

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

**A.S.No.1763 of 1998**

**JUDGMENT:**

This appeal is filed questioning the judgment and decree dated 07-08-1998 passed in O.S.No.93 of 1988 by the II Additional Senior Civil Judge, Kakinada.

2. As this is a first appeal and for the sake of convenience, the parties are referred to as 'plaintiff' and 'defendants' only as in the suit.

3. Defendants 1, 4, 6 to 8 are the appellants 1 to 5. Later, after the death of 5<sup>th</sup> appellant, who is 8<sup>th</sup> defendant, his legal representatives were brought on record as appellants 6 to 8, as per the orders of this Court, dated 28.11.2008 in AS MP No.2466 of 2008.

4. The suit is filed before the lower Court by the first respondent/plaintiff-Y. Narayanamma seeking a relief of declaration of her title to the plaint schedule property after ejecting the defendants therefrom and for profits and costs. The case of the plaintiff in her plaint is that she is the wife of one Yenupuri Venugopalarao, a retired railway employee. Venugopalarao was the owner of the suit schedule property, which is the house bearing No.3-11-80/1. She states that Venugopalarao died intestate on 14-03-1983. According to the plaint, the

first defendant is enjoying the possession of the property. Defendants 2 to 5 are the tenants of the suit schedule property. On the basis of this, she filed a suit as the sole legal heir for recovery of possession after ejecting the defendants. Later, the plaint was amended questioning the adoption deed and gift deed, which are executed by the deceased-Venugopalarao.

5. Defendants 1 to 4 filed a written statement wherein they alleged that Venugopalarao took the eldest son of the first defendant in adoption on 05.01.1978 and that the first son-Y. Venkata Hari Mohana Rao became the adopted son and therefore, he is entitled to the property as a son. In addition, it is pleaded that on 26.05.1979 Venugopalarao executed a registered gift deed in favour of defendants 6 to 8. The gift was accepted and their guardian, 4<sup>th</sup> defendant constructed a house on the site. To the similar effect is the additional written statement filed by defendants 1 and 4. A separate written statement was filed by 8<sup>th</sup> defendant. Rejoinder was also filed by the plaintiff wherein the gift deed dated 26.05.1979 was denied. It is pleaded that the gift deed is neither true nor valid nor legally executed. There was no delivery of possession also. On the basis of these pleadings, the lower Court framed seven issues:

1. Whether the adoption deed dated 05.01.1978 in favour of the eldest son of the 1<sup>st</sup> defendant and the gift deed dated 26.05.1979 in favour of the three sons of the 1<sup>st</sup> defendant by late Venugopalarao are true, valid and binding on the plaintiff?
2. Whether the plaintiff is entitled for declaration of her title over the plaint schedule property and for recovery of the same?
3. Whether the plaintiff is entitled for past and future profits, and, if so, at what rate?
4. Whether the three sons of the 1<sup>st</sup> defendant are necessary parties to the suit and whether this suit is bad for non-joinder and mis-joinder of parties?
5. Whether the suit house was constructed with the monies of the 4<sup>th</sup> defendant and of the 1<sup>st</sup> defendant without any notice of claims of 3<sup>rd</sup> parties?
6. Whether there is no course of action for the plaintiff to file this suit?
7. To what relief?

6. Parties went to the trial. For the plaintiff, PWs.1 to 3 were examined and Exs.A.1 & A.2 were marked. For the defendants, DWs.1 to 5 were examined and Exs.B.1 to B.23 were marked. Exs.X.1 and X.2 were also marked. After considering the oral and documentary evidence and after hearing the submissions, the lower Court passed the impugned judgment holding that the plaintiff has proved her case and that she is entitled for a declaration of title. It is this judgment that is now challenged in the present appeal.

7. This Court has heard Sri S. Subba Reddy, learned counsel (representing late Sri V.L.N.G.K. Murthy learned senior counsel) for the appellants/defendants and Sri K.A. Narasimham, learned counsel for the respondents.

8. This Court after considering the submissions made and the evidence on record is of the opinion that the following point is the crux of the whole matter:

Whether Ex.B.2-gift deed dated 26.05.1979 is correct and valid?

9. The rest of the questions for determination in this appeal would follow from the determination of this point. If the gift deed is held to be valid, the appellants are entitled for reversal of the judgment and decree of the lower Court and if the gift deed is held to be invalid, the plaintiff is entitled to succeed. In the lower Court, there was also a lot of discussion and evidence on the validity of Ex.B.1-adoption deed dated 05.01.1978. However, the learned counsel for the appellants rightly conceded during the course of hearing that the gift deed is opposed Section 7 of the Hindu Adoption and Maintenance Act as the consent of the plaintiff (wife) was not taken by late Venugopalarao for the said adoption. Therefore, considering the legal position on the subject, the learned counsel contended that the validity of adoption deed was

no longer open for discussion as it is hit by Section 7. In view of this concession on Ex.B.1-adoption deed, both the learned counsel concentrated in their submissions on the correctness or otherwise of Ex.B.2-gift deed.

10. It is the contention of the defendants that the eldest son of first defendant was adopted by late Venugopalarao, vide Ex.B.1. However, late Venugopalarao gifted the said property to all the three sons including the so-called adopted son under Ex.B.1. Therefore, the defendants/appellants claimed title through Ex.B.2-gift deed. The plaintiff has pleaded that the gift deed is not true or valid. This Court is therefore first examining the correctness or otherwise of Ex.B.2-gift deed dated 26.05.1979.

11. The plaintiff examined herself as PW.1 in the suit on 10.11.1993 and was cross-examined in 1994. The plaint shows that an amendment was carried in the plaint by orders dated 20.01.1990 by which she attacked the adoption deed and also gift deed. Later, she filed a rejoinder in 1989 in which she questioned the gift deed and the adoption deed. However, a reading of the evidence of PW.1 shows that it is very bland and does not really raise any serious issue about the gift deed in question. However, in her cross-examination, at page-5 she clearly states as follows:

“I verified the registered settlement deed purported to have been executed by my husband in favour of defendants 6 to 8 in the Registration Office. It was in or about 1985-86.”

In addition to this, she also states that there are disputes pending between her and her husband from 1961 onwards. The only two documents that she filed are Exs.A.1 & A.2, which are the copies of her matrimonial court cases filed in Chodavaram Court in 1981 and also the appeal therefrom in the District Court at Visakhapatnam. Other than this, no other document was filed. As mentioned earlier in her oral evidence, she does not really focus on the gift deed.

12. PW.2 is the elder brother of the plaintiff. He states that the plaint schedule property is the self-acquired property of late Venugopalarao and that Venugopalarao did not execute any adoption deed or settlement deed. He also states that in the cross-examination, he gave instructions for drafting the plaint in the suit. For the last 40 years, the plaintiff is living with him and not with her deceased-husband. In addition, he also states that defendants 6 to 8 are the grandchildren of late Venugopalarao's brother. He admits that 4<sup>th</sup> defendant is the friend of plaintiff's husband and also an attester of Ex.B.1 adoption deed. He also admits

that he has gone through the registered settlement deed and in the last part of his cross-examination, he admits that there has been litigation between the plaintiff and her husband for the last 35 years.

13. PW.3 is another witness, who was examined to support the case of the plaintiff. Late Venugopalarao, who is the husband of PW.1-plaintiff, is her elder brother. She states that at no point of time she was informed of the adoption deed or of the settlement deed. In her cross-examination, she states that Venugopalarao died at Kakinada and his final ceremonies were performed by younger brother-Adimurthy. In her cross-examination, he deposed as follows:

“I went to the house of the plaintiff before coming to the Court. PW.1 instructed me what has to be deposed before the Court and at her instance I am deposing the evidence. PW.2 was also present at the time of giving instructions to me. With a view to help my sister-in-law and at the instance of PW.2 and my sister-in-law, I am deposing today in the court.”

In view of this deposition, this Court is of the opinion that the evidence of PW.3 is not trustworthy.

14. In contradistinction to this, five witnesses were examined for the defendants and Exs.B.1 to B.23 were marked, apart from Exs.X.1 & X.2. The first defendant is DW.1. She deposed in line with her written statement and marked Exs.B.1 to B.12. The cross-examination was

also largely concentrated on the adoption deed and the manner in which the adoption was performed. In addition, in the cross-examination, this witness was also deposed that her sons-defendants 6 to 8 studied at Dhusipeta in Srikakulam District by staying at the house of 4<sup>th</sup> defendant. She also states that she was not present when Ex.B.2 was registered.

15. The next witness examined as DW.2, who also speaks essentially of the adoption. He states that he is one of the attesting witnesses of Ex.B.1-adoption deed. DW.3 is the 4<sup>th</sup> defendant in the suit. He is the critical witness since he is shown as the guardian of the donees under Ex.B.2. This witness deposes extensively about his friendship with the deceased Venugopalarao; about the defendants 6 to 8 staying with him for studies; about his presence during the registration of Exs.B.1 & B.2; about the loan obtained for the construction of the property and the developments made thereon after the gift was given to defendants 6 to 8. He has marked in his examination many of the documents which are filed on behalf of the defendants as exhibits (Exs.B.13 to B.23). However, the cross examination of this witness is not very elaborate and the same will be discussed later in the judgment. DW.4 is the elder brother of the deceased Venugopalarao. He is examined as the 4<sup>th</sup> witness and he

essentially deposed about the signature on Exs.B.1 & 2. He asserts that the signatures on these documents are of his brother. He also deposed about his brother's signatures on Exs.X.1 & X.2. Sri B.J. Prasad, an advocate clerk was examined as DW.5. He is also a licenced document writer. He identified his signatures and attestors of Ex.B.2. For this limited purpose, he was examined as a witness.

16. After the evidence was introduced and the arguments were heard, the lower Court came to a conclusion that Ex.B.1 is not a validly executed document and that there were certain suspicious circumstances about the execution of Ex.B.2 gift deed also. Hence, both were not believed. The learned Judge held that there is no evidence to show the signature of Venugopalarao on Ex.B.2-gift deed is correct; and that there is no opinion of an expert relating to the signatures of Venugopalarao. Therefore, the lower Court held that Ex.B.2 is not a validly executed document.

17. As far as Ex.B.1 adoption deed is concerned, the learned Judge noticed the case law on the subject and also Section 7 of the Hindu Adoption and Maintenance Act and came to the conclusion that as the consent of the wife is not taken, the adoption deed is invalid. This finding of the learned Judge is correct in the

circumstances. The same is also not really questioned in the appeal; as noted earlier. However, what remains is the finding of the learned Judge on the question of Ex.B.2 gift deed.

18. Sri S. Subba Reddy, learned counsel for the appellants pointed out that all the witnesses who were examined clearly speak about the execution of Ex.B.2-gift deed. They asserted that it contains the signatures of Y. Venugopalarao. The plaintiff in the suit did not introduce any evidence whatsoever to disprove the contents of Ex.B.2. The learned counsel points out that the plaintiff has attacked Ex.B.2-gift deed and pleaded that this has a forged signature. Therefore, the learned counsel contended that the plaintiff must produce the admitted signatures to disprove Ex.B.2 and if needed refer the matter to an expert and get the challenged signatures compared by an expert. He also argued that there are certain presumptions in favour of the registered document which are not discharged. He also points out that what was gifted under Ex.B.2 is a vacant site and that the documents filed by the defendants show the construction of her house by obtaining a loan etc. The plaint schedule is also of a built up house. Therefore, he states that all the essential ingredients of gift are fulfilled in this case due to the acceptance and the improvement.

Hence, he argues that the findings of the lower Court are totally incorrect.

19. In reply to this, the learned counsel for the appellants argued that the suspicious circumstances surrounding Ex.B.2 are not displaced, that when the natural parents are alive, the appointment of 4<sup>th</sup> defendant as a guardian itself is very suspicious circumstance. The learned counsel for the appellants argued that the findings of the lower Court are correct.

20. This Court on examination of the matter after hearing the submissions of the learned counsel notices the following:

i) Ex.B.2 is a registered gift deed. The same was marked through DW.1. Like all other registered documents it contains a certain presumption that it is valid.

ii) The plaintiff herself clearly states in her cross-examination that she has verified the registered settlement deed in the Registration Office in 1985-86, which is prior to the plaint itself. She states that 4<sup>th</sup> defendant was appointed as a guardian. However, despite being aware of the contents of Ex.B.2-gift deed, there is no pleading in the plaint about any of the issues that are raised now about the validity of the document. If the plaintiff was aware of the contents of Ex.B.2-registered

gift deed in 1985-86 itself, a duty was cast upon her to clearly plead about the issues that are now used to attack the gift deed.

iii) The appointment of 4<sup>th</sup> defendant as a guardian is another issue that is strongly commented upon by the plaintiff. The 4<sup>th</sup> defendant is a friend of the deceased-Venugopalarao. Admittedly, from 1961 onwards there were matrimonial disputes between the plaintiff and the deceased-Venugopalarao. PW.2 also deposes that PW.1 was living with her for 35/40 years. Exs.A.1 and A.2 which are only documents filed by the plaintiff are copies of proceedings in a matrimonial dispute. Therefore, it is clear that there was no husband and wife relationship between PW.1 and the deceased-Venugopalarao. The deceased-Venugopalarao was a friend of 4<sup>th</sup> defendant. In line with the friendship, he appointed the 4<sup>th</sup> defendant as a guardian of the children-defendants 6 to 8. The trust reposed on 4<sup>th</sup> defendant by 1<sup>st</sup> defendant is also borne out by the evidence of the first defendant. The first defendant who is natural mother of defendants 6 to 8 clearly states that Venugopalarao got her children educated. She also states that they were sent to Dushipeta to stay at the house of 4<sup>th</sup> defendant for their study. She also states that 4<sup>th</sup> defendant and herself constructed the house by availing loans and by spending

their own money. She has filed study certificates of defendants 6 to 8, which are marked as Exs.B.9 to B.12 to show that her children studied at Dushipeta.

iv) Apart from the natural mother agreeing to the appointment of 4<sup>th</sup> defendant as a guardian, the evidence of this critical witness, 4<sup>th</sup> defendant was recorded as DW.3. He deposes about the manner in which the house was constructed over a period of time. In the concluding part of his evidence, he also states that he has no interest in the schedule property or in the litigation and requested that the suit is to be dismissed against him. As he was a head master of a school; the children were sent to his town for education. This Court is of the opinion that in view of the fact that 4<sup>th</sup> defendant is a retired Head Master who worked in a school, his appointment does not *per se* appear to be unnatural or illogical. The actions of 4<sup>th</sup> defendant in protecting the property, constructing the house/improving the same clearly shows that the confidence reposed is actually kept up by him.

v). This Court also notices the fact that the deposition of 4<sup>th</sup> defendant as DW.3 is virtually unchallenged. The case law on this aspect is very clear. Courts have clearly held that when the witness is not cross-examined on crucial aspects, it means the other

party accepts the case as true. The bulk of the documents (Exs.B.13 - B.22) were marked by this witness particularly the documents pertaining to the loan obtained by him, the explanation given by him to the Income Tax Department, the steps taken by him to contest the court case initiated under the Cooperative Societies Act, the tax receipts paid etc., which clearly show that he was discharging the duty and also improving the property. There is absolutely no cross-examination on any of these vital aspects or on the contents of the documents. The witness also clearly deposed that defendants 6 to 8 stayed in his house and studied along with children.

vi) This Court also notices the fact that the defendants have produced the documents from the office of the employer of the deceased-Venugopalarao, viz., South Eastern Railways and these documents have received and marked as Exs.X.1 and X.2. It does not appear any witness was examined to prove these documents. However, the endorsement on the document clearly shows that they were compared with the original by the advocate for the plaintiff. The signatures of the advocate for the defendant are also on these documents. These documents are therefore apparently marked by consent. The plea of the plaintiff is that the signatures on

Exs.B.1 & B.2 do not belong to the deceased-Venugopalarao. The burden is squarely upon them to prove the same. Exs.X.1 & X.2 were not used to send the signatures on Ex.B.1/B.2 for comparison. The signatures of Venugopalarao with this Court notices on Exs.B.1 & B.2 are very distinctive and clear signatures. The plaintiff as the wife of Venugopalarao would definitely have documents with his signatures. Nothing was done to use the available signatures to disprove the signatures on the said exhibits or to disprove them by other means. Hence, there is no material to hold that Ex.B.2 is not executed by Venugopalarao.

21. Therefore, from a reading of the entire evidence that is available on record, this Court is of the opinion that the plaintiff did not prove that the gift deed was not a validly executed document. The gift has been accepted as can be seen from the fact that on the vacant site, a house has been built up by availing a loan and taxes have also been paid. Thus, all the essential ingredients of a gift are therefore fulfilled. The plaintiff has not pleaded as to why the gift deed should be revoked. The evidence of plaintiff's witnesses and the pleadings are extremely vague and the same does not support the case that they are trying to advance their arguments. A validly registered gift deed carries certain sanctity which is also

supported by proper evidence based on pleadings. The adoption deed and gift deed were executed in 1978 and in 1979 (Exs.B.1 & B.2) respectively. Venugopalarao, the executant/donor died in 1983. The plaintiff had an occasion to see Ex.B.2-document in the Sub-Registrar's Office in 1985-86. Despite seeing the contents of the document, she did not plead about it or introduce any evidence to show that it is invalid. She did not try to prove that the signatures on the document do not belong to her husband.

22. Therefore, this Court on examination of the entire evidence on record is of the opinion that the lower Court erred in holding that Ex.B.2-gift deed is not a valid document. This Court holds that the registered gift deed Ex.B.2 is a validly executed document, which is proved as required under law. Therefore, this Court is of the opinion that the finding of the lower Court on issue No.1 is incorrect. Even if the adoption deed is not valid by virtue of Ex.B.2-gift deed, the defendants/donees under Ex.B.2 in the suit are entitled to succeed.

23. In view of the finding on the gift deed, this Court is of the opinion that issue No.2 has to be held against the plaintiff and in favour of the defendants/appellants/donees under Ex.B.2. The issue No.4 is no longer available for decision as necessary parties were

added into. In view of the finding of this Court that Ex.B.2-gift deed is validly executed and acted upon, issues 5, 6 & 7 also do not survive for consideration. This Court therefore holds that the impugned judgment is to be set aside.

24. The appeal is accordingly allowed with costs. The judgment and decree dated 07-08-1998 passed in O.S.No.93 of 1988 by the II Additional Senior Civil Judge, Kakinada are set aside.

25. Miscellaneous Petitions, if any, pending in this appeal shall also stand closed.

Date: 20.07.2018  
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**D.V.S.S. SOMAYAJULU, J**

