

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.291 of 2015

JUDGMENT:

The plaintiff in O.S.No.118 of 2003 on the file of the V Additional Senior Civil Judge (FTC) at Vijayawada, who is also the appellant in A.S.No.94 of 2008 on the file of the VII Additional District & Sessions Judge, Vijayawada, having become unsuccessful in both the Courts, constrained to approach this Court by filing the present Second Appeal.

2. Heard Sri Kowturu Vinaya Kumar, learned counsel for the appellant. Though, the respondent entered appearance, there is no representation on his behalf.

3. The appellant is the plaintiff, whereas the respondent is the defendant in the O.S before the trial Court.

4. For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the O.S. before the trial Court.

5. Out of total extent of Ac.1.30 cents situated in Surayapalem Village, the plaintiff succeeded to an extent of Ac.0.40 cents, which is the subject matter of the suit. The cause of action has arisen on the ground that from the month of February, 2000, the defendant had excavated the earth to a depth of four feet in the entire extent of Ac.1.30 cents without the knowledge and consent of Srihari Rao, Tirupathi Rao, Sivanaga Kishore and Venkatramaiah for manufacturing bricks in his kiln situated adjacent to the suit property. The plaintiff ascertained a

sum of Rs.4,000/- per cent as net profit of the defendant and, thus, calculated the damages and filed the aforesaid original suit for recovery of Rs.1,60,000/- towards damages with interest at 24% per annum.

6. The plaintiff, in the direction of his source of title, would bank upon a Will, dated 12.11.2000, said to have executed by his father, Venkatramaiah bequeathing Ac.0.40 cents of land out of Ac.1.30 cents along with the right to recover damages from the defendant. The death of the father of the plaintiff did occur on 15.01.2001. Thus, the plaintiff has ascertained Rs.4,000/- per cent as net profit of the defendant and the claim for damages relates to Ac.0.40 cents. The plaintiff claims that he got issued a legal notice on behalf of his father on 30.09.2000, but it stood unanswered.

7. The claim of the plaintiff was resisted by the defendant raising various contentions disputing the Will propounded by the plaintiff. The trial Court framed the following three issues:

“1. Whether the plaintiff is entitled for Rs.1,60,000/- as claimed in the suit ?

2. Whether the plaintiff is entitled to interest @ 24% p.a ?

3. To what relief ? ”

8. Before the trial Court, the plaintiff examined himself as PW.1, besides examining six more witnesses as PWs.2 to 7, and marked Exs.A1 to A9. On behalf of the defendant, he himself got examined as DW.1, besides examining one more witness as DW.2, and marked

Exs.B1 to B5. Even a commission was taken out and a report was filed by the Advocate Commissioner noting down the physical features.

9. The trial Court dismissed the suit by judgment dated 09.04.2008; and on appeal by the plaintiff, the lower appellate Court also dismissed the appeal by judgment dated 02.02.2015. Questioning the same, this Second Appeal is filed.

10. Learned counsel for the appellant would submit that the lower appellate Court was unjustified in construing the title as vital in bringing out the suit as the suit is for damages, even though possession of the plaintiff is crucial. Learned counsel also would submit that both the Courts below went wrong in appreciating the evidence and the said deviation resulted in rejecting Ex.A1, Will and that the Courts below ought to have followed the evidence and accepted Ex.A1 as true and genuine. The said submissions sought to be projected as substantial questions of law in the present Second Appeal.

11. Learned counsel for the appellant also points out the findings recorded by the trial Court as well as the findings of the lower appellate Court touching Ex.A1 and the evidence discussed by both the Courts.

12. Incidentally, a settlement deed, dated 31.01.1991, marked as Ex.A8 has come up for appreciation and, while looking at its bearing on the controversy between the parties in the suit, the trial Court has recorded a finding that the suit schedule land does not constitute part of the settlement deed. On Ex.A1, Will propounded by the plaintiff, a

definite finding was recorded by the trial Court that it was not proved and, thereby, held that the right of late Venkatramaiah to claim damages from the defendant, was not transferred to the plaintiff with absolute rights. The trial Court also recorded a finding that the Advocate Commissioner's report shows that in the entire extent of Ac.1.30 cents, maize crop was raised and he has not found any pits at all anywhere in the said extent. Thus, the trial Court disbelieved the case of the plaintiff and held that the plaintiff is not entitled to damages.

13. The lower appellate Court, as could be seen from the judgment rendered by it, has re-appraised the entire evidence and recorded a finding in paragraph '24' that the evidence of PWs.5 and 6, who are material witnesses to prove Ex.A1-Will, is totally unsustainable and improbable. It is, of course, unnecessary to deliberate on the evidence of PWs.5 and 6 in view of concurrent findings recorded by both the Courts below. Even otherwise, the lower appellate Court has recorded a specific finding that PW.5, in his evidence, has asserted that the testator has instructed him the contents in his usual language, but he has scribed the same in grammatical terms. The evidence of PW.6 is to the effect that PW.5, after writing the contents of Ex.A1, has read over the same to the testator. The lower appellate Court also recorded that late Venkatramaiah, the testator, was an illiterate. Thus, while re-appreciating the evidence on record, the lower appellate Court also found that the suspicious circumstances surrounding the execution of Ex.A1 were not repelled successfully by the plaintiff and, placing reliance on the ruling in **Rani Purnima Devi and another v. Kumar**

Khagendra Narayan Dev and another¹, wherein, the Hon'ble Apex Court held that in the absence of evidence to show that the Will was read over to the testator before he admitted execution and when the exact words used by the clerk and exact reply of the testator were absent from the evidence, it can be stated that the due execution of Will is not proved and the surrounding suspicious circumstances are not removed by the propounder of the Will, and in the present case, similar situation occurs in consistent evidence of PWs.5 and 6.

14. When concurrent findings have been recorded by both the Courts below and there is nothing on record to show that the said findings are tainted with illegality or patently illegal, certainly, the present Second Appeal has to fail.

15. Hence, the Second Appeal is dismissed at the admission stage itself, confirming the judgment and decree, dated 02.02.2015, in A.S.No.94 of 2008 passed by the VII Additional District and Sessions Judge, Vijayawada. No order as to costs.

Miscellaneous applications, if any, pending in the present appeal stand closed.

JUSTICE A.SHANKAR NARAYANA

08.06.2017
v v

¹ AIR 1962 SC 567