

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

AS.No.1207 of 1997

J U D G M E N T:

This appeal is filed questioning the judgment and decree dated 24.09.1996 in OS.No.153 of 1988 (OP.No.35 of 1988) of Principal Subordinate Judge Ongole.

For the sake of convenience, the parties are referred to as they are arrayed in the suit.

The suit os.No.153 of 1988 is filed by one Akula Venkateswarlu against his junior paternal uncle (defendant No.1), wife of the junior paternal uncle (defendant No.2), mother of the junior paternal uncle (defendant No.3), daughter of the junior paternal uncle (defendant No.4) and his own mother (defendant No.5). Thus, defendant No.3 is also his grand mother.

The averments in the plaint are that defendant No.1 and one Govindaiah are the sons of Somaiah. Govindaiah is the father of the plaintiff. Plaintiff's father-Govindaiah died leaving behind him two sons and a wife. The plaintiff's father was mentally insane, but he was having lucid intervals. He married defendant No.5 in one lucid interval. In March, 1968, the plaintiff was born out of the said marriage. After the grand father died, defendant No.1 prevailed upon the plaintiff's father to execute the registered gift deed on 09.10.1968 by which the share of his father Govindaiah was given to defendant No.1. Later on 10.10.1968, another gift

deed came to be executed by plaintiff's mother in favour of defendant No.1. Both these deeds were executed at the behest of Govindaiah. Later when the plaintiff's father realised the selfishness and the motive behind the deeds, he filed a pauper OP.No.4 of 1971. Challenging her deed, the mother of the plaintiff also filed another case OS.No.254 of 1971. Both these cases came to be dismissed for various reasons. The plaintiff who became a major before filing of the suit as he was born in 1968 filed the present suit for partition and separate possession of 'A' and 'B' schedule properties. It is his case that as the documents that are executed are void, he can sue for a partition.

Written statement was filed in the suit by defendant No.3. The same was adopted by defendant Nos.1, 2 and 4. In the written statement, the entire case set up by the plaintiff has been denied. It is stated that the deeds are executed voluntarily and without any force, compulsion, misrepresentation etc. It is pleaded that the suit is also barred by time and that the defendants also perfected their title by adverse possession. It was specifically averred that the plaintiff will have to prove his legitimacy and his date of birth.

Basing on the above pleadings, the following issues were framed:

- (1) Whether the plaintiff is entitled to the relief of partition of the plaint 'A' and 'B' schedule properties into two equal shares

and for separate possession of one such share?

- (2) Whether the plaintiff is entitled to the relief of accounting as against the defendants?
- (3) What are the properties that are liable for partition?
- (4) Whether the suit is barred by time?
- (5) Whether the defendants perfected their title by adverse possession?
- (6) Whether the plaintiff is the legitimate son of Govindaiah?
- (7) Whether the judgement in OS.No.161 of 1974 is binding on the parties?
- (8) To what relief?

On behalf of the plaintiff, PWs.1 to 6 were examined and Exs.A.1 to A.6 were marked. On behalf of the defendants, DWs.1 and 2 were examined and Exs.B.1 to B.7 were marked. After the trial, the suit for partition was dismissed. Questioning the same, the present appeal has been filed.

This Court has heard Sri P.Krishna Reddy, learned counsel for the appellant and Sri V.Prabrahma Sastri, learned counsel for the respondents.

Counsel for the appellant argued that the judgment and decree of the lower Court is totally contrary to law and the facts. The counsel argued that the findings of the lower Court are contradictory. The Court held that the appellant is the legitimate child of Govindaiah. Once it is held that he is the legitimate child, the learned counsel argued that he has a

right to question the settlement deeds. Learned counsel also argued that enough evidence has been introduced to show that the plaintiff was born in March, 1968. Therefore, the finding that there is no documentary proof is not strictly correct and that the available evidence that can be seen from the lower Court record shows that the plaintiff was born in March, 1968. Therefore, the finding that the suit barred by time is not correct. The learned counsel argued that the finding on issue No.7 is also not correct and that it is not binding on the plaintiff.

Learned counsel for the respondents on the other hand argued that the parents have already filed cases questioning the so-called illegal settlement deeds and that both the said cases were dismissed. In addition, learned counsel submits that the appellant did not prove his date of birth. The available evidence indicates that he was not born in March 1968. In the alternative, the counsel submits that even if the legitimacy of the plaintiff is proved, there is no proof about the date of birth. His date of birth is a factor, which is eminently within the knowledge of the plaintiff and he did not prove the same despite the clear plea by the defendants that he was not born in March, 1968. It is also submitted that the settlement deeds are valid and binding and that there is no cause of action in the suit.

This Court notices that essentially the arguments were concentrated on these core issues. Therefore, this Court is

also proposing to decide the issues in line with the decision in the lower Court itself.

The first issue examined by the Court below is Issue No.4, whether the suit is within time. According to the plaintiff, he was born in March, 1968. According to the defendants, he was not born in March, 1968, but was born later. According to the documents that are pointed out by the learned counsel for the respondents, the plaintiff was born in November, 1969. In any view of the matter, whether he was born in March, 1968 or subsequent to the said date and in November, 1969, he has attained majority in 1986 or 1987. If either version is accepted to be correct, the suit which is filed in April, 1988 is therefore, within time. Therefore, the finding on issue No.5 was confirmed.

Issue No.6 is whether the plaintiff is the legitimate son of Govindaiah. As noticed by the Court below and as can be seen by this Court, the marriage between defendant No.5 and Govindaiah is not in dispute. The marriage was also in subsistence till Govindaiah died. The witnesses examined on behalf of the plaintiff assert that he was born out of this marriage. PW.2 is the mother of the plaintiff, who is defendant No.5 in the suit. She clearly deposes that she gave birth to PW.1-the plaintiff in her evidence. As rightly commented by the learned counsel for the appellant, it is the defendants who are doubting the legitimacy of the plaintiff. When they are disputing the paternity and the legitimacy of

the plaintiff, they should have to produce some evidence to show that the plaintiff was not born during the subsistence of the marriage by his parents. In the absence of any such evidence and in the light of the fact that all the other witnesses have spoken of the plaintiff as the son, this Court inclined to believe and uphold the finding on issue No.6. The evidence of the mother is also clear. Therefore, this Court confirms the finding of the lower Court on this aspect also.

The crucial issues which arise for decision by this Court are issues Nos.1, 2 and 3. The point that is framed for consideration is, whether the plaintiff is entitled to the said relief.

The entire case of the plaintiff as can be seen from the submissions is that the plaintiff was born before the two deeds that were executed. The crux of the case of the plaintiff is that the deeds executed on 09.10.1968 and 10.10.1968 are not binding on him. According to him, he was born in March, 1968. Therefore, the execution of gift deed by his father or mother are not binding as his consent was not taken for the said deeds and he questions both the gift deeds.

On the other hand, the learned counsel for the respondents argued that there is no proof to show that the plaintiff was born in March, 1968. It is further argued that he was born subsequent to the execution of gift deed dated 09.10.1968 and that by the date of execution of the settlement deeds in October, 1968, the plaintiff was not born

and by the date of the said deeds, neither the plaintiff nor his mother defendant No.5 have any right in the plaint schedule property. Therefore, it is the contention of the respondents that by the date of execution of the settlement deed, the plaintiff was not born and he had no subsisting right or interest to challenge the said deeds. To decide this issue of the birth or the time of birth of the plaintiff, the lower Court examined Ex.A.4 which is a certified copy of a petition in OP.No.4 of 1971. This OP is filed by Govindaiah-the father of the plaintiff. This was dismissed for non-prosecution. The legal implication of dismissal is dealt with later, but for the present, this Court notices that as per the averments in the said OP filed by the father, it is clearly mentioned that a child was born out of the marriage between him and defendant No.5 and that a son was born to them by name Venkateswarlu, who is one year old. This application was presented in to Court on 10.12.1970 as can be seen from the certified copy. Therefore, in view of the averments in this case, the date of birth of the plaintiff is approximately 10.12.1969. Even if the date is not very accurate, the month can be taken as December, 1969. In addition, A.Rama Thulasamma, who is shown as defendant No.5 in the suit has filed another case i.e. OP.No.3 of 1971. The certified copy of this document is marked as Ex.B.4. This is presented on 11.12.1970. In Ex.B.4, it is mentioned that the second plaintiff-Venkateswarlu (present plaintiff), is a minor represented by his mother. His mother clearly avers that the

second plaintiff is the minor son of the first plaintiff aged about one year and one month. Therefore, if the age of the plaintiff is reckoned from the date of filing of this application, which is 11.12.1970, his date of birth would be 11.11.1969 since the mother avers clearly that he is aged one year and one month. Both these documents when read together clearly put the plaintiff's month of birth and year of birth as November, 1969 or December, 1969. These documents are certified copies of proceedings filed into the Court by the plaintiff's father and mother. Although the plaintiff has a legal right to challenge any alienations made after his birth; in order to succeed in that challenge he will have to prove that his father had some property available on the date of his birth. In view of the registered deeds that are executed by the father prior to his birth, the plaintiff is not entitled to any share in the property. Similarly, by the date of execution of second gift deed, the plaintiff's mother also did not have a share. Hence, the second gift deed and the challenge to the second gift deed also have to fail. The properties were not available and the same were already transferred by the settlement deeds. Therefore, the finding of the lower Court is confirmed. This Court also reiterates that the plaintiff/appellant is not entitled to the relief of partition into 'A' and 'B' properties into two shares and for allotment of one share. Consequently, he is not entitled to a relief of accounting and it is held that there are no properties

available for partition. Therefore, issue Nos.1, 2 and 3 are held against the plaintiff.

Issue No.5 is whether the defendants have perfected their title by adverse possession. This Court finds that the plea and evidence of adverse possession that are raised in this case are not enough for granting of a decree. The entire evidence, which scrutinized carefully does not reveal the hostile animus necessary to prove the finding of adverse possession. The mere fact that they were in long uninterrupted possession is not enough. The defendants are asserting title and at the same time they are pleading adverse possession. These pleas are mutually destructive and are not permissible. In any view of the manner the available evidence leads this Court to a conclusion that issue No.5 is wrongly decided. Neither the pleading nor the evidence is sufficient to come to this conclusion. Issue No.7 is whether the judgment in OS.No.161 of 1974 is binding on the plaintiff. The judgment and decree are marked as Exs.B.6 and B.7. This Court concurs with the finding of the lower Court. However, this Court holds that the issue is academic for the reason that this Court holds that by the date of birth of the plaintiff there was no property left for the plaintiff to claim a share and the said issue strictly does not require consideration.

In view of the findings of this Court confirming the findings of the lower Court on issue Nos.1, 2 and 3 and as the date of birth is proven to be after the date of execution of the

deeds, this Court is of the opinion that there is no subsisting right in the plaintiff to claim partition, separate possession etc.

For all these reasons, this Court holds that there are no merits in the appeal and accordingly, the same is dismissed. No order as to costs.

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

Date: 12.12.2018
KLP

D.V.S.S.SOMAYAJULU, J

