

* HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

+ A.S.No.2284 of 1998

% 16-11-2017

Yallapi Rajamma, @ Sarojanamma,

... Appellant/
Plaintiff

Vs.

\$ Paditham Narayana Rao
and 2 others.

... Respondents/
Defendants

! Counsel for the appellant: M.P. Chandramouli

Counsel for the Respondents: P. Ganga Rami Reddy

< Gist:

> Head Note:

? Cases referred:

¹ AIR 1975 SC 1534

² AIR 1981 SC 2235



HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU**A.S.No.2284 of 1998****JUDGMENT:**

This appeal is filed against the judgment and decree passed in the suit O.S.No.120 of 1988 on the file of the Additional Sub-ordinate Judge, Guntur, dated 15.04.1997.

2. The unsuccessful plaintiff is the appellant. As this is a first appeal and the plaintiff is the appellant, the parties are described as they are arrayed in the suit only.

3. The plaintiff in the suit is Yallapi Rajamma @ Sarojanamma, w/o. Yallapi Sivaiah. She filed the said suit O.S.No.129 of 1988 against P. Narayana Rao, R. Krishnaiah and M. Pushpa.

4. The suit is filed for partition and separate possession of the share of plaintiff in the suit schedule property with a direction to defendants 1 & 2 to put the plaintiff in possession of her 1/3rd share in the property. The plaintiff claims to be the wife of one Yallapi Sivaiah as described in para-4 of the plaint.

5. One Yallapi Mallaiah was the father and the head of joint family consisting of himself and three sons Yallapi Veera Badraiah, Yallapi Sivaiah and Yallapi Nagaraju. As Yallapi Mallaiah died intestate, the plaintiff states that her husband-Sivaiah acquired 1/3rd share in the plaint schedule property. As per the averments of the plaint, the plaintiff and Yallapi Sivaiah begot a daughter by name Yallapi Pushpa.

As the said Pushpa and her husband-Yaliah died, her husband entire 1/3rd share in the property devolved on the plaintiff. Thus she became entitled to 1/3rd share in her own right.

6. As per the plaint averments, after the death of her husband and daughter, the plaintiff sold her 1/3rd share of property to one B. Subbaiah on 05.05.1970. Thereafter, she migrated elsewhere and lost touch with the property and her home town. She states that her purchaser-B. Subbaiah instituted a suit O.S.No.89 of 1977 for partition in the District Munsif Court, Venkatagiri for 1/3rd share in the suit schedule property. He lost the suit and filed an appeal in A.S.No.27 of 1980, which was also dismissed. He further filed Second Appeal No.904 of 1984 on the file of this Court, which was also dismissed. Coming to know all these facts, she filed the present suit for partition and for possession of her 1/3rd share and her specific case is that her daughter died long ago and that therefore, the third defendant in the said cases (the suit, first appeal and second appeal) is an imposter. She now seeks partition in her own right, as the Courts held that B. Subbaiah is not entitled to any share in the property, because the sale deed dated 05.06.1970 was signed by an imposter and not by the wife of Sivaiah.

7. Defendants 1 & 2 are the purchasers of the property. The defendants filed a written statement and denied all the allegations. They plead that defendant No.3 in the suit

is not an imposter and is the daughter of Yallapi Sivaiah and Rajamma. They support the judgments passed in the suit O.S.No.89 of 1977 and state that the actual wife of Sivaiah by name Sarojanamma left the family house more than 30 years prior to written statement as she was mentally deranged. The first defendant asserts that defendant No.3, who is his vendor, is the real daughter and only available heir of Yallapi Sivaiah. He questions the execution of the sale deed in 1970 on this ground and also on the ground that the sale deed was registered in Nellore, but the property was situated in the Venkatagiri. The defendants case is that the present plaintiff is not the wife of Yallapi Sivaiah nor she is the mother of defendant No.3. She does not have any right of the property and the plaintiff is an imposter set up by the said B. Subbaiah, who was the unsuccessful plaintiff in the earlier suit. This is the crux of the defence.

8. After considering the entire matter, the lower Court by the impugned judgment dismissed the suit holding that the plaintiff failed to prove that she is the widow of Yallapi Sivaiah, consequently, all other reliefs flowing from this were negatived. The purchase of the property by defendants 1 & 2 in the suit from defendant No.3 and others was upheld. Hence, the suit was dismissed. 3 witnesses were examined for the plaintiff before the lower Court and 5 witnesses were examined for the defendants. Exs.A.1 to A.10

were marked in favour of the plaintiff and Exs.B.1 to B.24 were marked in favour of the defendants.

9. The essential question, therefore, that falls for consideration in this appeal and on which Sri M.P. Chandramouli, learned counsel for the appellant/plaintiff and Sri P. Ganga Rami Reddy, learned counsel for the respondents/defendants concentrated on is point No.2- “whether the plaintiff is the wife of Yallapi Sivaiah.”

10. The learned counsel for the appellant/plaintiff points out that the lower Court erred in relying upon the alleged discrepancies in the dates and that the lower Court has given too much credence and weight to the discrepancies in the dates. As per the appellant, the defendants had admitted that Sarojamma is the wife of Yallapi Sivaiah and that PW.1 married to Sivappa, as the averments in paras 4 & 5 of the plaint are not denied. He also argued that an admission need not be proved and best evidence was ignored by the lower Court.

11. Before going into the matter, the entirety of the written statement has to be seen. It is a settled rule of interpretation, particularly of pleadings that the entire pleading should be seen and a stray line should not be highlighted and reliance placed thereon. A reading of the entire written statement makes it clear that defendant No.1 denied that the present plaintiff is the wife of Yallapi Sivaiah. He asserts that defendant No.3/Pushpa, the daughter of

Yallapi Sivaiah and Sarojanamma is still alive. He also asserts that the current litigation is set up by B. Subbaiah, who failed in the earlier round of litigation. Viewed in totality, this is the major defence. Therefore, the lower Court had to examine the fundamental issue whether the present plaintiff is the wife of Yallapi Sivaiah.

12. It is an admitted fact that there is no documentary proof of the marriage of Sivaiah with Sarojanamma. There are no photographs or other evidence of the said marriage. Neither is there any documentary proof to show the birth of a child or the death of child-Pushpa. No documentary evidence is filed to show where the said Sarojanamma was residing all these years prior to the litigation. Therefore, this Court like the lower Court will have to sift the details available to decide whether there is a probability that the present plaintiff is the wife of late Yallapi Sivaiah and if the daughter of Sivaiah and Sarojanamma called Pushpa had died in her minority. The following passage from the well known judgment of ***Dr. N.G. Dastane v. Mrs. S. Dastane***¹ is relevant for this case:-

“The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he links that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first

¹ AIR 1975 SC 1534

step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note.”

(emphasis supplied)

13. The registered sale deed executed by the plaintiff in favour of B. Subbaiah, which is the genesis for both the litigations, is marked as Ex.A.2 and it is dated 05.06.1970. This Document No.1021 of 1970 was registered on 05.06.1970 and is executed in favour of B. Subbaiah by Smt. Rajamma @ Sarojanamma, wife of Sivaiah. The certified copy of document is marked as Ex.A.2 and the original is marked as Ex.A.7. The present plaintiff states that she executed this document as per the recitals of this document. As per the said document, the husband of the executant died eight years prior to the execution of this document and that thereafter, the executant and her daughter became entitled to the husband's share and after the death of her daughter, the executant became the owner of the entire property. Therefore, she is executing the sale deed conveying the property in favour of B. Subbaiah. This document as mentioned earlier is the genesis for this litigation and the contents of this document go to show that Sivaiah, the husband of the executant died in 1962 and the daughter also died prior to 1970.

14. As noticed by the lower Court, the subsequent evidence does not support either of these dates. The witness was called for chief examination and was examined on 12.09.1994. According to her evidence in chief, her husband died about 25 years ago (1969). She also states that her marriage with Sivaiah took place 25 years ago (1968-69). She states that she sold her share in the property to B. Subbaiah, and the registration extract is marked as Ex.A2. She identifies that B. Subbaiah is in the Court hall that day. She states in her chief that after Ex.A.2 she resided for 4 or 5 years “thereafter” in Srikalahasti then some disputes arose between herself and her mother and she went away along with her daughter to Chittoor. Thereafter, she left her daughter and went to Bangalore. Therefore, as per the chief examination of PW.1 itself, the daughter was alive by the date on which she executed Ex.A.2 and along with her daughter she went to Chittoor, where she left her daughter with some unknown people. 4 to 5 years after 05.02.1970 places this movement from Srikalahasti to Chittoor in the year 1974-75. In her last line of chief examination, she says that my daughter-Pushpa passed away at Chittoor 25 years ago (1969).

15. In her cross-examination, she states that she lived with her husband for 5 years after her marriage at Venkatagiri in the suit house. So, if her marriage was performed in 1969-70, according to the cross-examination, she lived there till 1974/75.

16. She also states in the further cross-examination that there is no proof for her daughter's birth at Venkatagiri. She states that her daughter was aged about 5 years when she took her to Sivaiah and from there to Chittoor. This movement to Srikalahasti and Chittoor took place after Ex.A.2 was executed in February, 1970. Therefore, it leads to further doubt about the veracity of the claim. The last line of the cross-examination and before the re-examination is to the following effect:

“B. Subbaiah is conducting this litigation.”

17. PW.2 claiming to be the step-mother of the present plaintiff was examined as a witness to prove the plaintiff case. She states that she brought PW.1 and got her married to Sivappa. She states in her chief examination as follows:

“my daughter (PW.1) has sold away to one Subbaiah, the share fell to her husband and the sale consideration was handed over to me. The sale consideration sum was Rs.3,000/-. PW.1 stayed with us for some time and later she left for Bangalore along with her daughter without intimating me due to some disputes in the family.”

18. This again shows that the daughter was alive after execution of the sale deed in favour of B. Subbaiah (Ex.A.2 & A.7). In her cross-examination, PW.2 admits that the marriage was performed 25 years ago and that PW.1 lived with her husband for 5 years after the marriage. Therefore, even according to this witness, the marriage was performed in 1969 and Sivaiah was alive for 5 years i.e., till 1974. As per

the cross-examination, the daughter-Pushpa was aged about 3 years when Sivappa died. Therefore, the daughter must have been born in 1971.

19. Even PW.3, who is the stated step-brother, states that after the demise of Sivappa, Rajamma was at Venkatagiri for one year before she is coming to his house along with her daughter. He admits in his cross-examination that the daughter of PW.1 was aged about 1½ years, when PW.1 came to Sivaiah after her husband's death. This contradicts in the evidence of PW.2 and gives another set of dates.

20. It was the argument of the learned counsel for the appellant/plaintiff about these witnesses that in the chief examination of PW.1 it was asserted by her that Gouramma (her step-mother) has 6 daughters and 2 sons and that the names of sons and daughters were given very clearly in the chief examination. The names of uncles etc. were also given in the chief examination. He argued that the witness who spoke about the family history and genealogy has not been cross-examined at all on the relationship and that therefore, the evidence should be treated as admitted. Hence, he argues the evidence of PW.2 and PW.3 should be given due weight.

21. On the contrary, it is the reply of the learned counsel for the respondents/defendants that this genealogy or family tree is not very relevant for the crucial issue on hand viz., whether the present plaintiff is the wife of Yallapi Sivaiah or not. The family tree or details are not pleaded in

the plaint and hence the learned counsel stated that in the absence of pleading, no evidence can be considered. There is force and substance in this contention.

22. It is the fact that the burden is squarely on the plaintiff to prove this fact. The plaintiff will have to establish that “she” is the actual wife of Yallapi Sivaiah. As a plaintiff seeking to establish her right, one has to prove her case. Therefore, this Court is of the opinion that the failure to cross examine of PW.1 on these issues of genealogy is not very relevant, as held by Hon’ble Supreme Court of India in ***Pandurang Jivaji Apte v. Ramchandra Gangadhar Ashtekar (Dead) by Lrs. and Others***². The other evidence on this issue is enough to decide the point and there is no need to draw any adverse inference on the failure to cross examine.

23. The discrepancies in the date and the fact that other than the oral evidence of PWs.2 & 3, there is no other documentary proof or other evidence to establish that the present plaintiff is the wife of Yallapi Sivaiah leads to any amount of doubt about her identity itself. Her version is riddled with inconsistencies and does not inspire confidence.

24. The learned counsel for the appellant/plaintiff also laid stress on the fact that DW.1 entered into an agreement with PW.1 on 06.09.1994 for Rs.7,000/- and the present plaintiff agreed to relinquish her rights in the schedule property. Two demand drafts were also obtained to be paid to

² AIR 1981 SC 2235

her, which were marked as Exs.B.19 and 20. The learned counsel, therefore, argued that the defendant himself recognized the right of the plaintiff and her status as the wife of Yallapi Sivaiah. A reading of the evidence, however, goes to show that on 06.09.1994 the plaintiff came to the house of DW.1 and demanded Rs.7,000/- to relinquish her rights. Thereafter, the relinquishment deed was executed by the present plaintiff, but the same was not registered and the plaintiff did not turn up for registration at the Sub-Registrars office. The said document was presented before the District Registrar for registration. DW.1 also deposed that the plaintiff in O.S.No.89 of 1977 prevented her attending the registration. In the cross-examination on this aspect he states “though the plaintiff is not Rajamma and though according to us, she is in imposter, we have taken the said document dated 07.09.1994 only to get rid of the litigation, which was stated by the plaintiff and to look after our business.” He also admits that in the document dated 07.09.1994, it is mentioned that in view of the mediation and compromise, the plaintiff should get her suit dismissed. This explanation which was accepted by the Court is a plausible explanation. This Court is also of the opinion that the lower Court rightly believed in this explanation that because of the chequered history of this litigation and the long delay, the compromise was affected. The deed in question of September 1994 is however not in the evidence, as the same was not registered. If the evidence of

DW.1 is ready in his entirety, it leads to the conclusion that the said document was entered into with a view to settle the matter and to get rid of the current litigation. The property in question has been in litigation since 1977 till date, therefore, it is not unthinkable that compromise was sought to be effected in 1994. Therefore, the lower Court rightly believed that the defendants did not recognize the rights of the present plaintiff.

25. Viewed from all the above and in view of the alleged glaring discrepancies in the documentary and oral testimony of the plaintiff and her witnesses, plus the fact that B. Subbaiah is conducting all the litigations, it is clear that the plaintiff did not discharge the burden of proof that she is the original or real wife of Yallapi Sivaiah and that she has a right to file and maintain the suit. This court is of the opinion that she has been set up as the wife late Yallapi Sivaiah. The contents of Ex.A.2/A.7 itself dilute her entire story. When no direct evidence is available, contemporaneous document that throw light on the issues have to be considered and looked into. Therefore, point No.2 whether the plaintiff is the wife of Yallapi Sivaiah is answered against the plaintiff. The lower Court was also right in this finding.

26. The other important question is point Nos.3 & 4, whether the only daughter of Yallapi Sivaiah is dead or is still alive and whether defendant No.3 is the daughter of Yallapi Sivaiah.

27. These two points go together and as rightly noticed by the lower Court, no credible evidence about the birth or death of Pushpa is available. The recitals of the registered document Ex.A.7 are to the effect that she died before Ex.A.7 was executed. The evidence of prime witness (the plaintiff/PW.1) is that after execution of Ex.A.7, she went to her brother's house at Chittoor and later went to Bangalore. She does not know with whom she left her only child and when that child died or how the child died. Therefore, the lower Court rightly came to the conclusion that the contention of the plaintiff that her child died is improbable and untrue. As a corollary to this, the question to be decided whether defendant No.3 is the daughter of Yallapi Sivaiah. The evidence of defendants in this issue is clear. They have deposed that Pushapa, the third defendant is the daughter of Yallapi Sivaiah. They deposed that DW.3 was living in Madras and that her marriage was performed by defendants themselves. Even as rightly noticed by the lower Court in the plaint, the age of Pushapa is not mentioned by the plaintiff in the plaint. It is also important to note that in the previous round of the litigation, the courts up to this High Court have held that defendant No.3/Pushpa is the daughter of Sivaiah. The plaintiff herself filed the certified copies of orders passed in SA No.904 of 1984 and in CMP No.1222 of 1988. This Hon'ble High Court also noticed that defendant No.3/Pushpa is still alive and that both the courts below

found that the defendant No.3 is the daughter of Yallapi Sivaiah.

28. To contradict these judgments, the plaintiff has not filed any contrary evidence. Her conduct as a person and as a mother is noticed by the lower Court and no explanation was given by her to justify her conduct of leaving a girl child behind in the house of some unknown persons. By filing a copy of the order passed by this High Court (Ex.A.8), she proved the fact that she is aware of the finding that Pushpa in that suit has been held to be the daughter of Yallapi Sivaiah. Nothing contrary has been pointed out nor is any evidence filed to show that the findings of two courts and of the Hon'ble High Court in SA No.904 of 1984 on this matter is incorrect. No evidence has been filed by the present plaintiff to show that Pushpa in that earlier suit is not the Pushpa (defendant No.3) of this suit. In the absence of any other evidence, this Court is of the opinion that the plaintiff failed to prove that defendant No.3 is not the daughter of Yallapi Sivaiah. Therefore, the finding of the lower Court on point Nos.3 & 4 is correct. This Court holds that the daughter of Yallapi Sivaiah is alive and the defendant No.3 is the daughter.

29. Issue No.3 is another issue on which arguments were advanced. According to the defence, they have perfected the entitlement by adverse possession from 1976 onwards.

30. The learned counsel for the appellant/plaintiff argued that by pleading adverse possession, the defendants have recognized the title of the plaintiff. The learned counsel contends that adverse possession can only be raised against the true owner and that once the defendants plead adverse possession, they impliedly recognise the title of the plaintiff which was extinguished by open hostile possession of the defendants. It is true that there is a plea in the written statement, but the oral evidence of defendants does not show that they have given any evidence to prove adverse possession. The oral evidence is absolutely silent about the aspect of adverse possession.

31. Adverse possession needs to be pleaded and proved with certainty. The Courts will have to take the date on which the possession turned hostile and the manner in which the possession was hostile vis-à-vis the true owner. The possession should be open continuous and hostile. The evidence in this case on adverse possession and is totally lacking. The finding of the lower Court on this issue is therefore, not correct. The lower Court examined the issue vis-à-vis the sale to B. Subbaiah under Ex.A.2 & A.7, therefore, the Courts came to the conclusion that even if the plaintiff was the wife of Sivaiah, she stated that she delivered possession to B. Subbaiah and she lost her possession. The lower Court below felt that B. Subbaiah was not in possession as a third party purchaser and the suit he filed

was for partition and separate possession. Therefore, the Court held that from 1970 onwards, neither B. Subbaiah nor his vendor were in possession. The court below, therefore, held that even if the plaintiff was the wife of Yallapi Sivaiah, she lost the possession of plaint schedule property. Therefore, the finding of the lower Court is not very clear and is not in accordance with law. In the absence of evidence, the Court should not have entered into of this area of controversy, because adverse possession is a matter of pleading and proof.

32. The last argument advanced by the learned counsel for the appellant/plaintiff is that defendant No.3 was not examined as a witness and that in the absence of her evidence, an adverse inference should be drawn. In the chief examination itself, DW.1 deposed that he contacted defendant No.3 and that defendant No.3 told her that even B. Subbaiah also contacted her to give evidence on behalf of the plaintiff. She stated that she was not prepared to give evidence on behalf of either party in the suit and if she was summoned, she will depose against the persons. This part of the chief examination is not touched upon in the course of cross-examination. Hence, as per settled law, it is to be taken as admitted. Even otherwise, this appears to be a reasonable explanation for her non-examination. The plaintiff as the dominant litus choose to add this Pushpa as a party but she could not prove whether her daughter Pushpa died before or

after Ex.A.2 was executed. The findings of the Courts in the previous litigation about “Pushpa” were not proved to be incorrect or wrong in any manner. Hence, for all these reasons this Court holds that the mere non-examination of Defendant No.3/Pushpa is not fatal to this case.

33. For all these reasons, on a review of the entire evidence, pleadings and cross-examination, this Court holds that the findings of the lower Court are in order. There is nothing irregular or wrong in the said findings particularly the finding that the present plaintiff/appellant is not the wife of late Yallapi Sivaiah. This Court also does not find anything irregular or wrong in the finding that defendant No.3/Pushpa is the daughter of Yallapi Sivaiah. This Court holds that the present plaintiff is not the wife of late Yallapi Sivaiah. She cannot therefore maintain or pursue this litigation.

34. For all the above reasons, the appeal is dismissed and the impugned judgment and decree dated 15.04.1997 of the Additional Subordinate Judge, Gudur in O.S.No.120 of 1988 is hereby confirmed, except the finding of issue No.3. However, there shall be no order as to costs. Miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 16.11.2017
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