

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

C.C.C.A. No.145 OF 1999

JUDGMENT:

The present City Civil Court Appeal is preferred by the defendants assailing the judgment and decree dated 21.6.1999, passed in O.S. No.283 of 1990 on the file of III-Senior Civil Judge, Secunderabad, decreeing the suit partitioning the suit schedule property, which is a house into three shares and allotted two such shares to the plaintiff by metes and bounds.

2. Heard Sri K. Soma Konda Reddy, learned counsel for the appellants and Sri B.Veerabhadra Rao, learned counsel for the respondents.

3. A regular suit in O.S. No.283 of 1990 was filed by the deceased 1st respondent herein as sole plaintiff late Sri A. Bhaskar Rao against his natural brother A. Divakar arraying him as sole defendant for partitioning the suit schedule property and to allot 2/3rd share therein by metes and bounds.

4. He sets out the case that their father, A. Rama Swamy acquired the suit schedule house under a Registered Sale Deed, dated 8.4.1963 and since then he was in exclusive possession and enjoyment till his death that occurred in the year 1973. His case has been that their father had another son, besides them, by name A. Babu Rao, through the first wife of their father, Rama Swamy. The said Babu

Rao had relinquished his 1/3rd share in the suit schedule house in favour of the plaintiff and, therefore, he was entitled to 2/3rd share and the defendant, his brother, was entitled to remaining 1/3rd share. He had also referred to the suit in O.S. No.573 of 1983 filed by the disciples (sishtyas) of their father, Rama Swamy against them on the file of I-Assistant Judge, City Civil Court, Secunderabad seeking declaration that the suit schedule property belonged to them. That suit was dismissed holding that their father was the owner of the suit property. During pendency of the said suit, the said Relinquishment Deed was executed by A. Babu Rao in his favour. The plaintiff had also referred to the suit in O.S. No.1805 of 1983 filed by him on the file of I-Assistant Judge, City Civil Court, Secunderabad for eviction. The said suit was decreed. Appeal preferred against the judgment and decree therein in A.S. No.93 of 1988 was dismissed holding that the plaintiff was entitled to 2/3rd share in the said property. Thus, these events constituted basis for laying the suit, claiming 2/3rd share in the suit schedule property for the deceased plaintiff.

5. The defendant, on the other hand, while admitting the relationship expresses ignorance about the existence of Babu Rao as their brother, but admitted filing of suits in O.S. No.375 of 1973 and 1805 of 1983 and results thereof including in the appeals preferred against the judgments and decrees therein. He sets out the case that the Relinquishment Deed executed by Babu Rao was not a valid

document and thus, disputed the claim of the plaintiff for 2/3rd share in the suit schedule property.

6. During pendency of the suit since death of the defendant No.1 occurred, his legal representatives are brought on record as defendants 2 to 4. Defendants 2 and 4, who are the wife and son of Late Sri A. Diwakar (defendant No.1), filed an additional written statement contending that the suit schedule property was improved in the year 1972 by selling her jewellery and earnings, whereas the 3rd defendant-A. Madhusudhan, s/o. Late Sri A. Diwakar, filed Memo adopting the additional written statement of defendants 2 and 4.

7. The trial Court, on the basis of the pleadings, settled the following seven issues for trial:

“(1) Whether the plaintiff and one Mr. Baburao are the sons of late Ramaswamy?

(2) Whether the judgment in A.S. No.93 of 1988 on the file of Addl. Chief Judge, Secunderabad operates and binding on the parties of this suit?

(3) Whether A. Baburao executed a relinquishment deed on 3.3.81 relinquishing his 1/3rd share in the plaint schedule property in favour of the plaintiff and, if so, whether the plaintiff is entitled for the 2/3rd share in the plaint schedule property?

(4) Whether there is no cause of action against the defendant to file this suit?

(5) Whether the plaintiff is entitled for the partition of the plaint schedule property as prayed for?

(6) Whether the plaintiff is entitled for the alternative relief as prayed for?”

(7) To what relief?”

8. During trial, the plaintiff examined himself as P.W.1 and Exs.A1 to A3 were marked to substantiate his case, whereas the defendants on their behalf examined D.W.1 and marked Exs.B1 and B2.

9. The learned trial Judge on appraisal of evidence and basing on the admissions made by D.W.1 and the answers given by P.W.1 in his cross-examination recorded a finding on Issue No.1 that Babu Rao is no other than the step brother of the plaintiff and the deceased defendant. On Issue No.2, held that the judgment in A.S. No.93 of 1988 on the file of Additional Chief Judge, Secunderabad does not operate as *res judicata*. Having opined that on a reading of Exs.A1 and B2, they would disclose that the shares of the plaintiff and 1st defendant were left open to be decided later and that no finding was given that the plaintiff was entitled to 2/3rd share in the schedule property. Accordingly, answered the Issue.

10. The learned trial Judge then taken up Issues 3 to 6 as they do require appreciation of evidence and decided holding that Ex.A3 Relinquishment Deed executed by A. Babu Rao in favour of the plaintiff was a valid document and, therefore, the plaintiffs entitled to 2/3rd share. On Issue No.4, the learned Judge opined that there is cause of action to file the suit against the deceased defendant. But, on Issue No.5, held that in view of the findings recorded on other issues, the plaintiff was entitled to partition of the plaint schedule property as prayed for.

11. Thus, the learned trial Judge held that the plaintiff was entitled to 2/3rd share in the suit schedule property, whereas the defendants 2 to 4 were entitled to 1/9th share each. Aggrieved over the same, the defendants 2 to 4 preferred the present appeal.

12. The grounds agitated by the appellants in the present appeal are that the 2nd defendant died during pendency of the suit and, therefore, the judgment is liable to be set aside on the said ground alone; the learned Judge grossly erred in holding that the appellants have not disputed Exs.A2 and A3, that the learned Judge erred in putting the burden of proof regarding documents filed though entire burden rests on the plaintiff to prove Exs.A2 and A3 as they were specifically denied by the deceased defendant; that the learned Judge did not properly appreciate the evidence of D.W.1 as D.W.1 was only six-year-old on the date of Ex.A2 and Ex.A3; that the trial Judge has not properly appreciated the rulings relied on by the appellants reported in AIR 1987 SC 1775, (1993) 3 SCC 392 , 1996 (2) APLJ 26; that the learned Judge erred in holding that the aforesaid decisions relate to gifting of undivided share and not relinquishment deed though under law, both are means of transfer; that the alleged consideration shown under Exs.A2 and A3 is not valid under law; that the appellants also agitated the death of the 2nd defendant was intimated and recorded on 2.2.1999 but, in spite of the same passed decree even against the deceased defendant No.2 and, therefore, sought to set aside the judgment and decree. Last of these grounds

has no merit for the reason it is clear that the Court below while recording the death of the 2nd defendant on the memo filed has also recorded that the legal representatives of the 2nd defendant are already brought on record. Therefore, it cannot be said that there was none to represent the estate of the deceased 2nd defendant to view that the judgment was rendered against a dead person. The learned Senior Civil Judge, in such an eventuality, ought to have allotted 1/9th share of deceased 2nd defendant equally towards the shares of defendants 3 and 4 while defining their shares in the preliminary decree. Even otherwise, in final decree proceedings the same can be sorted out.

13. Though, it is agitated in the Grounds of Appeal that the death of second defendant was intimated on 2.2.1999 but in the present C.C.C.A., in the cause title, there is no indication that the 2nd appellant is no more, as nothing is expressed stating that “since expired”. In fact, to agitate such grounds the appellants herein ought to have resorted to appropriate procedure contemplated by the provisions of C.P.C. stating that there are no other legal representatives except the appellants 3 and 4 for the deceased 2nd appellant. For the reasons best known to the appellants they did not indicate the same. Thus, when viewed in the light of the legal principles, a deceased person also cannot maintain or present a proceeding, be it a suit or be it an appeal.

14. Turning to the other grounds, the following points would arise for determination.

“(1) Whether the Relinquishment Deed alleged to have been executed by A. Babu Rao in favour of the deceased plaintiff is valid and binding on the appellants/defendants?

(2) Whether the decree passed by the Court below is liable to be set aside?

(3) To what other relief, if any, to which the appellants are entitled to?”

15. As regards whether Babu Rao was step brother or not in view of clinching evidence on record the findings recorded by the learned trial Judge does not warrant interference, however, it reflects the conduct of the deceased defendant in denying the very relationship of Babu Rao with them though, he is a step brother, being the son through the first wife of A. Rama Swamy. When examined intrinsically, the said denial made by the defendants in the written statement, it gives a definite indication that with an oblique motive the said denial was made, that being to nullify the effect of Relinquishment Deed Ex.A3, dated 20.2.1981.

16. **Point No.1:-** A perusal of the oral evidence on record through P.W.1 and D.W.1 would clearly demonstrate the reasons for execution of Ex.A3 in favour of the deceased plaintiff by their step brother, A. Babu Rao. It is not as though there was no material to support it. The very fact that the suit in O.S. No.375 of 1973 was filed by the disciples of their father, Rama Swamy claiming title over the suit schedule property was defended by the deceased plaintiff incurring expenditure and to preserve reputation of their father and the very recitals of Exs.A2 and A3 *ex facie* showing that the deceased plaintiff did incur considerable expenses and hardship to uphold the

prestige of their father would all justify the execution of Ex.A3 - Relinquishment Deed in favour of the plaintiff. It is no doubt true that the wife of the plaintiff, who is one of the respondents, i.e., the 2nd respondent, who was attorney-holder through whom their step brother, A. Babu Rao executed Ex.A3, but the mere fact that the wife of the deceased plaintiff as attorney executed Ex.A3 in favour of deceased plaintiff is not a ground to disbelieve the contents of Ex.A3.

17. Even otherwise, on a perusal of the note sheet i.e., docket proceedings, the relevant date i.e., 1.2.1999 would reflect that Memo was filed stating that defendant No.2 died and the legal representatives are already on record and accordingly it was recorded and posted for evidence of defendants 3 and 4 to 9.2.1999. For convenience sake, the docket proceedings on that date are extracted, which read thus:

“1.2.1999

Plaintiffs evidence is already closed on 11.7.1997. Defendant did not adduce his evidence. Meanwhile D1 died and D2 to D4 are brought on record. Memo filed that D2 died and that his LRs are already on record. It is recorded. For evidence of D3 & D4, adjourned to 9.2.1999, failing which evidence would be closed.

Sd/
1.2.1999”

18. Therefore, that ground is not available to the appellant to question the judgment and decree herein. It is no doubt true, in the judgment and decree, the Court below has recorded that defendants 2 and 3 are entitled to 1/9th share each, which, of course, appears to be incorrect, as mentioned in the above, the 2nd defendant reported died and defendants 3 and 4 are the only legal representatives of defendant

No.2, $\frac{1}{3}^{\text{rd}}$ share ought to have been divided between D-3 and D-4 and allotted towards respective shares but by that error itself it cannot be said that the judgment and decree are against a dead person and, therefore, vitiate.

19. Therefore, it is difficult to hold that Ex.A3 is invalid as sought for by the deceased defendant.

20. One of the submissions of the learned counsel for the appellants has been that the learned trial Judge did not properly appreciate the rulings relied on by the learned counsel for the defendants. The death of Ramaswamy, father of the deceased plaintiff and deceased defendant, had taken place on 26.1.1973. Ex.A3 was executed on 20.2.1981, registered GPA was also executed on the same day. Admittedly, the executant A. Babu Rao died in the year 1990. It is needless to mention on the death of their father, A. Rama Swamy, his three sons i.e., A. Babu Rao, through his first wife, his other two sons, who are the deceased plaintiff and the deceased defendant acquired definite $\frac{1}{3}^{\text{rd}}$ share in view of notional partition being presumed by virtue of the proviso to Section 6 of Hindu Succession Act, 1956. Therefore, it cannot be said that the said A. Babu Rao, step brother of the parties to the suit, was incompetent to relinquish his undivided share in favour of the beneficiary.

21. Therefore, it cannot be said that the document Ex.A3 executed by A. Babu Rao through his attorney holder, wife of the

deceased plaintiff, was not a valid document. Hence, the ground that the learned trial Judge went wrong in holding that the rulings relied on relate to gifts but not relinquishments cannot be said to be a proper ground to attack that observation. Even non-examination of the attestors of Ex.A3 is not a ground to view the contents of Ex.A3 with suspicion in view of the judgment and decree passed in O.S. No.1805 of 1983 or in AS No.93 of 1988 as Ex.A3 was tested already in the said suit and appeal.

22. Therefore, viewed from any angle, the findings recorded by the Court below on Issues 1 to 6 and the conclusions arrived at in passing preliminary decree for partitioning the property in to nine (9) shares and allotment of six (6) shares in the suit schedule property to the plaintiffs and three shares to the branch of the defendants does not suffer from any legal infirmity and the said findings since based on process of reasoning on appreciation of evidence on record do not warrant interference.

23. Therefore, there are no merits in the appeal, and, accordingly the same is dismissed. There shall be no order as to costs.

As a sequel thereto, miscellaneous petitions if any pending in the Second Appeal shall stand closed.

A. SHANKAR NARAYANA, J

Dt. 29.08.2017
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