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

A.S.No.1642 of 1998

JUDGMENT:

This appeal is filed questioning the judgment and decree, dated 29.05.1998, passed in the suit O.S.No.24 of 1982, on the file of the Additional Senior Civil Judge, Narasaraopet.

The suit O.S.No.24 of 1982 is filed by one M.Aruna Kumari. She died after the suit was filed and her legal representatives were added. The suit is filed for a partition of the suit schedule property. Plaint-A schedule property was sought to be divided into 7 shares and for allotment of one such share to the plaintiff. Plaint-B schedule property was sought to be divided into 21 shares and for allotment of one such share to the plaintiff. In addition, *mesne* profits from the date of the suit till the date of the delivery was also sought. After the matter was heard, it was decreed with costs. Hence, the present appeal is filed, questioning the same.

The brief facts of the plaintiff's case are that the 1st defendant is the mother and defendants Nos.2 and 3 are the brothers of the plaintiff. Defendants Nos.4 to 6 are her sisters. The father of the plaintiff, the husband of the 1st defendant and the father of defendants Nos.2 to 6 is one Sri Gopalarao, who died at a young age after acquiring the plaint-A schedule property with his earnings. The plaint-B schedule property was acquired from his father. After the death of the father, M.Gopalarao, the 1st defendant-mother assumed management of the family. Every year the plaintiff was being paid a sum of Rs.1,000/- in cash at the time of Sankranti festival. This is continued till January, 1981. She was not given her share at that point of time and the defendants denied her right in the property. Therefore, she gave a notice in August, 1981, demanding partition of the plaint-A & B schedule properties and later filed the suit.

The written statement of the defendants was filed by defendant No.3 essentially. Their case is that late Gopalarao did not have any self-acquired properties. The property purchased by him is from out of the proceeds of the ancestral property only. The plaint-A & B schedule properties are joint family properties and late Gopalarao had only 1/3rd share in the said property. The other 2/3rd share belong to defendants Nos.2 and 3. In addition, it is also pleaded that Gopalarao executed a Will on 02.11.1959 bequeathing his 1/3rd share with a life interest to his mother, 1st defendant, and later to defendants Nos.2 and 3. In view of the said Will, it is pleaded that the plaintiff is not entitled to any share in the property.

The plaintiff got an amendment to the plaint made by alleging clearly that the Will, dated 02.11.1959 does not contain the signature of her father and that it is a rank forgery. The plaintiff further averred that there is another Will which was executed by her late father bequeathing his properties equally to his wife and children. The said Will was suppressed and a fabricated Will, dated 02.11.1959, is filed into the court.

The 3rd defendant filed an additional written statement denying all the averments made about the Will, dated 02.11.1959.

Ultimately, basing on the pleadings, as set out by the respective parties, the following issues were framed.

1. Whether the Will, dated 02.11.1959, said to have been executed by Gopalarao is true?

2. Whether the plaintiff has got any share in the plaint schedule properties?

3. Whether the suit is in time?

4. Whether the court fee paid is correct?

5. Whether plaint_A Schedule property is the self-acquired property?

6. To what relief?

In addition, two additional issues were also framed:

1. Whether the Will, dated 02.11.1959, allegedly executed by Musuluri Gopalarao is true?

2. Whether D2 and D3 perfected their title to the plaint schedule property by adverse possession?

The parties went to trial on the basis of these pleadings and issues. PWs 1 to 3 were examined for the plaintiff and Exs.A1 to A8 were marked. In addition, through PW 3, who is a handwriting expert, Exs.X1 to X3 were marked. For the defendants, DWs 1 to 6 were examined and Exs.B1 to B3 were marked.

After considering the oral and documentary evidence, the lower court came to a conclusion that the suit claim is proved and hence a decree was granted, as prayed for, on 29.05.1998. This decree is now assailed in the present appeal.

This court has heard Sri Ramarao Ghanta, learned counsel for the appellants and Sri S.Satyanarayanamurthy, learned counsel for the respondents.

In the opinion of this court, the first point that is to be decided is whether the Will, dated 02.11.1959 is correct. This is the issue No.1 and also the additional Issue framed.

Rightly both the learned counsels relied upon the depositions etc., to support their respective contentions. The learned counsel for the appellants essentially argued that the judgment and decree of the lower court are totally wrong and that the finding, particularly, that the Will is a forged Will is not correct at all. His contention is that the lower Court committed an error in relying upon the expert's evidence and the expert merely relied upon a photograph sent to him which is purportedly the admitted signature to be compared with the signature on Ex.B1 Will. In addition, the learned counsel also submitted that the Will was submitted in an earlier proceeding and the stamp and seal of the court where it is marked clearly show that the parties have acted upon the Will. It is his contention that the finding of the lower court is incorrect on this issue.

In reply thereto, the learned counsel for the respondents argued that the lower court did not discredit the Will only on the ground of the expert's opinion. He pointed out that there were a number of antecedent suspicious circumstances which were not removed by the proponent of the Will. He pointed out suspicious circumstances and argues that the court below rightly came to a conclusion that the Will is a created document. He points out that if the Will is true and correct, the conduct of the party/appellants in other legal proceedings would go to show that this Will is not in existence.

This court notices that Ex.B1 Will is executed on 02.11.1959. The testator died 10 days later. Thus, there is a gap of only 10 days between the execution of the Will and the death of the testator. The testator was also suffering from Bone Tuberculosis for a long time prior to the execution of the Will. Therefore, his disposing state of mind is also a matter of concern. In addition, it is noticed that apart from the testator, the scribe is also dead. The only witness who was examined in connection with the actual execution of the Will is the attester, who is DW

2. DW 2 is none other than the father-in-law of defendant No.3. He is not an uninterested party as the 3rd defendant is a direct beneficiary under the Will. This court notices that a mere fact that the Will was produced in another court in O.S.No.102 of 1958 will not give it any greater sanctity. It has to be proved in this case and the suspicious circumstances have also got to be explained.

The learned counsel for the respondents on the other hand argued that if Exs.A1 to A4 are seen, they would again raise a question that Ex.B1 Will is a genuine document or not. Ex.A1 is a certified copy of decree in O.S.No.102 of 1958, dated 28.04.1962. Ex.A2 is a certified copy of the decree in O.S.No.160 of 1959, dated 19.08.1961. Similarly, Exs.A3 and A4 were also copies of proceedings obtained from a Court. All these documents show that the plaintiff and her sisters were impleaded as legal representatives of late Gopalarao in pending Court proceedings. Therefore, the learned counsel for the respondents argued that if the Will was a genuine document, which excluded the plaintiff and others, the defendants who are the beneficiaries under the Will would not allow these parties to be impleaded. This court finds sufficient force in the submission of the learned counsel for the respondents. This is another suspicious circumstance.

In addition, the plaintiffs have also filed Exs.A7 and A8 sale deeds. These sale deeds are executed after the death of Gopalarao. In these sale deeds also, the plaintiffs in the suit and defendants Nos.1 to 6 are joined as the executants. If the Will was actually executed and was in force on the date of the documents, there was no need or necessity for these parties to join in the execution of the sale deeds, since they were excluded as per the said Will. In paragraphs Nos.19 and 20 of the impugned judgment, the lower court clearly and categorically dealt with these suspicious circumstances. During course of oral submissions before this court, nothing contrary was pointed out.

This court, however, agrees that the expert gave an opinion by comparing the signature on Ex.B1 with a photograph of another signature. This may not be a correct method of ascertaining the correctness of the signatures. But both the parties allowed the expert to continue with his examining of the disputed signature in the said manner. Therefore, this court is of the opinion that the appellants cannot raise any issues about the same now. The lower court in paragraph No.15 of the judgment also came to a conclusion that the reasons given by the expert are quite cogent. In paragraph No.15 of the impugned judgment, the lower court notices various aspects of the report of the expert. Similarities of formation of the letters, the connection, the inferior writing quality, the passage of time etc., were all considered by the lower court. Ultimately, the lower court came to a conclusion that the report of the expert is to be accepted. Even in this court, there is no strict comment about the procedure that is adopted by the expert in coming to the conclusion. Nevertheless, the other extraneous evidence and the conduct of the parties reveal that the Will dated 02.11.1959 that is produced in the court is not a correct Will. This court is of the opinion that issue No.1 and additional issue No.1 are to be held against the defendants/appellants. The conduct of the defendants in allowing the various parties to be impleaded in the legal proceedings and the fact that these parties who are supposedly excluded by the Will also joined the sale deeds, makes it clear that the Will, dated 02.11.1959, is not the actual Will that is executed by late Gopalarao. Hence, the findings of the court below on this issue are confirmed.

If the Will is excluded from consideration, the question that arises for consideration is as to the share of the plaintiff. Issues Nos.2 and 5 are the next issues that arise logically for consideration. According to the plaintiff in the suit, plaint-A schedule property is the self-acquired property of late Gopalarao and plaint-B schedule property is the ancestral property. Therefore, she sought for 1/3rd share in the plaint-A schedule property and 1/21st share in the plaint-B schedule property. The case of the defendants is that all the properties are joint family properties.

The question therefore that arises for consideration is whether plaint-A schedule properties were acquired by late Gopalarao independently or whether they were acquired from out of the nucleus of the ancestral plaint-B schedule properties.

This court notices that although both the parties were at issue on this matter, and continued their arguments in this court also, no sale deeds etc., of the plaint-A schedule properties are actually filed. No tax receipts etc., are filed to show that late Gopalarao exclusively enjoyed the plaint-schedule properties as self-acquired properties, till he died. Therefore, in the absence of any documentary evidence, this court is compelled to look into the oral evidence that is introduced in this case.

The oral evidence introduced does not lend support the theory that plaint-A schedule properties are self-acquired properties. As rightly pointed out by the learned counsel for the respondents none of the witnesses examined have actually spoken to the income or profit earned by late Gopalarao and his investments from his business in the purchase of plaint-A schedule property. Even DW 1, the wife of late Gopalarao, did not speak to the amounts earned by late Gopalarao. As rightly noticed and commented by the lower court that no evidence whatsoever is forthcoming to show that the business conducted by late Gopalarao was not in any way connected with the joint family funds. If parties adduced evidence to show that apart from plaint-B schedule property, late Gopalarao was earning enough money to acquire plaint-A schedule property, it can be presumed that plaint-A schedule property is the self-acquired property. The lower court also rightly considered the judgment of the Hon'ble Supreme Court of India in *Mallappa Giri Mallappa v. Yellappa Goud*[1] wherein it is held that apart from joint family property there was no other income, the presumption is that the property acquired by the joint family manager is not from his own funds. The burden of proof in such cases, as per the settled law, that the property is joint family property.

The plaint-B schedule properties are admittedly ancestral properties and these are being cultivated. There is no independent evidence to show the income and/or the profit earned by late Gopalarao from his Tobacco business. There is no independent evidence to show that plaint-A schedule properties were acquired from out of his Tobacco business or from other independent sources. Therefore, this court also concurs with the findings of the court below on issues Nos.2 and 3 and comes to the conclusion that plaint-A and B schedule properties are ancestral properties only.

Issue No.3 is on the question of limitation. Both the learned counsels have not advanced much arguments on this issue. This court notices that the pleading is not at all adequate and their plea in paragraph

[1] AIR 1959 SC 906

No.6 that the suit is barred by time will not be enough to decide the issue. Still the lower court decided the matter by considering the pleadings and evidence and came to a conclusion that the suit is in time and nothing contrary has been pointed out in the appeal. This court concurs with the finding of the court below on issue No.3 also.

Issue No.4 is about the court fee. This court concurs with the findings of the court below that *ad voleram* court fee is paid and nothing was argued in the course of this appeal also.

The additional issue that has been taken by the defendants is that they have perfected their title by adverse possession and as such, the plaintiff is not entitled to a decree, as prayed for.

This issue of adverse possession in the opinion of this court is a double edged sword. Implicit in any plea of adverse possession is the acknowledgement that the opposite party was the initial owner of the property. However, by virtue of the open hostile possession with necessary animus, the title that existed has been extinguished. This is the sum and substance of a plea of adverse possession. In the case on hand, the plaintiff in the lower court has not only raised a plea of adverse possession and argued the same but even in the course of the appeal, they have pressed for the issue of adverse possession. In the grounds of appeal also, it is reiterated that the defendants/appellants have been in open uninterrupted possession with necessary animus and thus, they have perfected their title. They also pleaded that there is a clear ouster.

As per the settled case law on the subject including the decision of the Hon'ble Supreme Court of India in the case of *Karnataka Board of*

Wakf v. Government of India[2] a person who pleads adverse possession does not have any equity in his favour and that implicit in the plea of adverse possession is an acknowledgment of the opposite party's title. There should be very clear pleading and proof of the date and time from which the possession has become adverse, particularly, amongst co-owners. This court has already held that the property is joint family property. Amongst co-owners greater precision and clarity is needed to prove the case of adverse possession. The possession of one co-owner is the possession of other co-owners as per the settled law on the subject.

The other main defense in the suit is ouster and limitation. Ouster is a good defense in a suit for partition of family property if the defendant is able to establish consistent and open assertion of denial title, long and uninterrupted possession and exercise of right of exclusive ownership openly and to the knowledge of the other co-owner. Since possession of one co- owner is presumed to be on behalf of all co-owners, it has to be established that the possession of the co-owner is in denial of title of co-owners and that the possession is hostile to co-owners by their exclusion.

In *Vidya Devi v. Prem Prakash*[3]' the Hon'ble Supreme Court held that 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of

[2] (2004) 10 SCC 779
[3] (1995) 4 SCC 496

other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner

As noticed by the court below in the entire evidence of the defendants, there is no evidence of open assertion of title and of the necessary animus. Animus or intention is subjective and it has to be proved by adequate evidence. The same is not done. Even the written statement that is filed is absolutely silent about these details. In fact, the written statement is also silent about the so-called ouster. Ouster is necessarily to be pleaded and proved. The facts on hand clearly show that the necessary pleading and proof of the ouster and the hostile intention over the statutory period are not made out.

However, the fact remains that by pleading and fighting on a case adverse possession not only in the first court but also continuing by argument in this court and by their grounds of appeal, the defendants in the suit have admitted that the plaintiff has title in the property. This title was not extinguished. This is the consequence of their consistent pleadings of adverse possession. In view of this pleading and in view of the fact that in Exs.A1 to A4 and A7 and A8 the plaintiff and others are included, the defendants themselves have admitted by their conduct that the plaintiff along with others has a share in the plaint-A & B schedule properties.

Therefore, this court concurs with the findings of the court below on the additional issue, which is discussed in paragraph Nos.29 to 35 of the impugned judgment. Nothing contrary has been pointed out in the course of hearing of the appeal. The findings of the lower court in this aspect are correct. Therefore, for all these reasons, this court concurs with the findings of the court below on all the aspects. There are no merits in the appeal. The findings of the lower court are confirmed and the Appeal is dismissed. In the circumstances, no order as to costs.

Pending miscellaneous applications, if any, shall stand closed in consequence.

D.V.S.S.SOMAYAJULU,J

Date: 14.12.2018
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