 1st defendant who propounded the Will in his written statement did not enter the witness box. Even the 2nd defendant did not first enter the witness box as D.W. 1 but examined himself as D.W. 4 after the scribe of Ex. B-1 was examined as D.W. 1 and its attestors were examined as D.Ws. 2 and 3. This conduct of the defendants is suspicious since normally a party to a suit is expected to depose first and the other witnesses are to depose subsequently. It gives an impression that he was examined subsequently to cover up the lacuna in the evidence of DWs. 1-3.

41. D.W. 3 who attested Ex. B-1 stated that he was the family doctor of Raghavaiah, that he attended on Raghavaiah for one month before his death and that Raghavaiah was treated by Dr. Y. Madhusudhana Rao, a doctor at Vijayawada at the latter's hospital. He stated that Raghavaiah was gradually improving but his speech was not clear but was signifying his intentions by signs which the defendants were able to understand and that Raghavaiah was taking time to express himself for five minutes or so. He further stated that D.W. 1 read over the contents of the Will to Raghavaiah before he obtained his thumb impression.

42. The treatment of Raghavaiah by Dr. Y. Madhusudana Rao and D.W. 3 was corroborated by D.W. 4, the 2nd defendant. D.W. 4 further stated that Dr. K. Kodanda Ramaiah of Guntur also treated his father.

43. But curiously the defendants have not chosen to file any medical reports relating to the condition of late Raghavaiah during the entire period of his illness. These reports would provide the best evidence as to the mental and physical condition of late Raghavaiah on 24-05-1982 when Ex. B-1 was executed or on 15.3.1982 when Ex. B2 was allegedly executed. The non-filing of these medical reports would warrant the drawing of an adverse inference against the defendants that if they were produced, they would not support the case of the defendants that Raghavaiah was in a sound mental and physical health at the time of execution of Ex. B-1 Will. Also what the qualifications of D.W. 3 are, whether he was a neuro physician competent to treat paralytic patients, is not brought out in the evidence of defendants.

44. D.W. 4 stated that Raghavaiah was fully conscious even after the attack and was reading newspapers and having conversations with others. D.W. 2 also stated that he was in a conscious state of mind and was reading newspapers. D.W. 3 however had stated that D.W. 1 had read over the contents of the Will Ex. B-1 to Raghavaiah before he obtained his thumb impression on it. D.W. 1 also stated that Raghavaiah put his thumb impression on Ex. B-1 after hearing the contents of the same. If according to D.W. 4 and D.W. 2, Raghavaiah was fully conscious and was able to read newspapers also, then there was no necessity for D.W. 1 to read the contents of the Will to Raghavaiah and Raghavaiah could have read the same himself.

45. D.W. 1 stated that the survey numbers and other particulars contained in the Ex. B-1 Will were supplied by Raghavaiah to him by handing over some documents and that Raghavaiah instructed him to mention the details of allocation of properties to his sons and others. He also stated that Raghavaiah dictated the terms of the Will orally regarding the bequests. This evidence of D.W. 1 contradicts the evidence of D.W. 3 that Raghavaiahs speech was not clear and he was signifying his intentions by signs and he was taking time of about five minutes to express himself by signs. It is difficult to believe that Raghavaiah, who was paralyzed, could personally handover documents containing particulars of the several properties to be dealt with under Ex. B-1 to D.W. 1 and that he also dictated the terms of the Will regarding bequests, particularly when the Will runs into six pages with several details of the properties and bequests, that too when his speech is not clear and he was communicating by signs.

46. Mopidevi is a big village in Krishna District. Yet, Raghavaiah who is native of Mopidevi according to the defendants, chose to get the scribe D.W. 1 from a different village Challapalli about 5 k.m. away even though he had no prior acquaintance with D.W. 1. There would be enough document writers in and around Mopidevi and there was no necessity for Raghavaiah to secure a scribe, previously not known to him from a different village, to write Ex. B-1 Will.

47. D.W. 2, one of the attestors of Ex. B-1, is working as a Clerk under 2nd defendant and D.W. 4 admitted that D.W. 2 was attending to each and every adjournment of the case irrespective of the presence of D.W. 4 in the Court. D.W. 4 also admitted that D.W. 2 is looking after all affairs of D.W. 4s business by receiving remuneration. D.W. 4 admits that the brothers of Raghavaiah also live at Mopidevi but mentioned that on account of some Court litigation the relationship of Raghavaiah with his brothers is not good. No details of such Court litigation are given by D.W. 4. One would expect Raghavaiah to get his relatives in Mopidevi to attest the Will and not get D.W. 2, a resident of Vijayawada and an employee of D.W. 4, to attest it. The fact that D.W. 2 was taking a more than active interest in the proceedings in the suit also suggests that he was made to attest Ex. B-1 by D.W. 4, who was one of the main beneficiaries under Ex. B-1. I hold that the evidence of DW. 2 is interested testimony biased in favour of the defendants and he is not a trustworthy witness.

48. In view of the above suspicious circumstances, I agree with finding of the trial Court that the defendants failed to prove that late Raghavaiah was of a sound state of mind at the time of execution of Ex. B-1 Will. Therefore, Ex. B-1 Will cannot be taken as true, valid and binding on the plaintiff.

Point (b):

49. The counsel for the appellants/defendants contended that under the Will Ex. B.1 dt. 24.05.1982 allegedly executed by Late Raghavaiah, not only the plaintiff, her two daughters but also the defendants, the son of the 2nd defendant by name Venkata Raghava Prasad was also a beneficiary and was bequeathed certain land by Raghavaiah but he is not impleaded in the suit by the plaintiff/respondent, that he is a necessary party to the suit and on account of his non-joinder in the suit, the suit is liable to be dismissed.

50. There is no reference to the above person Sri Venkata Raghava Prasad in the reply notice Ex. A.2 dt. 22.03.1983 issued by defendants to the plaintiff in response to the legal notice Ex. A.1 dt. 07.03.1983 issued by plaintiff to defendants prior to filing of the suit.

51. In the written statement a reference is made to the Will Ex. B.1 but no mention was made in it about the above person also being a beneficiary under it and no plea was raised about non-joinder of the said person by plaintiff as a party to the suit.

52. It is not disputed that the copy of the Will Ex. B.1 was not sent by the defendants along with the reply legal notice Ex. A.2 and was also not filed by them along with the written statement of 1st defendant on 29.12.1984. For the first time it was filed on 19.07.1994 when DW. 1 was examined as a witness i.e., ten years after filing of the suit.

53. The plaintiff who had no knowledge of the contents of the Will Ex. B.1, and in particular about the fact that the above person is also a beneficiary thereunder, cannot be expected to implead him as a party in the suit at the time when it was filed, particularly when no objection on the ground of non-joinder of the said party was raised in the written statement.

54. Out of the several items bequeathed under Ex. B.1, this person was given a small bit of land of Acs. 1.50 cents under Ex. B.1. The 2nd defendant, the father of this person, was already on record and was contesting the suit. In my opinion, the interest of this person was adequately protected/safeguarded by 2nd defendant and this person did not suffer any prejudice on account of his non-impleadment as a party in the suit. In this view of the matter, I am of the opinion that at best, this person is only a proper party and not a necessary party to the appeal.

55. It is no doubt true that a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court and if a necessary party is not impleaded, the suit itself is

liable to be dismissed. In *Kanikarathanammal v. V.S. Loganatha Mudaliar and another*, the Supreme Court held that notwithstanding Order I Rule 9 CPC no suit shall be defeated by reason of the misjoinder or non-joinder of parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. It held that even in such cases, the court can under Order I Rule 10(2) CPC direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties plea of limitation. It further observed that when a specific plea of non-joinder was taken in the trial court and a clear issue was also framed, the party might have applied to have necessary parties, while the suit was being tried. But if the party persisted and proceeded with the suit, it will be too late to allow him to rectify the mistake in the appellate court.

56. In the present case, as stated above, the plaintiff had no knowledge that the above person was also a beneficiary under Ex. B.1 Will since it was suppressed till 12.07.1994 i.e., ten years after filing of the suit. No plea was raised in the written statement about non-joinder of this person by the defendants and no issue was got framed by them on the point of non-joinder. Even if it is assumed for the sake of argument without conceding that this person is a necessary party to the suit, in my opinion, still it is not open to the defendants to raise the said plea for the first time in the appeal since they cannot be allowed to take advantage of their own wrong in not disclosing about this person being a beneficiary under the Will Ex. B1 to the plaintiff either in their reply legal notice or in the written statement.

57. In *Union of India v. Maj. Gen. Madan Lal Yadav*, the Supreme Court invoked the Latin maxim *nullus commodum capere potest de injuria sua propria* meaning no man can take advantage of his own wrong and applied it in the following manner:

28. Even if narrow interpretation is plausible, on the facts in this case, we have no hesitation to conclude that the trial began on 25-2-1987 on which date the court martial assembled, considered the charge and the prosecution undertook to produce the respondent who was found escaped from the open detention, before the Court. It is an admitted position that GCM assembled on 25-2-1987. On consideration of the charge, the proceedings were adjourned from day to day till the respondent appeared on 2-3-1987. It is obvious that the respondent had avoided trial to see that the trial would not get commenced. Under the scheme of the Act and the Rules, presence of the accused is a precondition for commencement of trial. In his absence and until his presence was secured, it became difficult, nay impossible, to proceed with the trial of the respondent-accused. In this behalf, the maxim *nullus commodum capere potest de injuria sua propria* meaning no man can take advantage of his own wrong squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In *Brooms Legal Maxim* (10th Edn.)

at p. 191 it is stated:

it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.

The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim *frustra legis auxilium invocat quaerit qui in legem committit*. He relies on *Perry v. Fitzhowe*. At p. 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At p. 193, it is stated that it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. At p. 195, it is further stated that a wrong doer ought not to be permitted to make a profit out of his own wrong. At p. 199 it is observed that the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed.

29. The Division Bench of the High Court has recorded the finding that the respondent has absconded from open military detention. From the narration of the facts it is clear that the respondent was bent upon protracting preliminary investigation. Ultimately, when the GCM was constituted, he had challenged his detention order. When he was unsuccessful and the trial was to begin he escaped the detention to frustrate the commencement of the trial and pleaded bar of limitation on and from 1-3-1987. The respondent having escaped from lawful military custody and prevented the trial from being proceeded with in accordance with law, the maxim *nullus commodum capere potest de injuria sua propria* squarely applies to the case and he having done the wrong, cannot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent GCM. Therefore, even on the narrow interpretation, we hold that continuation of trial from 2-3-1987 which commenced on 25-2-1987 is not a bar and it is a valid trial.

58. This principle was reiterated in *Eureka Forbes Ltd. v. Allahabad Bank*.

59. Therefore, I am of the opinion that the appellants cannot invoke Order I Rule 9 CPC and contend that the suit is liable to be dismissed on the ground of non-joinder of the son of 2nd defendant. The point is accordingly answered against the appellants and in favour of respondent.

Point (c):

60. Coming to Ex. B.2 Settlement Deed allegedly executed by Raghavaiah on 15.03.1982 gifting E schedule property to 2nd defendant, the plaintiff has pleaded that it is an invalid document and had also pleaded that Raghavaiah was

in a mentally paralyzed and unconscious state from the date he suffered the paralytic stroke till his death on 29.05.1982.

61. In the reply notice dt. 22.03.1993, it is stated by the defendants that Raghavaiah executed a registered Gift Deed on 15.01.1982. This Gift Deed allegedly executed on 15.01.1982 is not sent to the plaintiff along with the written statement and it was also not filed in the suit. There is no mention of Ex. B.2 Settlement Deed dt. 15.03.1982 in the reply notice by defendants. Neither the original nor the certified copy of Ex. B.2 was filed by defendants. They merely filed a photocopy of Ex. B.2 on 30.01.1995 during trial through DW. 4 stating that the original of this Deed is available in State Bank of Hyderabad, Guntur in Kothapet Branch. No explanation is furnished why its certified copy was also not produced in the trial court.

62. Admittedly, in December, 1981, Late Raghavaiah suffered a paralytic stroke and he died on 29.05.1982. According to DW 4, this Gift Deed Ex. B.2 was executed allegedly by Raghavaiah when he was in the hospital of Dr. Y. Madhusudan Rao at Vijayawada. The attestors of this Gift Deed have not been examined and no explanation is given for their non-examination. Also no evidence as to the soundness of health of Late Raghavaiah, at the time of its execution, is adduced by defendants. In the absence of evidence of Dr. Y. Madhusudan Rao as to the state of health of Late Raghavaiah at the time of execution of Ex. B.2 and in the absence of evidence of any attestor of this Gift Deed, its execution by Late Raghavaiah cannot be accepted.

63. Therefore, I hold that the trial court rightly held that execution of Ex. B.2 Gift Deed is also not proved.

64. In this view of the matter, I do not find any merit in the appeal. Therefore, the appeal is dismissed, but in the circumstances without costs.

65. As a sequel, the miscellaneous petitions, if any shall stand closed.