

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.694 of 2011

JUDGMENT:

Plaintiff in O.S.No.567 of 2003 on the file of Principal Junior Civil Judge, Narsapur, West Godavari, who is the respondent in A.S.No.30 of 2006 on the file of VI Additional District Judge, F.T.C. Narsapur, West Godavari, has preferred this Second Appeal challenging the dismissal of the suit by the first appellate Court by its Decree and Judgment dt. 25.04.2011.

2. For convenience of reference, the parties to the appeal are ranked as in O.S.No.567 of 2003 by the Principal Junior Civil Judge, Narsapur, through out the judgment.

3. The Plaintiff filed the suit for declaration of title; for recovery of possession and for mesne profits etc, alleging that;

(a) Late Kavali Ayyappa Naidu was the father of plaintiff and defendant No.1. Plaintiff 'A' schedule property was the self acquired property of said Ayyappa Naidu. The said Ayyappa Naidu leased out the plaintiff 'A' schedule property to defendant No.1, who agreed to pay maktha at eight bags of paddy for Sarva payable by 15th January every year and 4 bags of paddy for Dalwa payable by 15th May of every year and cash of Rs.100/- towards usufruct of coconut tress per year. Defendant No.1 was in possession of plaintiff schedule property as a tenant and thereafter he committed default in payment of maktha, the said Ayyappa Naidu got issued a registered legal notice to defendant No.1 and on receipt of notice, defendant No.1 paid maktha and obtained receipt from Ayyappa Naidu.

(b) The Ayyappa Naidu, who is the original owner, gifted plaintiff 'B' schedule property to the plaintiff towards her pasupukunkuma at the time of her marriage. In the year 1970, the said Ayyappa Naidu and his wife shifted their residence to Nandamuru Garuvu of Bhimavaram Taluk i.e., the house of the plaintiff from Agarthipalem Village as defendant No.1 and his brothers neglected both of them. Since then, they were looked after by the plaintiff till their death. Wife of Ayyappa Naidu pre-deceased to him. The plaintiff is in possession of plaintiff 'B' schedule property and he executed a registered Will dt. 17.05.1979 in sound and disposing state of mind, bequeathing the plaintiff 'A' schedule property to the plaintiff. The said Ayyappa Naidu died on 27.08.1980. Since the date of death of Ayyappa Naidu, the plaintiff became the land lady and defendant No.1, who continued as a tenant under her even after death of Ayyappa Naidu. Defendant No.1 failed to pay maktha and

committed default, the plaintiff got issued a registered Legal Notice dt. 22.11.1983 demanding him to pay maktha. Defendant No.1 having received the said legal notice got issued reply notice dt. 30.11.1983 with false allegations. After exchange of notices, defendant No.1 approached the plaintiff through elders namely Pulagam Satya Gopala Rao, the then sarpanch of Nandamuru Garuvu by name Mekala Venkateswara Rao and defendant No.1 made an offer to purchase the plaint 'A' schedule property at Rs.8,600/-and thereafter defendant No.1 obtained an agreement of sale dt. 15.12.1983 from him, thereafter defendant No.1 also executed an agreement of sale on the same day in favour of plaintiff and at that time, defendant No.1 paid Rs.2,000/- to the plaintiff towards advance.

(c) As per the terms of agreement of sale dt. 15.12.1983, defendant No.1 has to pay balance amount of sale consideration of Rs.6,600/- on or before 15.04.1984 and obtain a Registered Sale Deed, in default, defendant No.1 has to pay Rs.6,600/- along with interest at 24% per annum or the agreement would be cancelled. Defendant No.1 did not come forward to perform his part of contract and did not obtain Regd. sale deed as agreed. Though the plaintiff is ready and willing to perform her part of contract, defendant No.1 did not obtain registered sale deed and therefore, the agreement is deemed to have been cancelled, in view of the legal Notice dt. 26.06.1984. As such, defendant No.1 is liable to vacate plaint 'A' schedule property as a tenant and deliver vacant possession of the schedule property. Hence, she sought for declaration of title to the schedule property and recovery of possession along with other reliefs.

4(a). Defendant No.3 filed Written Statement and additional Written Statement, which were adopted by other defendants, contending that plaint schedule property is the ancestral property of defendants. Ayyappa Naidu had three sons namely Sriramamurthy, Defendant No.1 and Krishna Murthy. He also had two daughters namely the plaintiff and one Mandela Sarojini. His sons helped him in agricultural work and they all developed the joint family property and therefore, the property shown in 'A and B' schedule are joint family properties. The daughters of Ayyappa Naidu had no right to claim any share in plaint 'A' schedule property as they were received sufficient amount, as Pasupukunkuma at the time of their marriages.

(b) It is specifically contended that Ayyappa Naidu and his sons partitioned the joint family property long ago and in the said partition, the plaint 'A' schedule property was allotted to defendant No.1 and the deceased Defendant No.1 enjoyed the property till his death by paying land revenue to the Government and after his death, defendant Nos. 2 to 6 being the legal heirs of D.1 succeeded the estate of defendant No.1 and they are in continuous possession and enjoyment of the schedule property.

© Ayyappa Naidu sold away some extent of land to the wives of his sons and except that he did not execute any document regarding schedule property. It is further contended that Ayyappa Naidu was looked after by his sons till his death.

(d) The alleged Will is a forged document and the plaintiff created the said Will to knock away the property and by playing fraud and making false representation. Therefore, the said Will is not valid in the eye of law, hence, the plaintiff is not entitled to claim any share in plaint 'A' schedule property, as a legatee under the Will.

(e) The said Ayyappa Naidu and his sons gave some property to plaintiff and the said Sarojini at the time of their respective marriages towards Pasupukunkuma and therefore, there is no need to bequeath any property i.e., plaint 'A' schedule property, to the plaintiff.

(f) Finally, it is contended that at the request of plaintiff, the matter was placed before the elders and at the advice of elders, defendant No.1 paid Rs.2,000/- to the plaintiff and he also paid Rs.8,500/- to Sri Venkata Satyanarayana Raw and Boiled Rice Mill towards debt due by the plaintiff. He also paid Rs.1,683-10 Ps to Andhra Brank, Srungavaruksham Branch towards debt due by the plaintiff and at that time the plaintiff promised that she will never raise any dispute with regard to plaint 'A' schedule property and she executed an agreement dt. 15.12.1983 to defeat the document dt. 24.09.1989. Therefore, there was no sale agreement between plaintiff and defendant No.1. The defendants admitted the registered correspondence between the plaintiff and defendant No.1 and as the plaintiff is not entitled to claim any relief in the suit schedule property and the prayer for declaratory relief is barred by time, they prayed for dismissal of the suit.

5. Basing on the above pleadings, the trial Court framed nine issues, which are extracted hereunder, for trial:

- i) Whether the plaint 'A' schedule property was given on oral lease to D.1 by late Kavali Ayyappa Naidu ?
- ii) Whether the Will Dt. 17.5.1979 executed by late Kavali Ayyappa Naidu in favour of plaintiff No.1 bequeathing plaint 'A' schedule property is true and valid ?
- iii) Whether D.1 agreed to purchase plaint 'A' schedule land and executed agreement of sale dt. 15.12.1983?
- iv) Whether the plaintiff is entitled for recovery of possession of plaint 'A' schedule property ?
- v) Whether late Ayyappa Naidu and D.1 partitioned the joint family properties along with plaint 'A' schedule property?
- vi) Whether the agreement dt. 24.09.1989 was executed by plaintiff in favour of defendants ?
- vii) whether the plaintiff is entitled to damages as prayed for ?
- viii) Whether the plaintiff is entitled to future profits ?
- ix) To what relief ?

6. During trial, on behalf of plaintiff, PWs. 1 to 4 were examined and Exs. A.1 to

A.13 were marked. On behalf of defendants, DWs. 1 to 3 were examined and Exs. B.1 to B.3 were marked.

7. Upon hearing argument of both the counsel, the trial Court believed Ex.A.1—Will and passed a decree in favour of plaintiff granting relief of declaration of title to the plaint 'A' schedule property and ordered for delivery of the same on or before 5.06.2016 and further ordered to pay Rs.2,000/- towards past profits with future interest at the rate of 6% per annum from the date of suit till the date of realization and directed the plaintiff to file separate application for mesne profits.

8. Aggrieved by the said Decree and Judgment of the trial Court, defendant Nos. 3 to 6 filed an appeal before VI Additional District Judge, Narsapur in A.S.No.30 of 2006, which was allowed by its decree and judgment dt. 25.04.2011 setting aside Decree and Judgment of the trial Court passed in O.S.No.567 of 2003 dt.24.03.2006.

9. Aggrieved by the decree and judgment of appellate Court, the plaintiff/respondent preferred this appeal on various grounds and has formulated four substantial questions of law. Out of four substantial questions of law, Question No.1 to 3 relates to Ex.A.1—Will and Question No.4 is a question of fact and therefore, all the three substantial questions of law are treated as one and this Court formulated the substantial question of law as follows:

“Whether the plaintiff, who is the profounder of the Will, proved execution of Will marked as Ex.A.1 dt. 17.05.1979 dispelling the suspicious circumstances pointed out by the appellate Court and if so, is she entitled for declaration of title to Plaint 'A' schedule property and for recovery of possession?”

10. **Substantial Question of Law:** The trial Court believed the execution of Ex.A.1—Will by Ayyappa Naidu in sound and disposing state of mind, passed a decree in favour of plaintiff declaring that she is the absolute owner of the property while granting other consequential reliefs.

11. The Appellate Court pointed out several suspicious circumstances surrounded in the execution of Ex.A.1—Will, more particularly, for failure of the plaintiff to dispel the suspicious circumstances in execution of the Will-Ex.A.1, disbelieved Ex.A.1 and declined to grant reliefs in favour of plaintiff and dismissed the suit setting aside the Decree and Judgment of the trial Court.

12. During the course of arguments, Smt Deepika Gadde, learned counsel for appellant while reiterating the contentions urged before the trial Court mainly contended that the plaintiff proved execution of Will-Ex.A.1, as required under Special Rules of evidence, i.e. Section 68 of Indian Evidence Act, by examining one of the attestors of the Will, and discharged her burden of proof, which rests on her

being a profounder of the Will, and the defendants did not produce any evidence to disprove the execution of Ex.A.1-Will by Ayyappa Naidu in sound and disposing statement of mind. PW.2 also explained the reason for affixing thumb impression on Ex.A.1 by Ayyappa Naidu as he was suffering from illness and his hands were shaking by the date of execution of the Will. Therefore, believing the explanation of PW.2, the trial Court rightly concluded that Ayyappa Naidu affixed his thumb impression on Ex.A.1-Will, but the appellate Court erroneously concluded that the execution of EX.A.1—Will was not believed while pointing out several suspicious circumstances, which were not pointed out by the trial Court.

13. Whereas the learned counsel for respondents argued totally in support of the decree and judgment of the appellate Court in all respects while contending that in case the original Will is not available, there must be a pleading laying foundation for loss of document or in whose possession the document is available, which is the basis for claiming a right in plaint 'A' schedule property, but produced a certified copy without summoning necessary documents from the Registrar's office. On the strength of Ex.A.1 i.e., certified copy of the Will, a decree cannot be passed believing execution of Ex.A.1—Will.

14. Undoubtedly, the plaintiff being the profounder of the Will has to establish, execution of Ex.A.1 by Ayyappa Naidu in sound and disposing state of mind, to claim a right as per the terms of the Will, as a legatee in respect of plaint 'A' schedule property. Instead of producing the original Will, she produced a certified copy of the registered Will, which is marked as Ex.A.1. Undisputedly, the said Ayyappa Naidu was in the habit of signing in Telugu, but affixed his thumb impression on the original of Ex.A.1—Will. The explanation offered by the plaintiff for non-production of the original Will is that it was deposited into the bank for obtaining loan and later it was not traced by the bank authorities but after tracing it, defendant No.1 took away the original Will from the bank, as such, the Will could not be produced. When the Will is a document executed in favour of plaintiff, it is for the plaintiff to lay foundation that in whose possession the document is available, as required under Order 7 rule 14 of CPC. According to Order 7 Rule 14 of (1) CPC, where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

15. According to Order 7 Rule 14 of (2) CPC, where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is. Therefore, it is incumbent upon the plaintiff to comply the

Order 7 Rule 14 (2) of CPC, more particularly, when the document is not in her possession, but obviously for the reasons best known to the plaintiff, she did not follow the mandatory requirements under Order 7 rule 14(2) of CPC. But during the course of evidence, she explained the reason for non production. Even assuming for a moment that the explanation offered by the plaintiff is true, there is a special procedure for proving a Will since the Registrar's office is maintaining Book No.3 i.e., Register of Wills, which contains the details of the Wills and Register of Thumb Impressions, which contain the thumb impression of executants of the documents, as per the rules framed under Indian Registration Act. But, for the reasons best known to the plaintiff, she did not get summon the Registrar to produce Book No.3 i.e., Register of Wills and Thumb Impression Register to establish that Ayyappa Naidu affixed his thumb impression on the original of Ex.A.1—Will.

16. It is the contention of the plaintiff that she is entitled to produce secondary evidence and though Ex.A.1 being certified copy of registered Will, it falls within the definition of secondary evidence and on the strength of the same, she can claim a right in the property. In fact, the defendants denied the execution of registered Will by Ayyappa Naidu specifically in the Written Statement while contending that it was brought into existence by playing fraud and misrepresentation.

17. Thus, there is a specific denial about execution of Ex.A.1—Will contending that it is a forged document. However, the plea set up by the defendants are inconsistent with one another and the defendants can confine to any one of the plea and it is the consistent pleading of the defendants from the beginning that original of Ex.A.1 was not executed by Ayyappa Naidu. It is settled law that when the party wants to let in secondary evidence, they must lay foundation in the pleadings. In the absence of any foundation and leave of the Court, the plaintiff is not entitled to lead in secondary evidence.

18. In ***U. Sree v. U. Srinivas***^[1], the Apex Court relying on the judgment of Apex Court in ***J. Yashoda v. K. Shobha Rani*** (2007) 5 SCC 730, ***M. Chandra v. M. Tangamuthu and others***(2010) 9 SCC 712, ***H. Siddiqui (dead) by L.Rs v. A. Ramalingam***(2011) 4 SCC 240 and ***Samar Ghosh v. Jaya Ghosh*** (2007) 4 SCC 511, held that Section 65 of Indian Evidence Act permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section.

19. Similarly, secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original and mere admission of a document in evidence does not amount to its proof. Therefore, it is the obligation of the Court to decide the question of admissibility of a document as secondary evidence before making endorsement thereon and there must be a factual foundation in the pleadings.

20. In another judgment in *Kaliya v. State of Madhya Pradesh*^[2] the Apex Court held that it is the obligation of the Court to examine the probative value of documents produced into Court or their contents and decide the question of admissibility of a document in secondary evidence. Section 65 (c) of the Evidence Act, 1872 provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time. The Court is obliged to examine the probative value of a documents produced in Court or their contents and decide the question of admissibility of a document in secondary evidence. However, secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the Court that it was not in his possession or control of it and further that he has done what could be done to procure the production of it. Thus, the party has to account for the non production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In such a case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof, mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law.

21. The principle laid down in the above two decisions is directly applicable to the present facts of the case since no factual foundation was laid in the pleadings before the trial Court and no leave was granted to lead secondary evidence by producing a certified copy of Ex.A.1—Will.

22. It is an admitted fact that Ayyappa Naidu used to sign in Telugu on the documents, but in Ex.A.1, he allegedly affixed his thumb impression due to shaking of hands. Affixing of thumb impression on Ex.A.1 by Ayyappa Naidu is witnessed by PW.2, the attester of the document. But, without producing the original of Ex.A.1,

execution of the Will cannot be accepted. Even assuming for a moment that the original of Ex.A.1 is not available, nothing prevented the plaintiff to obtain summons to cause production of the Thumb Impression Register and Book No.3—Register of Wills to prove due execution of the Will by Ayyappa Naidu. In the absence of proof about the execution of Ex.A.1 in any of the modes pointed out by the appellate Court, the execution of Ex.A.1 cannot be believed since it is a compulsory attestable document and mere examination of the attestor without producing the original of Ex.A.1 is not suffice to believe the same since it does not bear the thumb impressions of the executants and even otherwise, it is difficult to identify the thumb impression bearing on a document. In the circumstances, the appellate Court disbelieved execution of Ex.A.1 for non production of the original of Ex.A.1—Will or at least proved execution of Ex.A.1 in any other modes by summoning Book No.3—Register of Wills and Thumb Impression Register, which contain the thumb impressions of the executants of the Will i.e, Ayyappa Naidu.

23. When the plaintiff sought for a declaratory relief, which is purely discretionary under Section 34 of Specific Relief Act, it is for the plaintiff to establish her case by adducing cogent and satisfactory evidence. But, conveniently the plaintiff avoided to produce the original of Ex.A.1—Will, which is a crucial document, to claim a right over plaint 'A' schedule property being a legatee under the Will. When the plaintiff did not lay foundation in the pleadings and failed to take steps as stated by me in the earlier paras, non-production of the original of Ex.A.1—Will is fatal. On this ground alone, the suit is liable to be dismissed when she did not approach the Court with clean hands. The trial Court did not consider the probative value of Ex.A.1—Will and accepted the genuineness of the Will based on the testimony of PW.2, who allegedly attested the original of Ex.A.1 and committed an error in believing the execution of Ex.A.1—Will and passed a decree in favour of plaintiff, but the appellate Court considered the probative value of Ex.A.1 coupled with Special Rules of Evidence contained in Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act to prove a compulsory attestable document to claim a right in the property.

24. The appellate Court also pointed out several suspicious circumstances. However, they are not relevant for deciding the issue.

25. On overall consideration of the material available on record, non production of original Will or failure to take steps to summon Sub-Registrar to produce Book No.3 – Register of Will and Thumb Impression Register maintained as per the rules under the Indian Register Act is fatal and on the strength of Ex.A.1—Will, a decree granting discretionary relief of declaration cannot be passed. Hence, I find no error in the findings of the appellate Court warranting interference of this Court while exercising

power under Article 100 of CPC, which confined to a substantial question of law. Hence, the question is answered in favour of the respondents and against the plaintiff/appellant herein.

26. In the result, this Second Appeal is dismissed, but without costs in the circumstances of the case.

As a sequel, miscellaneous petitions, if any, pending in this case, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 16-08-2016.

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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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[\[1\]](#) 2005 (5) ALD 25
[\[2\]](#) (2013) 10 SCC 758