

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

+ A.S.No.83 of 1998

% 27-11-2017

Ankam Laxminarayna

... Appellant/
Plaintiff

Vs.

\$ Ankam Bixapathy
and others.

... Respondents/
Defendants

! Counsel for the appellant: Bankatlal Mandhani

Counsel for the Respondents: K.V. Bhanu Prasad

< Gist:

> Head Note:

? Cases referred:

¹ AIR 1957 SC 49

² 1973 (2) SCC 366

³ 1969 (1) An.W.R. 209 (A.P.)

⁴ AIR 1999 SC 1441

⁵ (2010) 10 SCC 512



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

A.S.No.83 of 1998

JUDGMENT:

This appeal is filed by unsuccessful plaintiff against the judgment and decree dated 31.01.1997 in O.S.No.278 of 1985 on the file of the I Additional Subordinate Judge, Warangal.

2. As this is a first appeal, the parties are arrayed and described as plaintiff and defendants only.

3. The plaintiff has filed the suit against the elder brother and sister-in-law. The case of the plaintiff is that the plaintiff and first defendant purchased a plot admeasuring 660 square yards for a consideration of Rs.2,000/- under a registered sale deed dated 16.02.1971. The sale deed is in favour the plaintiff and the second defendant. The plaintiff states that the second defendant is the nominee of first defendant. Later, while the second defendant wanted to apply for a loan at the Cooperative Society, the plaintiff states that he relinquished his rights in favour of second defendant only in order to facilitate the availment of loan. The plaintiff states that the second defendant availed the loan, but the plaintiff was also involved in the construction etc., of the property. The plaintiff also claims that in 1984-85 he demanded for partition of the property and as the partition was not agreed, the present suit is filed for a declaration that the release deed bearing No.978 of 1972 is void and not binding on the plaintiff for declaration that the plaintiff is entitled to half

share in the suit schedule property excluding the value of the first floor for partition and other reliefs.

4. Both the defendants filed their written statements in which they assert that the loan was availed by the second defendant; that the property was developed by the second defendant and that the deed of relinquishment was voluntarily executed without any misrepresentations. They denied that the same was nominal etc. Both the defendants assert that as the property was developed by the second defendant alone by constructing first floor and as the value increased, first defendant devised a plan for partition, despite relinquishing his rights in 1972 itself. It is also averred by the defendants that the stand of the plaintiff is inconsistent and contradictory. In his lawyers notice when he made an attempt to seek a separate sub-division for the suit schedule property from the municipal office, he pleaded a partition. Now, it is urged that the document is nominal. Second defendant also asserted in her statement that she was openly enjoyed the property; constructed double storied building by clearing the loan that she availed and that the plaintiff by his conduct is estopped from laying the claim etc.

5. The lower Court framed 9 issues in all and gave its findings and ultimately dismissed the suit. It is this order that is assailed in the present appeal.

6. I have heard Sri Bankatlal Mandhani, learned counsel for the appellant/plaintiff and Sri K.V. Bhanu Prasad, learned counsel for the respondents/defendants.

7. The main contentions urged by the learned counsel for the appellant/plaintiff are that a) the relinquishment deed was nominally executed in favour of the second defendant and that consideration was not passed at all; b) the husband-first defendant is not a competent witness and the defendants case is not proved; and c) the suit is not barred by time and therefore, the judgment of the lower Court is wrong.

8. In reply thereto, the learned counsel for the respondents/defendants argues that a) the relinquishment deed in question was executed after due consideration of the terms and conditions; b) the first defendant is a competent witness and the case is proved; c) the suit is barred by time; and d) lastly, the order of the lower Court is valid and correct.

9. The first and foremost point has to be considered is whether the deed of release dated 20.03.1972, which is marked as Ex.A.2/Ex.B.1, is valid or correct. At the outset, it is to be noticed that the plaintiff and first defendant are brothers. Second defendant is the first defendant's wife and hence, she is the plaintiff's sister-in-law. Plaintiff and first defendant are educated and both parties are gainfully employed.

10. The defendants have pointed out that the plaintiff's claim in the suit is not clear and the stands are vacillating. In the plaint, it is stated in para-2 that based on representation made by defendants 1 & 2 that the A.P. Housing Cooperative Society Federation which was approached for a loan, would finance only an applicant who has clear title himself, the plaintiff executed the deed in question. Therefore, the representation was made by defendants 1 & 2 that the loan would be given only to one owner. In para-6, however, he states that a 'fraud' was played. The defendants also pointed out that in the lawyer's notice issued by the plaintiff, which is marked as Ex.B.42, the plaintiff stated that second defendant created a forged document, as though the plaintiff relinquished his rights. In the written statements, defendants pointed out that the plaintiff made a claim based on a oral partition for half share of the suit schedule property in a representation submitted to the Municipal Commissioner and the said representation was rejected, vide orders dated 07.01.1985 by the Municipal Commissioner, Warangal.

11. The learned counsel for the defendants/respondents is right in his submissions in this aspect. A fraudulent execution of the document is different from a validly executed document, which is nominal in nature. The quality of pleading and evidence is different for the same. If it is the case of the plaintiff that the document was

executed based on a representation which turned out to be false etc., the quality of evidence and pleading would have been different. Therefore, the learned counsel is right in pointing out that the attempt of the plaintiff is to somehow claim for a share in the property, particularly as land values have increased. The vacillating and conflicting stands lend credence to the argument advanced by the counsel for the respondents/defendants.

12. With regard to point Nos.1, 2 & 3, the same were discussed and decided as one by the lower Court. The plaintiff did not produce any evidence to show that second defendant is merely a nominee of first defendant. No credible evidence was introduced nor is any clear cross-examination of DW.1 to establish the fact that second defendant was only a nominee of first defendant in the sale deed (Ex.A.1). Oral testimony against the terms of the registered document should be of a good quality to allow the court to ignore the bar contained in Section 92 of the Evidence Act. This Court is of the opinion that there is no such evidence to point out that the second defendant is a nominee of first defendant in Ex.A.1.

13. Coming to Ex.A.2/Ex.B.1-release deed, dated 20.03.1972, it is important to note that this deed was registered in 1972 as document No.978 of 1972 and the same is being challenged in 1985. The case of the defendants is that he believed the representation and executed the nominal document only as Ex.A.2.

14. The learned counsel for the appellant/plaintiff took pains to point out that in case the document is nominal, the Court will have to see the entire transaction particularly the receipt of consideration or passage of consideration for the document. The learned counsel relying upon ***Meenakshi Mills, Madurai v. the Commissioner of Income Tax, Madras***¹ and ***Dr. Prem Chand Tandon v. Krishna Chand Kapoor***² contends that Ex.A.2 is a nominal document and the same is not supported by any consideration. He emphasized that the Court should look into the issue of payment of consideration to decide on the true nature of document.

15. However, this Court finds that the plaintiff as PW.1 himself did not depose anything about the lack of consideration. He did not depose to the effect that he did not receive the consideration under Exs.A.2/Ex.B.1. In the absence of any foundation about this fact, this Court is of the opinion that he cannot “argue” that the consideration of Rs.1,000/- was not received by him. Ex.A.2/Ex.B.1 clearly states that he has received the consideration for relinquishing his rights. There is no documentary evidence to contradict this.

16. The learned counsel for the appellant/plaintiff states that as per the cross-examination of DW.1, it is clear that no receipt was obtained from the plaintiff regarding the payment of Rs.1,000/-. This was repeatedly emphasized by

¹ AIR 1957 SC 49

² 1973 (2) SCC 366

the learned counsel. However, the fact remains that the registered document itself speaks about the receipt of consideration by the plaintiff. Therefore, this Court is of the opinion that there is no need to obtain a separate receipt. In addition, it is also important to note that along with the consideration, this Court has to look into a) the motive behind the transaction, b) the possession of the property and c) custody of the deed to decide about the nature of transaction. **Mulakalapalli Pullayya v. Chalamala Guravayya**³ is the relevant case for this. If the evidence is examined as per the tests laid down by this Court in **Mulakalapalli Pullayya** (3 supra), it is clear there is no evidence about the consideration or the lack of consideration by PW.1 himself. The motive behind the transaction viz., that the loan will be sanctioned to only one owner by the Cooperative Housing Federation is not proved. The possession of the property is with the second defendant who availed the loan, developed the property and also cleared the loan over a period of time. Custody of the original deed is with second defendant is alone. Therefore, following the 4 tests laid down in **Mulakalapalli Pullayya** (3 supra), following **Meenakshi Mills** (1 supra), it is clear that the deed in question is not nominally executed and that the plaintiff/PW.1 was conscious what he was doing. He voluntarily and willingly relinquished his rights in favour of second defendant. This deed was actually

³ 1969 (1) An.W.R. 209 (A.P.)

executed and registered after a certificate (Ex.B.3) was issued by the plaintiff. But the same was not accepted by the Housing Federation. The certificate itself speaks of relinquishment by the plaintiff. The lower Court rightly noticed that the plaintiff could not prove that he used the collect the rents for half share or that he paid the money for clearing the loan or for construction of the property. His alleged enjoyment of the property is also not borne out by the record. His contradictory stand of a 'forged' document is against at valuation with the theory of oral partition (Ex.B.60) and/or nominal transaction.

17. The other issue that is relevant to decide is whether the first defendant is a competent witness to speak about this case.

18. It is the contention of the learned counsel for the appellant/plaintiff that the first defendant is not a competent witness. He also prays that an adverse inference should be drawn as the first defendant was not examined as witness and the second defendant did not enter into the witness box. The learned counsel cited **Vidhyadhar v. Mankikrao and another**⁴ and **Man Kaur (dead) by LRs v. Hartar Singh Sangha**⁵ and argues that an adverse inference should be drawn.

19. Section 120 of the Indian Evidence Act makes it clear that a husband is a 'competent' witness on behalf of his

⁴ AIR 1999 SC 1441

⁵ (2010) 10 SCC 512

wife. Apart from this clear statutory provision, a reading of the plaint makes it clear that the first defendant was intrinsically involved in the entire transaction. At various places in the plaint, the role of the first defendant is highlighted. Even Ex.B.42-lawyer's notice that is issued is addressed to the first defendant only and not to the second defendant. The allegations that are made are equally against the defendants 1 & 2 and in para-3, the plaintiff states that the defendants have not partitioned the suit schedule property and therefore, he filed the suit. It is also stated that defendants 1 & 2 are taking an advantage of his relinquishment deed/release deed. Therefore, it is clear that the case law cited by the learned counsel for the appellant/plaintiff is not applicable to the facts of the case. The witness examined on behalf of the defendants is a competent witness and he was involved in the transaction from the beginning. Therefore, his competence to depose cannot be commented upon and the lower Court was right and relied upon his evidence.

20. The other issue that is argued strenuously by the defendant is about estoppel/acquiescence and standing. The learned counsel for the defendants rightly pointed out that the release deed was registered in 1972 and the suit was filed only in 1985. He also pointed out that Ex.B.5-building permission was obtained in the name of second defendant, the construction of house was carried on by obtaining a loan.

Exs.B.5 to B.59, which are the documents filed by the defendants, establish the fact that the plaintiff while constructing the property, corresponded with the Cooperative Society executed a deed of mortgage for the loan and repaid the loan over above period of time. The mortgage was ultimately discharged in 1987. Therefore, the learned counsel points out that from 1972 and 1987 it was second defendant alone who was enjoying the property and no point of time the plaintiff protested about the same or about the improvements being made to the property. His contention, therefore, is by virtue of his conduct, the plaintiff is estopped from by raising any issue about the rights of the first defendant in the property. The learned counsel says as an alternate submission made, the plaintiff allowed the defendants to modify the property by investing on the same and even the construction of the first floor is in the knowledge of the plaintiff as can be seen from the pleadings itself. Therefore, it would be any inequitable to order for partition of the suit schedule property which is not in the vacant site as it was 1971-72.

21. This Court agrees with the submissions made. The conduct of the plaintiff and his long silence disentitles him to seek a partition of the property which is not in the same state. For all the above reasons, this Court is of the opinion that issues 1, 2 & 3 are rightly decided in favour of the plaintiff and against the defendants.

22. Issue No.5 is about court fee paid. The plaintiff claims that he is joint possession of the property and consequently he paid fixed court fee of Rs.200/- only under Section 34 (2) of the A.P. Court Fee and Suit Valuation Act along with the fee for cancellation of the document. The evidence on record clearly shows that it is the second defendant alone who is enjoying the property. The deed to the property is in the name of second defendant, municipal building permission was obtained by her, she mortgaged the property as security for the loan, she cleared the loan and obtained a lease deed, she improved the property and constructed the first floor. There is no contradictory evidence to prove that the plaintiff had joint possession. As noticed earlier, his plea about investing in the construction of the property or clearing of loan is not borne out by record. He admits in his cross-examination as follows:

“except my oral testimony I have not filed any documentary evidence to show that I had any concern in the construction of the house which is the suit property or with the loan obtained from cooperative housing society. On 9-9-71 D2 obtained permission from the Municipality for construction of the house. After 1984 year D2 constructed the first floor of the suit building.”

The plaintiff also admits in the cross examination dated 22.12.1985 that in March 1979 the Pochampad Investigation Department was evicted from the suit house at the instance of defendants 1 & 2.

23. Therefore, this Court is of the opinion that all the normal incidences of possession and enjoyment are proved by the second defendant. The plaintiff failed to prove the possession or joint possession. Hence, the court fee paid is totally inadequate and accordingly, issue No.5 is also held against the plaintiff.

24. Issues 4 & 6 were decided together by the lower court. This Court is of the opinion that both these issues were decided correctly by the lower Court. The plaintiff did not adduce any evidence to show that the deed of release (Ex.A.2/Ex.B.1) was executed by him without being aware of the contents etc., or on the basis of some wrong representation. His pleading is not backed by evidence and his varying stand at different points of time lends credence to the theory that his intention is only to grab the half share in the suit schedule property. On the contrary, the evidence of first defendant is clear as to the title and possession of second defendant. Therefore, issues 4 & 6 are held against the plaintiff. The property in question is the exclusive property of second defendant and the plaintiff is not entitled to any share against the same.

25. As far as the issue No.7 is concerned, the lower Court held that the applicable Article is 59 of the Limitation Act and that the suit is barred by time because it is filed three years after execution of Ex.A.2/Ex.B.1. The findings are supported by the learned counsel for respondents, who

argues that the suit is barred by time. On the contrary, the learned counsel for the appellant/plaintiff argues that as per the averments of pleadings and evidence, the cause of action should be deemed to have been arisen in December 1984 which the plaintiff demanded half share in the suit schedule property and the same was denied. He points out that first defendant agreed during his cross-examination on 16.08.1996 that differences arose between the first defendant and the plaintiff in the year 1984 when the plaintiff demanded partition. Therefore, the learned counsel contends that the suit is within time as it is filed within three years by denial of his right.

26. It is pertinent to state here that the essential relief claim is a declaration against deed of relinquishment/release deed registered as document No.978 of 1972. This document was executed by the plaintiff in favour of the second defendant. Therefore, the cause of action of the suit should arise essentially between the plaintiff and the first defendant and the denial by the second defendant cannot be deemed to be a starting point. The second defendant is the owner of the property and the title is in her name (Ex.A.1) and the deed of release (Ex.A.2) was between the plaintiff and the first defendant. Therefore, this Court is of the opinion that the applicable Article is Article 59 only, and the denial of the first defendant will not give a cause of action for the suit. The relief claimed is against the document No.978 of 1972, which is in

the name of first defendant. As per Article 59 of the Limitation Act, 1963, the starting point is the date on which the plaintiff “first” became aware of the set of facts constituting a cause of action. In this case, right from the beginning as per his averments he was aware that it was a nominal document. As per this article, the “denial” of a right does not give rise to a course of action. Issue No.7 is, therefore, held in favour of the defendants and against the plaintiff.

27. Issue No.8 was held in favour of the appellant/plaintiff and therefore, this Court is not called upon to decide the correctness or otherwise of the same fact.

28. For all the above reasons, this Court holds that Ex.A.2/Ex.B.1 was executed voluntarily and willingly by the plaintiff. The findings of the lower Court are upheld and it is held that the plaintiff is not entitled to a decree cancelling the release deed as void, nor is he entitled to a decree for partition or declaration of a share in the suit schedule property.

29. In the result, the appeal is dismissed. 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: 27.11.2017
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