

THE HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL Nos.504 AND 508 OF 2011

COMMON JUDGMENT:

These two appeals, under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC'), are filed challenging the Decrees and judgments dated 31.12.2007 in A.S. No.61 of 2004 and A.S. No.62 of 2004 respectively passed by the VI Additional District Judge (FTC), Markapur, affirming the common judgment dated 10.03.2004 in O.S. Nos.30 of 1997 and 40 of 2001 passed by the Senior Civil Judge, Markapur.

The trial court decreed the suit O.S. No.30 of 1997 declaring that the first respondent herein is the owner of schedule property and respondents 2 and 3 are the purchasers of the same. However, during pendency of the suit, third respondent herein died and his legal representatives were brought on record as respondents 4 to 6 vide order in I.A. No.862 of 1999 dated 28.07.1999. Whereas defendants 3 and 4 in O.S. No.30 of 1997 filed another suit O.S. No.40 of 2001 for grant of perpetual injunction restraining the respondents in these appeals, and the said suit was dismissed by the trial court.

Before the trial court, based on a Memo, joint trial was conducted, recorded common evidence in O.S. No.30 of 1997, since it is a comprehensive suit.

Respondents in SA No.508 of 2011 are the plaintiffs in O.S. No.30 of 1997 and the plaintiffs 1 to 3 in the said suit were the defendants 1 to 3 in O.S. No.40 of 2001, whereas defendants 3 and 4 in O.S. No.30 of 1997 are the plaintiffs in O.S. No.40 of

2001. Since the claim is in respect of the same property, due to setting up a rival claim over the property, the trial court recorded findings based on the evidence recorded in O.S. No.30 of 1997, upon hearing the argument of both the counsel.

Respondents 1 to 6 in SA No.508 of 2011 filed suit O.S. No.30 of 1997 for declaration title of first plaintiff in respect of items 2 and 3, and the title of plaintiffs 2 to 6 in respect of item 1 of schedule property, and for grant of permanent injunction restraining the defendants and their men from interfering with the peaceful possession and enjoyment of the property. Whereas defendants 3 and 4 in O.S. No.30 of 1997 filed separate suit O.S. No.40 of 2001 for grant of perpetual injunction restraining the defendants therein (plaintiffs in O.S. No.30 of 1997) from interfering with their peaceful possession and enjoyment of the same property.

The pleading in the plaint in O.S. No.30 of 1997 and written statement in O.S. No.40 of 2001 are one and the same and similarly the written statement in O.S. No.30 of 1997 and the plea raised by the first plaintiff in O.S. No.40 of 2001 is similar as that of the plea raised in the allegations made in the plaint in O.S. No.40 of 2001. Therefore, to avoid conflict in reference to the parties, the parties hereinafter referred to as appellants and respondents, for convenience.

The case of the first respondent in SA No.508 of 2011, who is the first plaintiff in O.S. No.30 of 1997, is that herself and the first appellant are sister and brother and the second appellant is the wife of the first appellant. Respondents 2 and 3 are the purchasers of item 1 of schedule property, who are allegedly in

possession and enjoyment of the same, whereas items 2 and 3 are in her possession and enjoyment.

It is her case that the schedule property is the self acquired property of her father-Jenigorla Guravaiah, during his life time, in sound disposing state of mind, executed a Will dated 22.06.1989 bequeathing 'A' schedule property to his wife-Obulamma and 'B' schedule property to his daughter, who is physically handicap and a spinster, whereas 'C' schedule property was bequeathed to his son- first appellant herein who is mentally infirm. The said Will is the last testament of Guravaiah, father of the first respondent and the first appellant herein. He died on 06.02.1994 at Thimmapuram. After the death of their father-Guravaiah, their mother-Obulamma succeeded right in A, B, C schedule property as legatee under the Will. Thus they became absolute owners of A, B, C schedule properties in terms of Will dated 22.06.1989.

While the mater stood thus, Obulamma-mother of the first respondent and first appellant, out of her love and affection towards the first respondent, in sound disposing state of mind, executed Will dated 10.04.1994, bequeathed 'B' schedule property covered by the Will to the first respondent. The said Obulamma died on 09.08.1994. Consequently the first respondent succeeded the property described as items 1 and 2 of the plaint schedule property and took possession of the same, continuing in possession and enjoyment of the same.

The first respondent also got item 3 of plaint schedule property i.e. terrace of the house and also an amount of Ac.2.68 cents in S.No.63/3 of Thimmapuram Village by virtue of registered Will dated 22.06.1989 executed by her father

Guravaiah. The first respondent sold the land to the second respondent (SA No.504 of 2011) for valuable consideration, delivered possession of the same, in turn the second respondent sold away the said land to appellants, who are in possession and enjoyment of the same.

The first respondent sold item 1 of schedule property to plaintiffs 2 and 3 on 13.03.1996 for a valuable consideration of Rs.44,000/- and delivered possession of the schedule property to them. Prior to the death of the said Obulamma, item 1 of the schedule property was leased out to Subbaiah and after the death of said Obulamma, the first respondent succeeded the same as legatee under the Will, Subbaiah continued in possession and enjoyment of the said property as a tenant.

Thus, the respondents became absolute owners of various items of the property referred to supra, but the first appellant/ first defendant represented by his wife, who is second appellant (SA 508 OF 2011)/ second defendant in O.S. No.30 of 1997 filed O.S. No.59 of 1994 on the file of Senior Civil Judge, in respect of item 1 of plaint schedule property along with other properties. The contest of the plaintiff in the said suit that the property is joint family property and alienated several items of the property, later adjusted out side the court, however, the first appellant with the active support of the second appellant got started threatening, interfering with their peaceful possession and enjoyment of the schedule property shown in the schedule. Thereupon, the plaintiff in the said suit got issued a legal notice dated 03.08.1996 to the first appellant and the tenant Jenigorla Subbaiah, but the first appellant got issued a contentious reply,

denied her right over the schedule property. Therefore, in those circumstances, the first respondent along with respondents 2 and 3 filed suit for declaration and consequential permanent injunction.

The first appellant represented by second appellant resisted the claim setting up another Will dated 06.08.1994 executed by Obulamma bequeathing her share of property to the first appellant while denying the Will set up by the first respondent dated 10.04.1994 and 22.06.1989 executed by Obulamma and Guravaiah and claimed exclusive right over the property as a legatee under the Will executed by Obulamma, mother of the first appellant, and that the first appellant alone is in possession and enjoyment of the property and prayed for dismissal of the suit.

The appellants filed suit for perpetual injunction in O.S. No.40 of 2001 repeating the same allegations contending that they are in possession and enjoyment of the property after death of Obulamma by virtue of the Will dated 06.08.1994 while denying the right of respondents 1 to 3. But made serious allegations of threat to interfere with the peaceful possession and enjoyment of the property and sought for perpetual injunction.

Whereas respondents 1 to 3 contested the suit reiterating the pleas raised in O.S. No.30 of 1997 while asserting that they are in possession of the schedule property.

Based on the above pleadings, the trial court framed separate issues in both the suits.

Upon hearing argument both the counsel, the trial court believed the Will marked as Exs.A.1 and A.2 dated 22.06.1989 executed by J.Guravaiah in favour of J.Guramma and

J.Obulamma and another Will dated 10.04.1994 unregistered Will executed by J.Obulamma, mother of the first respondent, and the first appellant in favour of J.Guramma, the first respondent herein, while disbelieving the Will dated 06.08.1994 marked as Ex.B.1 allegedly executed by Obulamma in favour of the first appellant and upheld the claim of the plaintiffs in O.S. No.30 of 19997 based on the decree declaring that the plaintiff in O.S. No.30 of 1997 and the respondents herein are the owners of the property and granted perpetual injunction restraining the appellants from interfering with their peaceful possession and enjoyment of the property while dismissing O.S. No.40 of 1997.

The entire dispute is revolving around Exs.A.2 and B.1 dated 10.04.1994 and 06.08.1994 allegedly executed by Obulamma one in favour of first respondent and the other in favour of the first appellant bequeathing her share of property in their favour.

The trial court and the first appellate court disbelieved the Will marked as Ex.B.1 dated 06.08.1994 set up by the appellants while accepting Ex.A.2 Will dated 10.04.1994 unregistered executed by Obulamma in favour of the first respondent.

The present appeal is filed raising several contentions regarding the appreciation of evidence, while contending that concurrent finding recorded by both the Courts are not in accordance with law and Ex.A.2 was not proved by the propounder of the Will as required under Section 68 of Indian Evidence Act, 1872 and Section 63 of Indian Succession Act, 1925. The only question of law raised before this Court in both the appeals is regarding genuineness of Ex.A.2 and B.1.

Undoubtedly, the Will is a testament executed by a living person in favour of any person bequeathing his property making certain arrangements after her death. Section 2(h) of Indian Succession Act defined the word 'Will' as legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It would come in to operation after the death of testatrix. This is almost an equivalent statement of a person, who died subsequently, the Will is required to be proved under special rules contained in Sections 68 to 70 of Indian Evidence Act and Sections 63 and 64 of Indian Succession Act.

According to Section 68 of Indian Evidence Act, Will is compulsorily attestable document. To prove such Will, the propounder has to establish due execution of Will, dispelling suspicious circumstances surrounded in the execution of Will by adducing cogent and satisfactory evidence as held by the Apex Court **SMT. INDU BALA BOSE AND OTHERS VS. MANINDRA CHANDRA BOSE AND ANOTHER**¹, **MALAPATI SURYAMBA AND OTHERS VS. VENIGALLA KOTESWARAMMA AND OTHERS**², **BALATHANDAYUTHAM AND ANOTHER VS. EZHILARASAN**³, **S.R. SRINIVASA AND OTHERS VS. S. PADMAVATHAMMA**⁴, **JOSEPH ANTONY LAZARUS (DEAD) BY LRS VS. A.J. FRANCIS**⁵, **RANI PURNIMA DEBI AND ANOTHER VS. KUMAR KHAGENDRA NARAYAN DEB AND ANOTHER**⁶,

¹ AIR 1982 Supreme Court, 133

² 2010(1) ALT 228

³ 2010(4) ALT page 8 (SC)

⁴ 2010(4) ALT page 12

⁵ 2006(3) ALT, page 87 (SC)

⁶ AIR 1962 SC, page 567

**LALITABEN JAYANTILAL POPAT VS. PRAGNABEN JAMNADAS
KATARIA & OTHERS⁷, RAMCHANDRA RAMBUX, VS.
CHAMPABAI AND OTHERS⁸, BANDLAMURI VENAKTESWARA
VS. JANIKAMMA AND OTHERS⁹, GIRJA DATT SINGH
V.GANGOTRI DATT SINGH¹⁰.**

In the present facts of the case, the first respondent/
plaintiff examined first attesor of Ex.A.2 - Will as P.W.2 and the
testimony of P.W.2 is free from any doubts and both the trial
court and the first appellate court believed the evidence of P.W.2,
attesor of Ex.A.2, since his testimony is specific that in the
presence of himself and other attesor, the executant affixed her
thumb impression on Ex.A.2. Thus in his presence alone,
testatrix affixed her thumb impression on Ex.A.2 and he
identified his signature on Ex.A.2 Will, first attesor. No
suspicious circumstances were pointed out to the witnesses -
P.Ws.1 and 2 in execution of Ex.A.2 Will so as to enable them to
dispel such suspicious circumstances by adducing cogent and
satisfactory evidence. His evidence further disclosed that
Bhujanga Rao is the scribe of the document, who was examined
as P.W.5 and his consistent evidence before the trial court is
suffice to believe the evidence on record and much credence can
be attached to such statement. Therefore, both the trial court and
the appellate court believed the evidence to P.Ws.1, 2 and 5, the
attestors and propounder of the Will, the first attesor and the
scribe, and upheld the Will marked as Ex.A.2 executed by mother

⁷ 2009 AIR SCW, page 828

⁸ AIR 1965 Supreme Court, page 354

⁹ 2005(4) ALT, page 16 (D.B)

¹⁰ AIR 1955 SC 346

of the first respondent and the first appellant- Obulamma, thereby bequeath covered by Ex.A.2 in favour of first respondent was accepted.

Whereas the first appellant set up another Will dated 06.08.1994 marked as Ex.B.1. While answering issue No.6 in O.S. No.30 of 1997 the trial court recorded a specific finding, disbelieved the Will marked as Ex.B.1 executed by Obulamma-mother of the first appellant and the first respondent and mother-in-law of the second defendant. The evidence of D.W.1 is consistent that she served her mother-in-law, Obulamma and her mother-in-law inclined to execute Will in her favour bequeathing some of her property and executed the Will. The evidence of D.Ws.2 and 3 is in support of her case, but the scribe was not examined and for non-examination no explanation was offered. Thus, the only witnesses available to prove the Will are D.Ws.2 and 3.

The trial court pointed out that by the date of execution of Ex.B.1, Obulamma has been residing with them. Ex.B.2 certified copy of the plaint in O.S. No.59 of 1994 filed by J. Obulamma representing her husband (second appellant) who is unsound mind, specifically asserted that there are disputes between defendants 1 and 2 on one hand and testatrix-Obulamma on the other in O.S. No.59 of 1994 and the plaint in O.S. No.59 of 1994 was presented on 05.08.1994, Ex.B.3 is certified copy of decree and Judgment in O.S. No.59 of 1994 dated 11.02.1995 dismissing the suit on the basis of Memo. Thus by the date of filing suit in O.S. No.59 of 1994 there were disputes between the appellants herein and the testatrix-Obulamma, whereas alleged

Ex.B.1 executed on 06.08.1994. Thus by the date of dismissal of the suit, Ex.B.1 - Will was allegedly executed, thereby there is any amount of suspicion regarding Will, since there was bitter enmity between the parties approached the Court claiming rights. In such circumstances, it is difficult to believe the Will executed by Obulamma during pendency of the suit, since the propounder of the Will-Ex.B.1 failed to dispel the suspicious circumstances. The trial court disbelieved the Will and the appellate court affirmed it.

Yet, another strong circumstance pointed out by the trial court is that before the death, Obulamma, underwent treatment in Government Hospital, Guntur. Ex.A.11 is the doctor certificate would show that she underwent treatment in Government Hospital from 28.09.1994 and 07.08.1994, by examining P.W.8- Medical Officer, who treated Obulamma Ex.A.11 was proved. When she underwent treatment in the hospital as inpatient, question of execution of Ex.B.1 during treatment at Government Hospital, Guntur, is a strong circumstance to disbelieve execution of Ex.B.1 Will.

Therefore, the trial court rightly concluded that Ex.B.1 is not genuine and on the strength of such document, the appellants are not entitled to claim any right in the property. The question before this Court is only with regard to Will and both the trial court and the appellate court recorded concurrent findings that the Will marked as Ex.B.1 is not genuine while upholding Ex.A.2. In such case, fact finding recorded based on appreciation of evidence, this Court cannot interfere with such finding while exercising jurisdiction under Section 100 CPC, which is limited to a pure substantial question of law.

But there is an exception to such rule i.e. when the finding recorded by the Courts is perverse, this Court can interfere even in the second appeal, but it was never the contention of the appellants that the judgment of both the trial court and the appellate court are perverse. Even if such contention is raised, unless, it is, *prima facie*, established that there is perversity in the Judgment of both the courts i.e. passing a decree and judgment, without considering evidence or based on any extraneous evidence or exigencies in its jurisdiction which conferred on the trial court and the appellate court, but no such circumstances are pointed out except questioning the finding recorded by the trial court about genuineness of Ex.A.2 and disbelieving Ex.B.1. Such fact finding cannot be interfered by this Court, when those findings recorded on appreciation of evidence by the trial court and re-appreciation of evidence by the first appellate court by applying judicial mind and arrived at an independent conclusion in substantial compliance of Order 41 rule 31 of CPC.

Time and again the Apex Court laid down certain guidelines what is substantial question of law and appreciation of evidence, arriving at a conclusion based on facts is purely a question of fact and question of appreciation of the evidence would not gives rise to a substantial question of law as held by the Apex Court in **GORRELLA DURGA VARA PRASADA RAO V. INDUKURI RAM RAJU AND OTHERS**¹¹.

Order XLI, Rule 31 C.P.C. provide guidelines for the appellate court as to how the court has to proceed and decide the

¹¹ 2002 (2) ALT 589 (D.B.)

case. The provisions should be read in such a way as to require that various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: “**SUKHPAL SINGH V. KALYAN SINGH¹²**” “**GIRIJANANDINI DEVI AND ORS. V. BIJENDRA NARAIN CHOUDHARY¹³**” “**G. AMALORPAVAM AND ORS. V. R.C. DIOCESE OF MADURAI¹⁴**” “**SHIV KUMAR**

¹² AIR 1963 SC 146

¹³ AIR 1967 SC 1124

¹⁴ (2006) 3 SCC 224

**SHARMA V. SANTOSH KUMARI¹⁵ ; and “GANNMANI ANASUYA
V. PARVATINI AMARENDRA CHOWDHARY¹⁶”)**

In view of the principle laid down in the above judgments, it is mandatory for the appellate Court to independently assess the evidence of the witnesses and consider the relevant points which arise for adjudication and bearing on the evidence on those points.

If the same principle is applied to the present facts of the case, at best, the first appellate Court is required to assess or appreciate the evidence independently without depending upon the discussion in the lower Court judgment. Even if there is a defect in appreciation which would not go to the root of the case, such defect would not give rise to a substantial question of law and when a concurrent finding is recorded by both the trial court and the first appellate court, this Court cannot interfere with such finding by re-appreciating the entire evidence expressing its independent opinion, since the jurisdiction of this Court is limited to substantial question of law in second appeal.

At the stage of admission, Sri Venkateswarlu Saniseti contended that the trial court and the appellate court did not appreciate evidence and pointed out that both the courts did not consider oral evidence to establish the Will executed, marked as Ex.B.1 and to disprove the Will marked as Ex.A.2, except the above, no other contention was raised before this court.

Having considered the finding recorded by both the trial court and the first appellate court regarding Exs.A.2 and B.1, I

¹⁵ (2007) 8 SCC 600

¹⁶ AIR 2007 SC 2380

find no error warranting interference of this Court with the Decree passed by the trial court and affirmed by the appellate court recording specific finding on Exs.B.1 and A.2. Therefore, I find no substantial question of law to admit these appeals.

In the result, these appeals are dismissed at the stage of admission confirming the concurrent finding recorded by the trial court and the first appellate court, without costs.

Miscellaneous petitions, if any, pending in this second appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

04.11.2016
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