

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.1054 of 1998

JUDGMENT:

This appeal is filed by the unsuccessful plaintiff challenging the decree and judgment dated 27.8.1994 in A.S.No.5 of 1992 on the file of Court of III Additional District Judge, Guntur, confirming the decree and judgment dated 16.12.1991 in O.S.No.105 of 1985 on the file of the Court of Subordinate Judge, Tenali, dismissing the suit filed for declaration and recovery of possession.

2. For the sake of convenience, the parties hereinafter will be referred to as they were arrayed in the suit.

3. The plaintiff is the third daughter of late Janaswami Hanumantharao and Subhadramma of Kolluru Village. The defendant is the sister's son of the plaintiff. Hanumantharao executed a registered Will dated 25.8.1973 bequeathing the suit schedule property and some other properties in favour of his wife, by name, Subhadramma, with absolute rights. Subhadramma died on 30.10.1985. The case of the plaintiff is that she used to look after her mother-Subhadramma during her life time and out of love and affection her mother bequeathed the suit schedule property in her favour of the plaintiff by way of registered Will dated 28.10.1985. It is the further case of the plaintiff that the defendant, aggrieved by the execution of the Will dated 28.10.1985 in favour of the plaintiff, has been creating troubles for enjoyment of the suit schedule property by the plaintiff. Hence the plaintiff filed the suit to declare her as absolute owner of the suit schedule property, basing on the Will dated 28.10.1985, and consequential relief of recovery of possession.

4. The defendant filed written statement admitting *inter se* relationship between the parties *inter alia* contending that the Will dated 28.10.1985 set up by the plaintiff is not valid document. Subhadramma, who is the maternal grandmother of the defendant, did not execute the Will dated 28.10.1985 in favour of the plaintiff. Due to ill-health, Subhadramma was not in conscious state of mind from the morning of 28.10.1985. The husband of the plaintiff evidently played fraud and by deceiving Subhadramma obtained her thumb impression on the papers and created the spurious document i.e., the Will dated 28.10.1985, taking the assistance of the Scribe and the Attestors. The husband of the plaintiff influenced the Sub-Registrar, Kolluru in getting the registration of the Will dated 28.10.1985. Subhadramma executed the Will dated 31.5.1982, in a sound and disposing state of mind, bequeathing the suit schedule property in favour of the defendant, out of love and affection. The defendant performed the obsequies of Subhadramma. Hence the suit is liable to be dismissed.

5. Basing on the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled to the declaration of her title and for possession of the plaint schedule property?
 2. To what future profits if any is the plaintiff entitled?
 3. Whether the Will dated 28.10.1985 executed by Subhadramma, the mother of the plaintiff, is true, valid and binding on the defendant?
 4. Whether the Will dated 31.5.1982 executed by late Subhadramma is true, valid and binding on the plaintiff?
 5. To what relief?
6. To substantiate the case before the trial Court, on behalf of the plaintiff, P.Ws.1 to 8 were examined and Exs.A1 to A3 were

marked. On behalf of the defendant, D.Ws.1 to 8 were examined and Exs.B1 to B17 and Exs.X1 to X8 were marked.

7. Basing on the oral, documentary evidence and other material available on record, the trial Court disbelieved the Will dated 28.10.1985 set up by the plaintiff and dismissed the suit. The unsuccessful plaintiff, aggrieved by the judgment and decree dated 16.12.1991 in O.S.No.105 of 1985 passed by the Court of the Subordinate Judge, Tenali, preferred A.S.No.5 of 1992 on the file of the Court of III Additional District Judge, Guntur. The learned appellate Judge, after reappraising the oral and documentary evidence, confirmed the decree and judgment dated 16.12.1991 in O.S.No.105 of 1985 and consequently dismissed the appeal. Hence, the present second appeal by the unsuccessful plaintiff.

8. The substantial questions of law raised in this second appeal are as follows:

1. Whether the Courts below are justified in disbelieving the Will dated 28.10.1985 even though the defendant failed to prove that the same was obtained by playing fraud and deception?
2. Whether the trial Court is justified in disbelieving the Will dated 28.10.1985, even though its execution was proved?

9. Both the points are interlocutory with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts.

10. In order to appreciate the rival contentions, this Court is placing reliance on the judgment of the Hon'ble apex Court in **Municipal Committee, Hoshiarpur v. Punjab SEB**¹, wherein while

¹ (2010) 13 SCC 216

considering the scope of Section 100 of CPC, it was held at paragraph No.16 as follows:

16. Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a *sine qua non* for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari v. Purshottam Tiwari*, (2001) 3 SCC 179); *Sarjas Rai v. Bakshi Inderjit Singh*, (2005) 1 SCC 598; *Manicka Poosali v. Anjalai Ammal*, (2005) 10 SCC 38; *Sugani v. Rameshwar Das*, (2006) 11 SCC 587; *Hero Vinoth v. Seshammal*, (2006) 5 SCC 545; *P. Chandrasekharan v. S. Kanakarajan*, (2007) 5 SCC 669; *Kashmir Singh v. Harnam Singh*, (2008) 12 SCC 796; *V. Ramaswamy v. Ramachandran*, (2009) 14 SCC 216 and *Bhag Singh v. Jaskirat Singh*, (2010) 2 SCC 250.)

11. Let me consider the facts of the case on hand in the light of the above legal principles.

12. It is an admitted fact that originally the suit schedule property belongs to Janaswami Hanumantha Rao, who bequeathed the same to his wife-Subhadramma, by registered Will dated 25.8.1973. Subhadramma is mother of the plaintiff and maternal grandmother of the defendant. The plaintiff and the defendant are claiming title to the suit schedule property by way of the Wills dated 25.10.1985 and 31.5.1982 respectively.

13. The entire controversy revolves around Ex.A2 Will dated 28.10.1985, which is the foundation for filing the suit by the plaintiff. In order to substantiate the case, the plaintiff herself examined as P.W.1. P.W.2 is the Scribe whereas P.Ws.3 and 4 are the attestors of the Will. P.Ws.5 and 6 are the identifying witnesses before the Sub-Registrar, Kolluru. Admittedly, Subhadramma died on 30.10.1985 i.e., two days after execution of the Will in favour of the plaintiff. It is the case of the defendant that the plaintiff's husband had obtained thumb mark of Subhadramma when she fell ill and was in unconscious state of mind.

14. The learned counsel for the appellant-plaintiff submitted that the defendant having taken the plea that the husband of the plaintiff created the Will by playing fraud and deception on Subhadramma, failed to prove the same; therefore, the plaintiff is entitled to the relief of declaration. It is the duty of the propounder of the Will to dispel the suspicious circumstances surrounding the execution of the Will. As observed earlier, the suit is based on the Will dated 28.10.1985 propounded by the plaintiff. Therefore, the burden is on the plaintiff to prove that the Will was executed by Subhadramma, bequeathing the suit schedule property in her favour, in a sound and disposing state of mind, as well as it was not surrounded by any suspicious circumstances. Once the plaintiff *prima facie* proves the execution of the Will dated 28.10.1985, the onus of proof shifts on to the defendant to establish that the husband of the plaintiff played fraud and deception in obtaining the Will in favour of the plaintiff. The trial Court, basing on the oral evidence of D.Ws.2, 6 and 7 and recitals

of Ex.B10, arrived at a conclusion that Subhadramma was not in a conscious state of mind from the morning of 28.10.1985. The first appellate Court, after reappreciating the entire oral and documentary evidence on record, concurred with the said finding of the trial Court.

15. As seen from the record, D.W.2-Family Doctor of Subhadramma, categorically stated that on 28.10.1985, D.W.7-Farm Servant of Subhadramma, came to his house and informed that Subhadramma was seriously ill and at about 10.00 a.m., he rushed to the house of Subhadramma. As per the testimony of D.W.2, Subhadramma was suffering with high fever and in semi-conscious condition and she was unable to speak. His testimony further reveals that on 29.10.1985, the husband of the plaintiff brought Subhadramma to his Clinic on a rikshaw and as she was not in a position even to get down from the rikshaw, he went to the rikshaw and gave injunction. As seen from the testimony of D.W.6-Archaka of Sivalayam in Kolluru, the plaintiff and her husband came to Kolluru on 28.10.1985 at about 08.00 pm. Till then D.W.6 and his wife were looking after Subhadramma as she was suffering from fever. His testimony further reveals that he wrote Ex.B.10 letter to the defendant on 28.10.1985, expressing seriousness of the health condition of Subhadramma and asking the defendant to come to Kolluru to see her. The testimony of D.W.7-the Farm Servant, categorically reveals that Subhadramma was not in conscious state of mind on 28.10.1985. In the cross-examination, P.W.7-the Sub Registrar, Kolluru, deposed that he did not verify the health condition of Subhadramma. D.Ws.2, 6 and 7 are not interested witnesses. If the testimony of these

witnesses is taken into consideration, Subhadramma was in semi-conscious state of mind. In such circumstances, the execution of the Will dated 28.10.1985 by Subhadramma, in sound and disposing state of mind, is somewhat unbelievable. The Courts below have considered the testimony of D.Ws.2, 6 and 7 in right perspective and disbelieved the version putforth by the plaintiff. Since the plaintiff failed to prove that Subhadramma executed the Will dated 28.10.1985, in a sound and disposing state of mind, shifting of onus of proof on the defendant to establish the fraud and deception played by the husband of the plaintiff on Subhadramma in executing the Will does not arise. The findings recorded by the Courts below are supported by oral and documentary evidence. I am fully agreeing with the concurrent findings recorded by the Courts below.

16. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that the points raised by the learned counsel for the plaintiff will not fall within the ambit of Section 100 of C.P.C. There is no question of law much less substantial question of law in this appeal.

17. In the result, the Second Appeal is dismissed. There shall be no order as to costs. As a sequel, miscellaneous petitions pending, if any, shall stand closed.

T.SUNIL CHOWDARY, J

November 02, 2017.
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