

HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

Second Appeal No.666 of 1998

JUDGMENT:

This Second Appeal is preferred by the 2nd defendant aggrieved by the Judgment and decree dated 27.02.1998 in A.S.No.7 of 1994 passed by the Senior Civil Judge, Razole, whereby and whereunder the learned Judge allowed the appeal filed by the plaintiff by setting aside the decree and judgment dated 05.04.1994 in O.S.No.19 of 1985 on the file of Principal District Munsif, Razole, filed for specific performance of agreement of sale dated 09.06.1982.

2) The parties in this appeal are referred as they were arrayed before the Trial Court.

3) The factual matrix of the case is thus:

a) The case of the plaintiff is that 1st defendant is the absolute owner of plaint schedule property; she agreed to sell the same for consideration of Rs.5,000/- and accordingly executed Ex.A1—agreement dated 09.06.1982 on receipt of advance amount of Rs.4,500/- and agreed to receive the balance amount of Rs.500/- on the date of registration and put him in possession. His further case is that on the date of agreement, plaint schedule property was vacant and he raised coconut and casurina plants and also constructed a Makam shed and shifted his residence to that place due to his illness and since from the date of agreement he was in possession of the plaint schedule property. It is also his case that he

was ready and willing to pay the balance sale consideration and in spite of his repeated demands, 1st defendant failed to execute the sale deed and hence he issued Ex.A2—registered notice to D1 but she managed to return the same; suspecting her conduct, plaintiff made enquiries in the Sub-Registrar Office and known that in the year 1984, she (D1) executed Ex.B1—registered gift deed in favour of her grand daughter—D2 in respect of plaint schedule property; he contends that D1 has no right to execute the gift deed and it is not binding on him. Hence the suit.

b) The 1st defendant filed written statement. While denying all the material averments it is contended, she never agreed to sell the plaint schedule property to the plaintiff and he has no capacity to purchase the same; D2 is her grand daughter; she brought up and educated her since from childhood and out of love and affection she gifted the property to D2 through a registered Ex.B1—gift deed dated 11.11.1984; since from the date of said gift, D2 was in possession and enjoyment of the same through her guardian and father Kolla Suryanarayana; D1 herself planted coconut and casurina plants with the help of her son-in-law—Kolla Suryanarayana; since she was widowed lady, Suryanarayana was looking after her affairs including the plaint schedule property; while so, in the 1st week of January, 1985 the plaintiff requested Suryanarayana to lease out the plaint schedule property to him, but Suryanarayana refused the said request; thereupon, plaintiff with an evil intention to grab the plaint schedule property attempted to trespass on 11.01.1985, but Suryanarayana resisted the same and reported the matter to the village

elders; having failed in his attempt, plaintiff fabricated the suit agreement and filed the present suit with all frivolous allegations; D1 is not aware of any registered notice said to have been issued by plaintiff and hence the plaintiff is not entitled to relief of specific performance of agreement and thus she prayed to dismiss the suit with exemplary costs.

c) D2 filed a memo adopting the written statement of D1.

d) Basing on the above pleadings, the Trial Court framed the following issues:

- (1) *Whether the agreement of sale dated 09.06.1982 in favour of the plaintiff in respect of the plaint schedule property is true, valid supported by consideration and binding on the defendants?*
- (2) *Whether the plaintiff is entitled for specific performance of agreement of sale for schedule property against the defendants?*
- (3) *To what relief?*

e) During trial, PWs.1 to 6 were examined and Exs.A1 to A4 were marked on behalf of the plaintiff. On the other hand, DWs.1 and 2 were examined and Exs.B1 and B2 were marked on behalf of defendants.

f) On appreciation of facts and evidence, the trial Court observed that Ex.B1—gift deed is a registered document and defendants proved the same and on the other hand, plaintiff failed to prove the alleged agreement of sale and accordingly dismissed the suit.

g) Aggrieved, the plaintiff filed A.S.No.7 of 1994 before the Senior Civil Judge, Razole challenging the Judgment of the trial Court.

h) Pending appeal, 1st appellant died and appellants 2 to 9 were brought on record as his LR's. as per order in I.A.No.269 of 1995 dated 27.12.1995. Like wise, R1/D1 died and R3 to R6 were added as her LR's. vide Court order dated 04.09.1997 in I.A.No.104 of 1997.

i) After hearing both sides, the lower Appellate Court observed that 1st appellant had discharged his burden of proving the truthfulness and genuineness of Ex.A1—agreement and hence, burden shifts on the 1st respondent to rebut the same, but she did not place any cogent material to discharge the burden and not taken any steps to send the disputed document along with her admitted thumb marks to the hand writing expert. The lower appellate Court also observed that 1st appellant was in possession of plaint schedule property pursuant to the agreement of sale and he was always ready and willing to perform his part of contract and accordingly allowed the appeal by setting aside the decree and judgment in O.S.No.19 of 1985 on the file of Principal District Munsif, Razole.

Hence, the instant Second Appeal.

4) While admitting the appeal this Court framed the following substantial questions of law:

i) Whether the Lower Appellate Court was justified in holding that Ex.A1—agreement of sale dated 09.06.1982 has been proved, to have been executed by ignoring the discrepancies as minor, by reversing the well considered finding of the trial Court, which held that Ex.A1 is not proved, in view of clinching evidence of PW1 who stated that attestors were not present at the time of drafting and PW3—scribe stated

that attestors were called after execution of Ex.A1 by 1st defendant?

ii) Whether the Lower Appellate Court is justified in placing the burden on 1st defendant, to have sent the document Ex.A1 to finger print expert to disprove that the thumb impressions thereon does not belong to her, instead of placing the same on plaintiff, who come to Court and initiated legal proceedings by virtue of Ex.A1 as suit document?

iii) Whether the Lower Appellate Court could hold that Ex.A1— agreement of sale is duly attested and executed especially when both attestors say that they have not witnessed the execution and PW3—scribe says that attestors were called after execution by first defendant and by improperly appreciating the evidence on record arriving at a finding by reversing the well considered finding is perverse?

iv) Whether the Lower Appellate Court could hold that Ex.B1— gift deed is not proved, as contemplated under Section 68 of Evidence Act, ignoring the fact that plaintiff admitted in his evidence that Ex.B1—gift deed is executed nominally and donor and donee as well admit the execution and acting upon the same and in reversing the finding of the trial Court, the reasons given by the Appellate Court is perverse?

5) Heard arguments of Sri Yellabandi Ramatirtha, learned counsel for appellant/2nd defendant. Sri M.S.R.Subrahmanyam, learned counsel for respondents 2 to 9. Respondent No.1 died vide cause title. Appeal against respondent No.10 was abated vide Court order dated 03.01.2012. Though notice to respondent No.11 was served, but none appeared on

his behalf. Appeal against respondents 12 and 13 was dismissed for default vide Court order dated 03.01.2012.

6) **Substantial Questions 1 to 3:** These three substantial questions are taken up together as they relate to the appreciation of the evidence relating to Ex.A.1—agreement to sell and thus they are interconnected. On a careful scrutiny of the judgment of the lower Appellate Court touching the appreciation of evidence relating to Ex.A.1, it must be said, there is no perversity in its findings relating to Ex.A.1. Relying upon the evidence of PWs.3 and 6 coupled with PW.1, the lower Appellate Court held that Ex.A.1 is believable. I gave my anxious consideration to the aforesaid evidence. PW.3 is the scribe of Ex.A.1. He deposed that he scribed Ex.A.1 at the instance of PW.1, who took him to the house of D.1 and she informed this witness that she was selling away her land and asked him to write the document and she produced some old documents to him. Accordingly, he scribed the agreement and read over to her and she admitted the contents and then signed. PW.1, Sreerama Murthy and another witness were present at that time. Those witnesses saw her putting her thumb mark and she also saw them attesting the document. Money was paid in their presence. He identified Ex.A.1 which was scribed by him. It may be noted, the parties belong to Edarada village whereas the scribe belongs to Kadali. Giving reason for scribing the document belonged to a different village, he stated that he was working as VAO and previously he worked as Village Karanam and he used to write the documents of Yerubandi people of Edarada village when he used to go to collect tax from the persons living in Edarada

village. He further stated that he got licence to scribe the documents. He further stated in the cross examination that cash of Rs.4500/- was paid in his presence after D.1 put her thumb mark and the remaining amount was agreed to be paid within six months. No doubt, he stated that the property was agreed to be delivered at the time of registration of the sale deed contrary to the recital in Ex.A.1 to the effect that possession was delivered on the date of Ex.A.1. On a scrutiny of the evidence of PW.3, I find no suspicious circumstance brought in his evidence to disbelieve him. No enmity was suggested between D.1 and PW.3 to assist PW.1 to create a forged document.

7) Then we have the evidence of PW.6, who is the attesor of Ex.A.1. He deposed that he belonged to Edarada; he knows PW.1 and D.1; D.1 sold Ac.0-10 cents of land to PW.1 about 10 or 11 years back and she executed an agreement of sale in favour of PW.1 under Ex.A.1; he attested Ex.A.1; the signature shown belongs to him; D.1 sold the property for Rs.5000/-; PW.1 paid Rs.4500/- to D.1 at the time of agreement of sale; Village Karanam of Kadali scribed Ex.A.1 and he read over Ex.A.1 and after having satisfied with the contents, D.1 put her thumb mark on Ex.A.1 and this witness saw her putting the thumb mark on Ex.A.1 and she also saw him attesting Ex.A.1 which was written at the house of D.1 at about 10:30am; one Yerubandi Venkata Rao was the other attesor of Ex.A.1. This witness further stated that property was delivered to D.1 on the date of execution and till date PW.1 has been in absolute possession and enjoyment of the said property. He also stated that for some time PW.1 resided in it and

subsequently due to heavy floods, his house and the house of this witness fell down and they were given compensation by the Government. This witness was also cross-examined at length but no useful material could be extracted to discredit him. No enmity was suggested between him and D.1 to speak falsehood against her.

8) Then PW.1 is the plaintiff, who deposed in terms of his plaint averments. The lower Appellate Court rightly believed the evidence of PWs.3 and 6, which evidence was in corroboration of PW.1. I find no perversity in the aforesaid appreciation of the evidence. No doubt the main suspicious circumstance regarding Ex.A.1 is that it was executed on an old stamp paper dated 04.01.1978, whereas the agreement of the sale was dated 09.06.1982. However as rightly observed by the lower Appellate Court, it is not the case of D.1 that she in fact put her thumb impressions on some old stamp papers and plaintiff fabricated the suit agreement of sale on such stamp papers. Had it been so, using of the old stamp papers might have created strong doubt on the genuineness of Ex.A.1. On the other hand the plea of D.1 is that the document was forged. The plaintiff by examining the attester and scribe discharged his burden. However, the defendants did not make any attempt to send Ex.A.1 to the expert to compare her admitted thumb impressions with the disputed thumb impressions available on Ex.A.1. Above all, she did not step into witness dock nor did she make an attempt to be examined through an Advocate Commissioner. Then possession is concerned, in Ex.A.1 it was clearly recited that possession of the suit property was

delivered to plaintiff on the date of Ex.A.1. Apart from that, the oral evidence adduced in this regard strongly supports plaintiff's version.

9) Thus on a conspectus, the lower Appellate Court has rightly held that Ex.A.1 was proved to be a genuine document. Since there is no perversity in the appreciation of evidence, I find no substance in the questions raised by the appellants.

10) **Substantial Question No.4:** This substantial question relates to finding of the lower Appellate Court on Ex.B.1—gift deed. The Court held Ex.B.1 was not proved by the defendants. It must be noted that when Ex.A.1—agreement to sell is held as genuine document, the finding on Ex.B.1 will be redundant or of academic importance only. Ex.B.1 is the gift deed executed by D.1 in favour of D.2. It is a registered document. It must be noted, neither D.1 nor for that matter plaintiff, disputed about the execution of this document. While D.1 supports this document and contends that she did not execute Ex.A.1-agreement to sell and she executed Ex.B.1—gift deed and delivered the suit property to D.2, the plaintiff would contend that Ex.B.1 is a sham and nominal document to nullify Ex.A.1—agreement to sell. Thus the execution of Ex.B.1 is not a disputed fact.

11) Be that it may, Ex.B.1 being a gift deed is a compulsorily attestable document. The mode of proof of execution of an attestable document is discussed in Section 68 of Evidence Act. It reads thus:

“Section 68. Proof of execution of document required by law to be attested:- *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence;*

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied.

As per Section 68, atleast one attesting witness has to be examined to prove the due execution of gift deed. Ofcourse, the defendants' case is that of the two attestors, one left to Bombay, whose whereabouts are not known and another attestor, due to his old age, is unable to move. The lower Appellate Court observed that the defendants ought to have taken an Advocate Commissioner to examine the second attestor and as they did not make such an endeavour, Ex.B.1 should be held not proved. I am afraid, this view is not correct for the reason that as per the proviso attached to Section 68 of Evidence Act, if the execution is not specifically denied, the necessity of examining attesting witnesses in respect of attestable documents other than will, does not arise. Since execution is not a disputed fact in the instant case as mentioned supra, execution of Ex.B.1 cannot be said to be not proved. Thus the conclusion is that its execution was established. However, since the prior document i.e, Ex.A.1 is held to be a genuine one, Ex.B.1 is of no avail to the defendants. This question is answered accordingly.

12) In the result, this Second Appeal is dismissed by confirming the judgment in A.S.No.7 of 1994 passed by the Senior Civil Judge, Razole, and ordered as follows:

- a) The respondent Nos.2 to 9 herein are directed to pay balance sale consideration of Rs.500/- (Rupees five hundred only) to the appellant and respondent Nos.11 to 13 herein on or before 05.02.2018, if not deposited already.
- b) The appellant and respondent Nos.11 to 13 are directed to receive the said balance sale consideration and execute the registered sale deed in favour of respondent Nos.2 to 9 in terms of Ex.A.1— agreement to sell dated 09.06.1982 within one month from 05.02.2018 and put them in possession of the suit schedule property, failing which the respondent Nos.2 to 9 are at liberty to get it done through the process of Court.
- c) No costs in the appeal.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 05.01.2018

Murthy/scs