

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

**A.S.No.1493 of 1998**

**J U D G M E N T:**

This appeal is filed by the unsuccessful plaintiffs against the judgment and decree dated 30.06.1997 in O.S.No.117 of 1991 passed by the Principal Subordinate Judge, Tenali.

This is a first appeal and for the sake of convenience, the parties are referred to plaintiffs and defendant only.

The brief facts of the case are that the suit OS.No.117 of 1991 was filed to set aside the decree passed by this Court in A.S.No.473 of 1971 regarding the undivided 1/4<sup>th</sup> share of Edara Venkayamma, which is the subject matter of O.S.No.95 of 1963 on the file of the Subordinate Judge Court, Tenali and the appeal thereon A.S.No.473 of 1971 on the file of this Court, which was subsequently confirmed by the Hon'ble Supreme Court of India in Civil Appeal No.1070 of 1976 and for costs.

The plaintiffs are brothers and are sons of late Edara Venkata Subbaiah. The paternal grand father of the plaintiffs is Edara Pitchaiah. Edara Pitchaiah got only one son Venkata Subbaiah, who is the father of the plaintiffs. Pitchaiah and Venkata Subbaiah (who is the father of the plaintiffs) constitute a Hindu undivided joint family. Late Pitchaiah died undivided with his son Venkata Subbaiah and intestate on 15<sup>th</sup> March, 1956 leaving behind him, his widow

Venkayamma and on his son Venkata Subbaiah. No partition took place between them regarding the estate of Pitchaiah. The defendant is the daughter of the sister of the plaintiffs' original grand mother.

The plaintiffs were born on 15.04.1954 and 22.05.1959 respectively. The plaintiffs' father, as joint family manager, acquired items 3 of A-schedule and items 10 & 11 of A-1 schedule by purchasing the same under registered sale deeds dated 17.09.1959, 01-06-1960 and 30-10-1960 with the joint family funds.

The plaintiffs paternal grand mother and Venkata Subbaiah's mother Venkayamma died intestate on 05.03.1963 at Ithanagar, Tenali and her undivided  $\frac{1}{2}$  share in the half share of husband Pitchaiah in Items 1, 2, 4 to 6 of 'A' schedule and in items 1 to 9 of A1 schedule and 'B' schedule devolved on her son Venkata Subbaiah from Venkayamma is part of the ancestral property the sons of Venkata Subbaiah i.e., the plaintiffs also got a share therein.

The defendant filed O.S.No.95 of 1963 on the file of Subordinate Judge's Court, Tenali against the plaintiffs, their brother Anjaneya Vara Prasad and their father Venkata Subbaiah for partition and separate possession of one-fourth share in plaint A1 and B schedule properties setting up a Will stating that late Edara Venkayamma executed her last Will and testament dated 05.02.1963 bequeathing for same to her with absolute rights. The plaintiffs and their brother

Anjaneya Venkata Vara Prasad are minors at that time and they were represented by their father as guardian. The father of the plaintiffs was semi literate learning only to sign, but did not diligently prosecute the suit O.S.No.950 of 1963. He did not raise relevant and valid pleas regarding the genuineness of the Will, applicability of the terms of the said Will to the share of Venkayamma, in her husband's properties. He was negligent in producing and adducing proper and sufficient evidence regarding the forged Will dated 05.02.1963 alleged to have been executed by late Venkayamma. He did not produce even a single piece of documentary or oral evidence regarding the above mentioned items. The suit O.S.No.95 of 1963 was dismissed by the Sub-ordinate Judge, Tenali and the findings on the above mentioned items are given in favour of the defendant, who was the plaintiff in O.S.No.95 of 1963. The defendant carried the matter in appeal to this Court in A.S.No.473 of 1971. The plaintiffs' guardian did not either prefer a separate appeal or cross objection in A.S.No.473 of 1971 regarding items 3 of A schedule and items 10 and 11 of A1 schedule. Pending the said appeal A.S.No.473 of 1971, the plaintiffs' father died intestate on 19.04.1973. The plaintiffs' mother, who was a semi literate, was appointed as their guardian. The plaintiff's guardian did not take any steps to adduce additional evidence both documentary and oral. The appeal filed by the first defendant AS.No.473 of 1971 was allowed by this Court on 14.03.1975.

The plaintiffs came to know recently that their mother as the guardian of plaintiffs and Anjaneya Vara Prasad preferred appeal to the Supreme Court of India in Civil Appeal No.1070 of 1976 and that it was dismissed on 09.11.1990.

As a result, the plaintiffs herein who are defendants 3 & 4 in O.S.No.95 of 1963 suffered loss and they lost that legitimate shares. Hence, the decree passed by this Court in A.S.No.473 of 1971 which is confirmed by the Hon'ble Supreme Court in Civil Appeal does not bind the plaintiffs and it is liable to be set aside for the above mentioned grounds.

The defendant filed written statement which is briefly reproduced:

The defendant denies the plaint allegations. It is submitted that the plaintiffs have no right in law to question the validity of judgment and decree passed in AS.No.473 of 1971 on the file of this Court, which was confirmed by the Hon'ble Supreme Court in Civil Appeal No.1070 of 1976. The judgment and decree passed in AS.No.473 of 1971 by this Court and also judgment and decree passed in Civil Appeal No.1070 of 1976 on the file of Hon'ble Supreme Court, operate as *res judicata* and the plaintiffs are estopped from questioning the validity of the judgments and decrees. Plaintiffs cannot, re-agitate once again as the matter was decided once for all by the highest Court of the land. The father and mother of the plaintiffs are well-versed in litigation.

The father and mother of the plaintiffs never acted negligently. They both are very intelligent and engaged senior most advocates at every stage of the litigation. The plaintiffs are fully aware of the legal proceedings both in this Court as well as in the Hon'ble Supreme Court. The legal proceedings stated in the year 1963 ended in 1990 i.e., for a period of nearly 27 years, the legal proceedings were pending. There are absolutely no grounds for setting aside the decree and judgment in AS.No.473 of 1971 on the file of this Court, which was confirmed by the Hon'ble Supreme Court in Civil Appeal No.1070 of 1976.

In the light of the above pleadings, the following issues are settled for trial:

- i) Whether the plaintiffs' father and guardian acted negligently in defending the suit OS.No.95 of 1963 and appeals and that the judgments therein are not binding on the plaintiffs?
- ii) Whether the judgments and decrees in OS.No.95 of 1963, AS.No.473 of 1971 and Civil Appeal No.1070 of 1976 act as *res judicata* against the pleas of the plaintiffs?
- iii) Whether the suit is barred by time?
- iv) Whether the plaintiffs are entitled to the reliefs prayed for?
- v) To what reliefs?

On behalf of the plaintiffs, PWs.1 to 3 were examined and Exs.A.1 to A.13 were marked. On behalf of the

defendant, she was examined as DW.1 and no documents were marked.

This Court has heard Sri T.S.Anand for the appellants and Sri V.S.R.Anjaneyulu for the respondent.

A long legal battle from 1963 to 1976 from the sub-court, Tenali to the Hon'ble Supreme Court of India did not give a quietus to the issue but resulted in a further round of litigation leading to the filing of OS.No.117 of 1991 and the present appeal.

The genesis for this litigation is a suit OS.No.95 of 1963 filed by Sri Jetti Seeta Mahalakshamma against four defendants one Pitchayya and his son Venkata subbayya constituted a joint family. The said Pitchayya died intestate leaving behind him his widow Venkayamma and his son the 1<sup>st</sup> defendant. The said Venkayamma executed a Will dated 05.02.1963 bequeathing a share to the plaintiff. The defendants in the said suit have set up another Will dated 28.02.1963 said to have been executed by Venkayamma. So they are impleaded as parties. The lower Court framed issues about the correctness/genuineness of both the Will dated 05.02.1962 and 28.02.1963. Ex.A.8 is a copy of the printed judgment in OS.No.95 of 1963. After a trial, the suit OS.No.95 of 1963 was dismissed. This High Court, however, allowed the appeal filed against the judgment in OS.No.95 of 1963 in Appeal No.473 of 1971. Against the same, a Civil

Appeal was filed in the Supreme Court of India (Civil Appeal No.1070 of 1976) which was dismissed.

Questioning the conduct of the trial in the suit and stating that their interests as minors was not adequately represented, the present suit is filed to set aside the decree passed in AS.No.473 of 1971 by the High Court of Andhra Pradesh, which was confirmed by the Hon'ble Supreme Court in Civil Appeal No.1070 of 1976.

This is the brief history of the litigation, which is now pending before this Court.

Sri T.S.Anand, learned counsel, argued that a minor, whose interests were not adequately and correctly represented, can file a suit to have the same set aside on the ground of prejudice caused due to gross negligence of the guardian and also on the ground of fraud. There is no doubt about this proposition and both Order XXXII, Rule 3A of Code of Civil Procedure and Section 44 of the Indian Evidence Act provide for the same.

The learned counsel for the respondent, however, argued that though the same is legally permissible, the moot question is whether there was gross negligence in the conduct of the case OS.No.95 of 1963. His submission is that the case was diligently prosecuted and there is no negligence let alone gross negligence.

An examination of Ex.A.8 judgement and decree shows that Exs.A.1 to A.16 were marked for plaintiff and Exs.B.1 to

B.11 were marked for defendants. Eight witnesses were examined for the plaintiff and four witnesses for defendant.

An examination of the lower Court judgment also shows that in paragraphs 26 to 31 it has considered all the aspects. These paragraphs and the findings therein are relied upon by the learned counsel for the respondent to argue against the appellant. The learned counsel also took pains to point out that the case law cited in the lower Court was also analysed by the learned Judge. His contention is that there was no material available in the lower Court to hold that the prosecution of the suit OS.No.65 of 1993 is not correct. Nothing has been pointed out in the submission before this Court also.

This Court is of the opinion that evidence of a higher character or a better standard is necessary to set aside a judgment, more so, the judgment of the higher Courts. The law also permits the setting aside of judgments on grounds of fraud or gross negligence.

As per settled law on this subject, fraud; improper conduct etc., must be specifically pleaded with clarity and with particulars; ***Afsar Sheikh and Anr. V. Soleman Bibi and Others***<sup>1</sup> and ***The Union of India (UOI) vs. Pandurang Kashinath More***<sup>2</sup>. There is no such clear pleading in this case nor are there particulars and evidence furnished leading to a finding of gross negligence or fraud.

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<sup>1</sup> AIR 1976 SC 163

<sup>2</sup> AIR 1962 SC 630

Standard of proof in cases of fraud in civil cases is also very high. In fact, in **Savithramma vs. H. Gurappa Reddy and others**<sup>3</sup>, the Karnataka High Court held that the standard of proof of a fraud in a civil case is equal to that of a criminal case. The other ground available is not mere negligence in prosecuting the case, but gross negligence, which again leads to the conclusion that the plaintiffs must prove an absolute lack of care and not a mere lack of care. Here again the evidence must be of a better quality, since the plaintiff is seeking to set aside judgments of Courts of law including the superior Courts of law.

After hearing the learned counsels and perusing the records, this Court is of the opinion that the case OS.No.65 of 1993 was prosecuted diligently. The lower Court also in deciding Issue No.1 analyzed the facts and case law correctly and came to a correct finding. Except general statements; nothing concrete was pointed out. This Court therefore agrees with the findings on Issue No.1.

As far as Issue No.2 is concerned, the earlier judgments do not operate as “*res judicata*” because the challenge is to the very same judgment on the ground that the suit was not prosecuted correctly or diligently. The Division Bench judgment relied upon by the lower Court clearly supports this view. Thus, there is no infirmity in the finding.

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<sup>3</sup> AIR 1996 Karnataka 99

With regard to limitation and Issue No.3 also, this Court on an examination of the judgment and evidence concurs with the findings. The present plaintiffs were aged 31 and 36 years by the date of the plaint. After 1973, their mother was pursuing the case. Their plea that they came to know of the case only in 1991 cannot be believed. The important admission of PW.1 in his cross-examination on 18.03.1997 that he questioned his mother and she answered as follows: “

“The Supreme Court confirmed the judgment of the High Court while we were majors. We asked my mother about the suit and the litigation. She instructing me to mind your education and not concerned with the suit.”

The suit was not admittedly filed within three years from the date of knowledge. Hence, this Court agrees that the suit is barred by time.

In the result, this Court concurs with all the findings of the lower Court and does not find any reason to interfere with the findings. The judgment and decree dated 30.06.1997 are confirmed. The appeal is dismissed with costs to the respondent.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

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**D.V.S.S. SOMAYAJULU, J**

Date: .02.2018  
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