

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.204 of 2000

JUDGMENT:

This second appeal is filed by the defendant, under Section 100 of CPC, assailing the decree and judgment dated 02.8.1999 passed in A.S.No.1 of 1994 on the file of the Court of Senior Civil Judge, Tadepalligudem, wherein and whereby the decree and judgment dated 22.12.1993 passed in O.S.No.210 of 1985 on the file of the Court of Principal District Munsif, Tadepalligudem, dismissing the suit for perpetual injunction, was reversed.

2. The parties to the second appeal will hereinafter be referred to as they were arrayed before the trial Court, to avoid confusion.

3. Heard the learned counsel for both the parties.

4. The facts leading to filing of the second appeal are briefly as follows: It is the case of the plaintiff that one Rudrapaka Venkata Subbarao is the owner of the suit schedule property. On 24.4.1954, Venkata Subbarao executed a Will bequeathing the suit schedule property in favour of the plaintiff and creating life interest in favour of his wife. Venkata Subbarao died in the year 1962. Wife of late Venkata Subbarao died in the year 1968. After death of Venkata Subbarao and his wife, plaintiff took possession of the suit schedule property. The defendant owns vacant site on the east of the suit schedule property. The plaintiff refused the request of the defendant to sell the suit schedule property to him. The defendant, without any right whatsoever, is interfering with the suit schedule property; hence, the suit.

5. The defendant filed the written statement denying all the averments made in the plaint including the Will dated 24.4.1954, *inter alia*, contending that one Bala Tripura Sundari is the fostered daughter of Rudrapaka Venkata Subbarao. Venkata Subbarao performed the marriage of Bala Triupra Sundari on 25.2.1950 and gifted the suit schedule property to her towards pasupu-kunkuma. There is a thatched house in the suit schedule property up to 1962. Bala Tripura Sundari, her husband and children sold the suit schedule property in favour of the defendant on 05.7.1985 and delivered the possession of the same. Since then, the defendant has been in possession and enjoyment of the suit schedule property. The plaintiff created the Will. The plaintiff was never in possession of the suit schedule property much less as on the date of filing of the suit; hence, the suit is liable to be dismissed.

6. Basing on the pleadings, the trial Court framed the following issues for trial:

1. Whether the plaintiff is entitled for permanent injunction as prayed for?
2. To what relief?

7. Before the trial Court, on behalf of the plaintiff, P.Ws.1 to 4 were examined and Ex.A.1 was marked. On behalf of the defendant, D.Ws.1 to 5 were examined and Exs.B.1 to B.8 and Ex.X1 were marked.

8. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the plaintiff failed to prove Ex.A.1 Will and consequently dismissed the suit. Feeling aggrieved by the decree and judgment of the trial Court, the plaintiff preferred the appeal.

9. The first appellate Court, after re-appraising the oral and documentary evidence available on record, arrived at a conclusion that the plaintiff failed to prove Ex.A.1 Will; however, the plaintiff has been in possession and enjoyment of the suit schedule property; therefore, the plaintiff is entitled to the relief of perpetual injunction; consequently, allowed the appeal, setting aside the judgment and decree of the trial Court. Feeling aggrieved by the judgment and decree of the first appellate Court, the defendant preferred the second appeal.

10. The question of law urged by the learned counsel for the appellant is as follows:

Whether the first appellate Court is justified in granting perpetual injunction in favour of the plaintiff while disbelieving Ex.A.1 Will?

11. It is the case of the plaintiff that late Venkata Subbarao executed Ex.A.1 Will in his favour bequeathing the suit schedule property while creating life interest in favour of his wife. It is the case of the defendant that he purchased the suit schedule property from Bala Tripura Sundari and her family members under a registered sale deed dated 05.7.1985-Ex.B.6. It is not in dispute that the suit schedule property originally belongs to late Rudrapaka Venkata Subbarao, who died in the year 1962. The wife of Venkata Subbarao died in the year 1968. It is the case of the defendant that Bala Tripura Sundari is the fostered daughter of Rudrapaka Venkata Subbarao. It is the further case of the defendant that the suit schedule property was given to Bala Tripura Sundari towards pasupu-kunkuma, at the time of her marriage. Mere pleading in the written statement would not amount to its proof. There is no material on record to establish that Bala Tripura Sundari was the fostered daughter of Venkata

Subbarao. The material available on record falls short to establish that Rudrapaka Venkata Subbarao had given the suit schedule property was given to Bala Tripura Sundari towards pasupu-kunkuma.

12. A person, who files the suit seeking equitable relief, has come to the court with clean hands. In order to succeed the suit, the plaintiff has to adduce evidence to establish that he has been in possession of the suit schedule property much less as on the date of filing of the suit. If the plaintiff establishes his possession over the suit schedule property, as on the date of filing of the suit, then the onus of proof shifts on to the defendant to establish his stand. The plaintiff is claiming the title over the suit schedule property basing on Ex.A.1 Will. Suffice it to say, a duty is cast on the propounder of the Will to dispel the suspicious circumstances surrounding the execution of the Will. It is the duty of the plaintiff to prove that late Venkata Subbarao executed Ex.A.1 Will in his favour in a sound and disposing state of mind. Let me consider the facts of the case on hand, in the light of the above legal principles.

13. P.W.1 and D.W.1, being the parties to the proceedings, there is every possibility of distortion of the facts in order to suit their respective claims. P.W.2 is the brother of late Rudrapaka Venkata Subbarao. As per the testimony of P.W.2, his brother executed Ex.A.1 Will in favour of the plaintiff. If the testimony of P.W.2 is taken into consideration, he was present at the time of execution of Ex.A.1 Will by Venkata Subbarao in favour of the plaintiff. It is not in dispute that P.W.2 is neither scribe nor attestor of Ex.A.1 Will.

In such circumstances, much weight cannot be attached to the testimony of P.W.2.

14. Will is an attestable document. An attestable document has to be proved by examining one of its attestors. If the attestors of the Will are no more, the propounder of the Will has to examine the person, who is well acquainted with the hand-writing of the attestors of the Will. To prove the ingredients of Section 68 of the Indian Evidence Act, the plaintiff is mainly placed reliance on the testimony of P.W.3. P.W.3 is none other than the son of the one of the attestors. As per the testimony of P.W.3, Ex.A.1 Will bears the signature of his father. The Court has to consider the credibility of a witness, in order to place reliance on his testimony. Exs.B.1 to B.4 are the registered documents contain the signatures of the father of P.W.3. P.W.3 denied the suggestion that Exs.B.2 to B.4 bear the signature of his father. Both the Courts gave a specific finding that that P.W.3 intentionally denied the signature of his father on Exs.B.2 to B.4. A perusal of the record reveals that both the Courts disbelieved the testimony of P.W.3. The trial Court, while disbelieving the testimony of P.W.3, discarded Ex.A.1 Will. The first appellate Court made an observation in paragraph No.16 of its judgment, which reads as follows:

16. P.W.3 has intentionally denied his father's signature on the registered documents. It does not mean that Ex.A.1 Will is a forged one. Even if Ex.A.1 Will is not proved, the plaintiff has established his possession.

The above portion clearly indicates that the first appellate Court disbelieved Ex.A.1. Will. The Courts below have assigned reasons much less cogent and valid reasons while discarding Ex.A.1. Will.

15. The crucial question that falls for consideration is:

Whether the plaintiff established that he has been in possession and enjoyment of the suit schedule property as on the date of filing of the suit, even if Ex.A.1 Will is discarded?

16. The trial Court made an observation that the plaintiff failed to prove that he has been in possession and enjoyment of the suit schedule property much less as on the date of filing of the suit. The first appellate Court, while discarding Ex.A.1 Will, arrived at a conclusion that the plaintiff has established his possession. This Court is unable to understand on what basis the appellate Court came to the conclusion that the plaintiff was in possession of the suit schedule property as on the date of filing of the suit. The appellate Court has not given any specific finding that the plaintiff has been in possession and enjoyment of the suit schedule property as on the date of filing of the suit. Except Ex.A.1 Will, the plaintiff did not file even a single scrap of paper to establish his possession over the suit schedule property. Even assuming, but not conceding, that the plaintiff has been in possession and enjoyment of the suit schedule property from 1968 till the date of filing of the suit, what prevented him to produce any document to substantiate his stand. Either it is a vacant site or any house is there in the suit schedule property, tax has to be paid to the Gram Panchayat. The plaintiff has also not taken any step to examine concerned official of the Gram Panchayat, to prove that he has been in possession and enjoyment of the suit schedule property. The first appellate Court made an observation that the plaintiff established his title over the suit schedule property. This Court is unable to understand how the first appellate Court arrived at such a conclusion while disbelieving Ex.A.1 Will. If the findings recorded by the Courts below are not based on evidence or based

on evidence, which is not legally admissible, this Court can interfere with such a finding and set aside the same while exercising the jurisdiction under Section 100 of CPC. As observed earlier, the finding of the first appellate Court that the plaintiff has proved his possession over the suit schedule property, even though has not proved Ex.A.1 Will, is not sustainable either on facts or in law. In such circumstances, the findings recorded by the first appellate Court are not sustainable. The trial Court has assigned reasons much less cogent and valid reasons to its findings. The question of law raised by the learned counsel for the appellant is a substantial question of law.

17. Having regard to the facts and circumstances of the case, this Court is of the considered view that the decree and judgment passed by the first appellate Court is liable to be set aside.

18. In the result, the second appeal is allowed, setting aside the decree and judgment dated 02.8.1999 passed in A.S.No.1 of 1994 on the file of the Court of Senior Civil Judge, Tadepalligudem. Consequently, the suit is dismissed confirming the decree and judgment dated 22.12.1993 passed in O.S.No.210 of 1985 on the file of the Court of Principal District Munsif, Tadepalligudem. Miscellaneous Petitions, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 06.11.2018
YS