

(2002) 10 AP CK 0006

Andhra Pradesh High Court

Case No: Appeal No"s. 1910 and 2802 of 1987

D. Suryanarayana and Another

APPELLANT

Vs

I. Suryakanthamma and Another

RESPONDENT

Date of Decision: Oct. 8, 2002

Acts Referred:

- Evidence Act, 1872 - Section 68

Citation: (2003) 2 ALT 759

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: E.S. Ramachandra Murthy and T. Veerabhadrayya, for the Appellant; G. Dharma Rao, for the Respondent

Final Decision: Allowed

Judgement

P.S. Narayana, J.

The 10th defendant in O.S.No. 77/80 on the file of Subordinate Judge, Bhimavaram had filed A.S.No. 1910/87. The 8th defendant in the said suit likewise preferred A.S.No. 2802/87 and since both these Appeals arise out of the same Judgment, both the Appeals are being disposed of by this Common Judgment.

2. The 1st respondent in these Appeals -plaintiff in the suit, filed O.S.No. 77/80 on the file of Subordinate Judge, Bhimavaram for partition of the plaint schedule properties into two equal shares and the averments in the plaint are as follows.

3. 1st defendant is the sister of the plaintiff. The property shown in the schedule measuring Ac. 1-54 cents and other lands originally belonged to Basula Peraiah. These properties were got by him in the family partition which was effected on 25-2-1959. The said Peraiah executed a Will dated 18-9-1963 in a sound and disposing state of mind. As per the terms of the said Will, the schedule properties are to be enjoyed by Smt. Balsu Seshamma - his wife, and Venkatramayya - his son, during their lifetime with life estate and thereafter the said properties are to be

devolved on the plaintiff and the 1st defendant with equal rights. Subsequent to the execution of the said Will, Peraiah died and after his death, his wife Seshamma had been enjoying the schedule mentioned proprieties with life estate thereon till she died on 30-9-1976. The aforesaid Venkatrammayya, son of Peraiah, in his turn executed a registered relinquishment deed dated 12-10-1969 whereunder he had relinquished his life estate in favour of the plaintiff and the 1st defendant. As per the terms of the said Will and the relinquishment deed, the schedule mentioned properties have devolved upon the plaintiff and the 1st defendant with equal rights. The plaintiff got an undivided half interest in the schedule mentioned properties and she had been enjoying ever since the death of Seshamma. The plaintiff and the 1st defendant started enjoying the property as tenants in common. Thus the plaintiff is in joint possession of the plaint schedule properties along with the 1st defendant. Venkatramayya, who happens to be the father of the plaintiff and the 1st defendant, was unfortunately addicted to vices and deceitful means and obtained signatures of the plaintiff on some blank papers. The 1st defendant being a minor, the properties were being enjoyed by Venkatramayya who was looking after the cultivation affairs etc., of the schedule mentioned properties. The plaintiff resumes the rights and asks for partition of the properties in R.S.No. 115/9 - Ac.0-09 cents; R.S.No. 115/5 - Ac. 0-30 cents and R.S.No. 164/4 - Ac.0-15 cents, for which relinquishment was not given by Venkatramayya. It was further pleaded that the plaintiff had been demanding the 1st defendant to co-operate for partition and separate possession of the schedule mentioned properties into two equal shares by metes and bounds. However, the 1st defendant being under the influence of the said Venkatramayya had not been cooperating for partition and was postponing the same on some count or the other. A Receiver had been appointed in the above suit to take possession of the suit property and manage the same and to deposit the proceeds into Court. As a result of the Receiver's report, it was revealed that 2nd defendant, Seshyia, son of Suryanarayana Avadhanulu in an extent of Ac.1-00 of the land in items 3 and 4 of the plaint schedule, defendants 3 to 6 in an extent of Ac. 1-75 cents of land in item No. 5 of the plaint schedule, 7th defendant in an extent of Ac.0-55 cents of land in item No. 6 of the plaint schedule and 8th defendant in item No. 10 of the plaint schedule, have been setting up some interest falsely and without any authority at the instance of the 1st defendant. The alleged alienations in their favour are only collusive, nominal and without any effect and do not bind the plaintiff. It was also pleaded that Late Devarakonda Sessaiah and the defendants 2 to 7 have been sought to be impleaded as parties in I.A.No. 125/80 and when the said petition was pending the said Sessaiah died. Therefore, the defendants 9 to 13 have been impleaded as legal representatives of the deceased Sessaiah. Subsequent to the filing of the suit, defendants 9 to 13 have been impleaded as parties with a view to enable this Court to adjudicate all the matters involved in the suit and hence the plaintiff was constrained to file the suit for partition and for separate possession of the property.

4. The 1st defendant filed a written statement with the following allegations:

It was pleaded that the material allegations in the plaint are neither true nor tenable under law. By the date of the Will, as per the recitals therein, Peraiah had debts to be discharged and the plaintiff and defendant were by then unmarried. He, therefore, gave power to his wife Seshamma to sell property to the extent of Ac. 2-00, if necessary for the said purpose. By the time of the death of the said Peraiah, he was indebted to a tune of about Rs. 10,000/-. So, in the management of the properties the said Seshamma discharged the debts due by her husband and got the plaintiff married in October 1966 spending about Rs. 10,000/-towards marriage expenses and she purchased from Venkatramayya under sale deed dated 28-4-1965 for Rs. 6,000/- his half share in the terraced dwelling house and sites i.e., items 8 to 10 of the plaint schedule and Ac.0-37 cents in R.S.No. 89/2 of Vandram village and as she thought it absolutely necessary to preserve the family house in tact, she made the abovementioned purchase. It was further pleaded that late Peraiah, during his lifetime, gave item No. 6 of the plaint schedule and took Ac.0-55 cents out of Ac.0-67 cents covered by R.S. No. 163/2 of Narasingarajupuram Agraharam from Yeleswarapu Suryanarayanamurthy and hence item No. 6 never devolved on the plaintiff and the 1st defendant. Seshamma - the widow of Peraiah, sold away the properties mentioned in the plaint schedule during her life time for the purposed mentioned above in the management of the family property for family necessity and put the purchasers in possession of the properties sold under the sale deeds. It was further pleaded that item Nos. 3 and 4 of the plaint schedule i.e., R.S.No. 160/1 - Ac.O-12 cents and R.S.No. 160/3 - Ac. 2-97 cents, are contiguous plots and out of the said Ac.3-09 cents, she sold Ac. 1-00 of land to Devarakonda Seshaiiah under a sale deed dated 30-6-1967 and she also sold item No. 7 of the plaint schedule with her own Ac.0-37 cents in the said item Ac.0-74 cents in R.S.No. 89/2 of Vandram village to Konduri Sriramachandramurthy and Viswanadham under a sale deed dated 5-9-1970. She sold Ac.0-25 cents in R.S.No. 120/2 - item No. 1 of the plaint schedule, to Vegesina Krishna Raju under a sale deed dated 6-4-1965. She also sold Ac. 0-55 cents out of Ac. 0-67 cents covered by R.S.No. 163/2 of N.R.P. Agraharam which late Peraiah got under the exchange deed from Yeleswarapu Suryanarayana Murthy, to Kavuru Koteswara Rao under a sale deed dated 6-5-1974. Seshamma sold item No. 10 of the plaint schedule, which measured only 2424 sq. yards to Kadali Mahankali under a sale deed dated 2-2-1976. After Seshamma's death during the minority of the 1st defendant, the plaintiff and the said Venkatramayya as guardian of the 1st defendant, entered into a sale agreement dated 27-7-1977 to sell Ac. 1-75 cents in Ac. 2-51 cents covered by R.S.No. 168/3 of N.R.P. Agraharam i.e., item No. 5 of the plaint schedule to Polamuru Devashayam, Tarlapati Davidu and his wife Sundamma for Rs. 23,276/- for the purpose of discharging debts etc. It was further pleaded that after the aforesaid alienations, only on extent of Ac.3-29 cents remained for partition between the plaintiff and the 1st defendant. The said Venkatramayya was disputing that the relinquishment deed is not valid as it did not

comprise the entire property of late Peraiah and as the property purchased by late Seshamma from him was also included therein. Under the said circumstances, on the advise of Josyula Puurushottm garu, advocate of Kaikaluru the plaintiff and the said Venkatamayya as guardian of the 1st defendant, entered into an agreement to settle their family disputes. According to the said settlement, the plaintiff was to take Ac.2-00 and the 1st defendant was to take Ac.0-29 cents and leave the house and sites to their father. They executed an agreement dt. 30-7-1977 as per the said Advocate's advise to execute a deed in settlement of their family disputes in terms of the said agreement and it was pleaded that the said agreement and the unregistered Will of Peraiah are with the plaintiff. It was also pleaded that by virtue of the family settlement mentioned above, the said Venkatramayya is in possession of the family house and site covered by item Nos. 3, 8 and 9 of the plaint schedule and therefore he is a necessary party to the suit. The 1st defendant being a young unmarried woman was always ready for settlement and for partition and she was also willing for a preliminary decree being passed for partition and for possession of such property from the Receiver which the plaintiff and the 1st defendant are entitled to.

5. The 7th defendant filed a written statement pleading as follows:

The plaintiff has no right in the Gram Kantam site and the house therein. The plaintiff has no right to question the alienation of this item of the property in his favour. Late Balusu Seshamma in her individual capacity and Balusu Venkatramayya as minor guardian alienated this property for the purpose of liquidating the debts and also on account of the fact that they were not getting any income from this item of the property. For the aforesaid purpose, they have alienated the schedule mentioned property on 6-5-974 and executed a sale deed. In addition to that this property was sold in favour of the 7th defendant in order to liquidate the debts contracted by late Balusu Peraiah from his daughters. The plaintiff is fully aware of this alienation. The 7th defendant is a bona fide purchaser for valuable consideration. The alienation as made for family expenses, liquidation of debts and for the maintenance of the minors. Therefore, the plaintiff has no right to question the alienation since the sale proceeds were utilized for their maintenance and the alienation is binding on the plaintiff. The plaintiff, in collusion with the 1st defendant, filed the suit with a view to defeat the rights of the bona fide purchaser having suppressed the true facts.

6. Likewise, the 8th defendant filed a written statement denying the allegations and further pleading that the property purchased by him was Grama Kantam site lying in the village and the plaintiff has no right to question the alienation in his favour. It was also pleaded that late Balusu Seshamma and Late Balusu Venkatramayya had alienated this property on 2-2-1976 by executing a sale deed. That part, the schedule property is a self-acquired property of Balusu Seshmma. Therefore, this property is not liable for partition and the plaintiff and the 1st defendant have no right to seek

for partition of this item of the property. In the sale deed executed in favour of the 8th defendant, it was mentioned that the vendors have mentioned that the property was sold for the purpose of discharging their debts and also on account of the fact that they were not getting any income from this item of the property. It was pleaded that the plaintiff is aware of this transaction. The 8th defendant is a bona fide purchaser for valuable consideration and the consideration received under the sale deed was utilized not only for liquidating the debts, but also for the maintenance of the minors and as such it is binding on them. The plaintiff and the 1st defendant had colluded together and filed the suit with a view to defeat the rights of the 8th defendant and thereby grab the property from him.

7. Defendants 9 and 10 had filed separate written statements pleading as follows:

8. The suit is barred by limitation. The 9th defendant is the widow of late Seshayya while the 10th defendant is their son. Item Nos. 3 and 4 of the plaint schedule measuring Ac.1-00 in R.S.No. 160/1 and R.S.No. 160/3 were got by these defendants by a registered Will dated 17-6-1968 executed by late Seshayya. Seshayya purchased this Ac. 1-00 from Balusu Seshamma - the paternal grandmother of the plaintiff and the 1st defendant, in her individual capacity and as guardian of the plaintiff and the 1st defendant, by way of a registered sale deed dated 30-6-1967 for Rs. 4,000/- and the said sale was solely for discharging the debts made for the marriage of the plaintiff. Eversince then, late Seshayya was in occupation and possession of Ac. 1-00 and after his death, the defendants 9 and 10 are in possession to the exclusion of all. Seshayya gave vouchers at the time of the execution of the sale in token of the receipt of the consideration. Late Seshamma gave security for the sale of Ac.1-00 in case the plaintiff and the 1st defendant dispute the alienation. The sale item was shown as A schedule, which the property covered by security was shown as B schedule in the sale deed. Therefore, the alienation is legal and valid. It was further pleaded that the father of the plaintiff and the 1st defendant is not a party to the sale deed. But, in the sale deed it was mentioned that Seshamma got this item of the property from her husband Peraiah who executed a Will dated 18-9-1963 authorising Seshamma to dispose of some property in case the usufruct on the land was not sufficient to perform the marriages of the plaintiff and the 1st defendant. The plaintiff and the 1st defendant are parties to this alienation. Therefore they are estopped from disputing the same and the plaintiff had not chose to question the validity of the sale deed dated 30-6-1967 within time. Therefore, the defendants 9 and 10 have perfected their right by adverse possession against the plaintiff. The plaintiff, her husband, the 1st defendant and their father know this alienation made in favour of Seshayya.

9. The plaintiff also filed rejoinders as against the written statements filed by defendants 7 and 8 and had pleaded that the alleged sale deed said to have been executed in favour of the 8th defendant is neither true nor valid and supported by consideration and it is a sham and collusive document and the possession of the

said property was continuous in the family of the plaintiff wherein she has got a joint interest. It was also pleaded that it is not true that Venkatramayya had contracted some debts for his daughters and for the discharge of the same, he had sold the property to the 7th defendant. It was further pleaded that it is absurd to contend that Venkatramaiah contracted debts from his own daughters and this itself would show that the entire execution is bogus and therefore the alienation in favour of the 7th defendant is neither true, nor valid and binding on the plaintiff and the alleged document in favour of the 8th defendant is neither true, nor valid and supported by consideration and it is not binding and this item also continues to be in joint possession of the plaintiff and the 1st defendant and the 8th defendant was never in possession of the property at any time and it is false that the said property is the absolute property of late Seshamma. The alienation in favour of the 8th defendant is nominal, sham and collusive and the document was never acted upon.

10. On the strength of the respective pleadings of the parties, the following Issues and additional Issues were settled:

Issues:

- (1) Whether late Seshamma sold away part of items 3,4,7,1 and item 10 of the plaintiff schedule for family necessity?
- (2) Whether the plaintiff and the defendants guardian sold away item No. 5 of plaintiff schedule land to discharge debts?
- (3) Whether the suit parties entered into settlement agreement on 30-7-1977 wherein the plaintiff agreed to take Ac.2-00 and the defendant to take Ac.1-29 cents and leave the land and site to their father?
- (4) Whether the suit is bad for nonjoinder of necessary parties?
- (5) Whether the defendants 8 and 9 are bona fide purchasers for valuable consideration of items 3,4 extending Ac. 1-00?
- (6) Whether the defendants 8 and 9 have perfected their title over one acre of items 3 and 4 of plaintiff schedule?
- (7) Whether the suit is barred by the law of limitation?
- (8) Whether the 7th defendant is bona fide purchaser for the value from Balusu Seshamma and Balusu Venkatramayya and the plaintiff site is in his possession?
- (9) Whether Balusu Venkatramaiah and Mahankali obtained an agreement of sale regarding Ac.0-44 cents of land in R.S. No. 155/3 from 1st defendant?
- (10) Whether the plaintiff is entitled for the partition of the suit properties as prayed for?
- (11) To what relief?

Additional Issue:

Whether the property sold to 8th defendant is the self acquired property of late Seshamma?

11. On 13-8-1986, a joint memo was filed before the court below to delete the issues already settled and fresh Issues were settled as specified hereunder:

(1) Whether the alienations in favour of D-7 to P-9 are true and valid?

(2) Whether the plaintiff is entitled to the partition of an extent of Ac. 1-00 in items 3 and 4 for partition of the properties covered by item Nos. 5 and 10 of the plaint schedule?

(3) To what relief?

12. After settlement of the Issues, before the trial Court, P.W.I to P.W.4 and D.W.I to D.W.9 were examined and Exs.A-1 to A-25 and Exs.B-1 to B-8 and Exs.X-1 to X-2 were marked. The trial Court ultimately had passed a preliminary decree in favour of the plaintiff with costs against all the defendants, except the 7th defendant and the suit against the 7th defendant was dismissed with costs and aggrieved by the same, the respective parties had preferred the above Appeals.

13. Sri E.S. Ramachandra Murthy, the learned Counsel representing the 10th defendant - the legal representative of the 2nd defendant - appellant in A.S.No. 1910/ 87, had contended that the father of the appellant had purchased the property under Ex.B-5 and the learned Counsel also had contended that the payment of Court fee on the ground that the plaintiff is in joint possession of the property itself is not in accordance with law since she is out of possession. The learned Counsel also contended that the plaintiff had not prayed for cancellation of the document. The learned Counsel no doubt had taken me through oral and documentary evidence and had pointed out that Ex.A-2 was not proved in accordance with law and the suit for partition itself is not maintainable and at any rate the suit is barred by limitation. The learned Counsel had taken me through the evidence of P.W.I and also Ex.A-3. The learned Counsel also contended that in the absence of a Will, the granddaughters Will not come into picture at all and hence inasmuch as the Will was not proved in accordance with Section 68 of the Indian Evidence Act, the suit is liable to be dismissed on that ground alone. The learned counsel further contended that though the alienations were made long back and the alienees have been in possession of the property the plaintiff had not thought of instituting the suit within the period of limitation and these parties are bona fide parties who had purchased the property. The learned Counsel also had contended that even if the recitals in Ex.A-2 are taken into consideration, in the light of the fact that these documents were executed for discharging debts, these are valid transactions. The learned Counsel also had contended that the documentary evidence Ex.B-5 and B-6, had not been appreciated properly and the evidence of

D.W.3 the father of the plaintiff, also was not appreciated in the right spirit. The learned Counsel further contended that though the power to sell Acs. 2-00 had been specified, the details are not clear and the finding recorded by the trial Court at paragraph 18 of the Judgment is contrary to the recitals and also the evidence. Elaborate submissions were made on the oral and documentary evidence also available on record and ultimately the learned Counsel placed strong reliance on [Kashibai and Another Vs. Parwatibai and Others](#), and also *Thakkar Varajlal Bhimjee v. Thakkar Jamnadas Valjee and Anr.*, (1994) 4 SCC 723 .

14. Sri Veerabhadrayya, the learned Counsel representing the 8th defendant -appellant in A.S.No. 2802/87 had drawn my attention to paragraph 20 of the Judgment and had contended that the 8th defendant is entitled to the entire extent being the bona fide purchaser. The learned Counsel further appreciated that if all the recitals of Ex.A-2 are to be accepted, Peraiah had incurred debts and his wife was given the power to the properties for the purpose specified therein and the purchaser is a bona fide purchaser from her and the son and in view of the fact that the wife was given the power to sell the properties for the reasons specified, the alienation cannot be assailed in any way. The learned Counsel also had pointed out the question of limitation and also had further submitted that the trial court had not appreciated both facts and law in proper perspective.

15. Sri Dharma Rao, the learned Counsel representing the contesting respondent/ plaintiff who was successful in the trial court had submitted that there is no denial relating to the validity of the Will and when no plea was raised and no Issue was framed, for the first time at the appellate stage the appellant cannot be permitted to raise such a ground. The learned Counsel also submitted that when there is no specific denial of the Will as such, there is no necessity of proving the Will in accordance with Section 68 of the Indian Evidence Act. The learned Counsel had placed reliance on *Balappa Thipanna v. Asangappa Mallappa and Anr.*, AIR 1950 Mysore 234 [Chhuttan Lal Vs. Shanti Prakash and Others](#), , [Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and Another](#), The learned Counsel further contended that the plaintiff is a non-party to these alienations and hence the plaintiff need not ask specifically for cancellation or in view of the peculiar facts it is not necessary that the plaintiff should have filed the suit within three years from the date of the said alienations and hence on that ground it cannot be said that the suit is beyond limitation. The learned Counsel further had placed strong reliance on *Kidar Nath v. Emperor*, AIR 1929 Lahore 817, [Patamata Seshagiri Rao Vs. Pamidimukkala Sree Ramachandra Rao and others](#), and also [Mst. Gulkandi and Others Vs. Prahlad and Another](#),

16. Heard the counsel on record and also perused the oral and documentary evidence.

17. In view of the respective contentions of the parties, the following Points arise for consideration in this Appeal:

- (a) Whether Seshamma is entitled to alienate the properties exceeding Acs.2-00?
- (b) Whether Ex.A-2 was proved in accordance with law?
- (c) Whether the alienations in favour of 7th defendant and 8th defendant are valid and binding on the plaintiff?
- (d) Whether the suit is within limitation?
- (e) To what relief the parties are entitled to?

18. Points (a) to (c), in view of the fact that the factual aspects are common, can be discussed together for the purpose of convenience.

19. The parties are referred to as shown in the original suit.

20. As already stated supra, the plaintiff filed the suit for partition. Ex.A-2 is the crucial document on which elaborate arguments had been advanced. The counsel representing the alienees had contended that the Will itself is not proved and in the alternative even if the recitals of the Will are taken into consideration, the alienations in their favour are to be upheld. The factual aspects as narrated in the pleadings need not be repeated again. However, to be in brief, the 1st plaintiff and the 1st defendant are the sisters, being the daughters of one Balusu Venkatramayya s/o. Peraiah. Late Balusu Peraiah and Venkatramaiah had partitioned their properties on 25-2-1959 under a registered partition which was marked as Ex.A-1. Peraiah executed a Will dated 18-9-1963, marked as Ex.A-2 and this is the most crucial document as already specified supra. Under the said Will, late Peraiah made provision to his wife Balusu Seshamma for enjoyment of the properties covered thereunder during her lifetime imposing certain restrictions on alienations in fulfilment of certain obligations placed on her and subsequent to the execution of Ex.A-2, Peraiah died and his wife Seshamma enjoyed the said properties with life interest and she died in the year 1976. The plaintiff and the 1st defendant are the daughters of Venkatramayya s/o. Seshamma. The stand taken by the plaintiff, the granddaughter of Seshamma, is that Seshamma had no authority to alienate more than Ac.2-00 of land in view of the recitals in Ex.A-2 and hence the alienations in favour of defendants 7,8 and 9 as per Ex.B-1, and B-5 are not valid. The defendants had resisted the suit on the ground that their vendor Seshamma and others had got the right to alienate the properties as per Ex.A-2 and had conveyed the title by executing the sale deeds. The recitals of Ex.A-2 go to show that late Peraiah had Acs. 10-00 of land and a terraced building and vacant sites as specified therein and it was also mentioned that he had some debts and certain obligations of performing the marriages of his son's daughters, who are the plaintiff and the 1st defendant. The recitals also go to show that he had authroized his wife Seshamma to perform the obligations and she was authorized to alienate Acs.2-00 of land out of Acs. 10-00 and in the event of non-possibility of fulfilment of other obligations, certain other conditions also had been specified. Venkatramayya - the only son of late Peraiah and

Seshamma, was examined as D.W.3 and no doubt he had deposed that his mother Seshamma might have discharged the debts by alienating the properties covered by Exs.A-24 and A-25. Under the original of Ex.A-24, an extent of Acs. 1-15 cents was sold by Seshamma on 11-9-1965 in favour of Suryakantham who in turn had sold away the said item of the property to P.W.4. Ex.A-25 is the registration extract of the sale deed whereby Seshamma sold away an extent of Acs. 0-85 cents on 18-4-1965 in favour of P.W.3. The recitals in Ex.A-24 reveal that the alienation was made for the purpose of discharging certain debts. No doubt, the counsel for the appellant on one breath had attacked the validity of Ex.A-2 and on the other breath had placed reliance on the recitals therein and in view of the fact that for discharge of debts, alienations can be made, even exceeding the extent of Acs. 2-00 of land which had been specified and in the light of the recitals specified in the document, the finding of the trial Court cannot be sustained.

21. Ex.A-3 is the relinquishment deed executed by plaintiff's father in favour of the plaintiff and her sister. Ex.A-4 is the office copy of the registered notice. Exs.A-5 to A-18 are the acknowledgments. Ex.A-19 is the office copy of reply notice sent by defendants 3 and 5. Ex.A-20 is the office copy of reply notice issued to defendants 3 and 5 and the plaintiff by the 1st defendant. Likewise, Ex.A-21 is the office copy of the reply notice issued by the plaintiff and the 1st defendant. Ex.A-22 is the office copy of the letter addressed to the Sub-Registrar. Ex.A-23 is the endorsement of the Sub-Registrar and Ex.A-24 is the extract of sale deed executed by Seshamma in favour of Suryakantham and Ex.A-25 is the extract of another sale deed. Ex.X-1 is the sale deed executed by Balusu Venkatramayya in-favour of Balusu Seshamma and a portion of it was marked as Ex.X-2. Ex.B-1 dated 6-5-1974 is the registered sale deed executed by Balusu Venkata Ramanamma's guardian Balusu Seshamma. Ex.B-2 is the stamped receipt. Ex.B-3 is the sale deed executed by Balusu Seshamma and another in favour of Mahankali dated 2-2-1976. Ex.B-4 is the promissory note executed by Balusu Seshamma and others in favour of D.W.8, dated 1-9-1966. Ex. B-5 is the registered sale deed executed by Balusu Seshamma and others in favour of Devarakonda Seshayya, dated 30-6-1967. Ex.B-6 is the endorsement of discharge made on Ex.B-4. Ex.B-7 is the receipt issued by Undi Rural Bank. Ex.B-8 is the Will executed by Devarakonda Seshayya, dated 17-6-1966. The oral and documentary evidence had been discussed in detail and I would have gone into the other oral evidence also in detail, but for the fact that an objection was raised at the appellate stage that the very foundation of the suit is based on Ex.A-2 which was not proved in accordance with law. No doubt, the oral evidence had been let in and the witness had deposed several of the aspects.

22. Section 68 of the Indian Evidence Act reads as hereunder:

Proof of execution of document required by law to be attested:

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its

execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (6 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied".

It was strongly contended that whether there is a specific denial or not relating to the Will, the Will has to be proved in accordance with law as per the provisions of Section 68 of the Indian Evidence Act. Section 68 proviso specifies that it shall not be necessary to call an attesting witness in proof of a document not being a Will which has been registered in accordance with the provisions of the Indian Registration Act unless its execution by the person by whom it purports to have been executed is specifically denied. In the present case, the dispute relates to Ex.A-2, a Will. Strong reliance was placed on the decision referred (1) supra for the purpose that the due execution of the Will has to be proved in accordance with Section 68 of the Indian Evidence Act, 1872. Reliance also was placed on the decision referred (2) supra wherein the proof of execution of a mortgage deed had been dealt with. The learned Counsel representing the 1st respondent/plaintiff had placed strong reliance on the decision referred (3) supra and also (4) supra and had contended that inasmuch as there is no specific denial of the Will there is no necessity of proving the Will in accordance with Section 68 of the Indian Evidence Act, 1872. It was also further contended that inasmuch as the 1st respondent/plaintiff is not a party to the alienations, there is necessity of bringing an action within a period of three years and hence the question of limitation also does not arise in such a case. Strong reliance was placed on the decisions referred (6) and (8) supra.

23. As can be seen from the, material available on record, there is no specific denial relating to the execution of the Will and the trial Court had recorded findings proceeding on the ground that there is no dispute at all relating to Ex.A-2 and basing on the recitals of the said Will Ex.A-2, findings had been recorded. The learned Counsel for the 1st respondent/plaintiff had placed strong reliance on the decision referred (5) supra wherein it was held that a new point, the plea of execution of a document required to be attested was not proved, when not raised in the court below cannot be allowed to be raised in Appeal before the Supreme Court and on the strength of the said ratio the learned Counsel contended that inasmuch as this question was not raised before the trial Court the same cannot be permitted to be raised in the Appeal.

24. It is no doubt true that the said question was not raised, nor an Issue was framed in this regard. But however, it is the proof of a document in accordance with the provisions of the Indian Evidence Act and Section 68 is clear and categorical on this aspect. When that being so, the mere fact that the plea was not raised or the

Issue was not framed and hence such question cannot be permitted to be raised in Appeal, cannot be accepted since it is a pure question of law which need not be established by adducing any evidence at all, and it is absence of the proof of the execution which is contemplated by Section 68 of the Indian Evidence Act, 1872 and inasmuch as no plea was raised and the trial Court had recorded findings proceeding on the ground that it is only the interpretation of the recitals of Ex.A-2 on which the rights of the parties had to be decided in the light of the respective contentions of the parties, and inasmuch as the said ground is raised in the Appeal, if opportunity is not given to the 1st respondent/plaintiff to adduce further evidence if any relating to Ex.A-2, I am of the considered opinion that the 1st respondent/plaintiff would be put to serious loss and prejudice too. Hence, though the other aspects relating to limitation had been argued at length, I am inclined to frame the Issue specified hereunder and remit the matter back to the trial Court for the purpose of adducing further evidence by both the parties in this regard.

25. "Whether the Will Ex.A-2 is true, valid and binding on the parties to the suit".

26. In view of the fact that an additional issue is framed by this Court and the matter is being remanded, I had not discussed the other oral evidence and in this view of the matter, all the questions are left open between the parties and the parties are at liberty to agitate all the other issues also by letting in further evidence too, if they are so advised in this regard.

Point (e): In the light of the findings recorded above, the judgments and decrees of the trial Court are hereby set aside and the matter is remanded to the trial Court for the purpose of disposing of the matter in accordance with law in the light of the findings recorded above. The appeals are allowed so far as the subject matter of these appeals is concerned to the extent indicated above. No order as to costs.