
(2012) 02 AP CK 0021

In the Andhra Pradesh High Court

Case No : S.A. No's. 108 and 413 of 2012

Abdul Razak Miya (died) per L.Rs. and another

APPELLANT

Vs

Abdul Gaffar and others

RESPONDENT

Date of Decision : 04-02-2012

Acts Referred:

Citation : (2012) 5 ALT 678

Hon'ble Judges : B.N. Rao Nalla, J

Bench : Single Bench

Advocate : Gangaiah Naidu, for Mr. Jallikanakaiah, for the Appellant; R. Mahender Reddy, Counsel for Respondent Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Rao Nalla, J.—At the request of both counsel, these appeals are being taken up for final disposal at the admission stage itself. S.A. No. 108 of 2012 and S.A. (S.R.) No. 1472 of 2012 are filed against the common judgment in A.S. No. 198 of 2008 and A.S. No. 199 of 2008 dated 27-10-2011, respectively, passed by the learned III Additional District Judge (Fast Track Court), Ranga Reddy District whereby the common judgment of the trial Court was reversed.

2. A.S. Nos. 198 and 199 of 2008 were filed against the common judgment in O.S. Nos. 241 of 1999 and 742 of 2001 dated 19-07-2008, respectively, passed by the learned V Additional Senior Civil Judge (Fast Track Court), Ranga Reddy District, whereby the suit in O.S. No. 241 of 1999 was decreed while the suit in O.S. No. 742 of 2001 was dismissed.

3. Originally the suit in O.S. No. 241 of 1999 was filed by Abdul Razak Miya along with A, Madhava Reddy against his sons viz., Abdul Gaffar, Abdul Hafeez and Abdul Majeed, who born through his second wife Smt. Durdana Begum, for declaration of title and perpetual injunction over the suit schedule property. During the pendency of the suit, as Abdul Razak Miya, who is plaintiff No. 1, died, his third wife and her children were brought on record as plaintiff Nos. 3 to

9 respectively; however; Abdul Jabbar and Smt. Shameem Sulthana, who are his son and daughter through his first and second wives respectively, were brought on record as defendant Nos. 4 and 5 respectively.

4. After filing of the suit in O.S. No. 241 of 1999, the sons of plaintiff No. 1 through his second wife, who are the defendants in O.S. No. 241 of 1999, filed O.S. No. 742 of 2001 against the plaintiffs in O.S. No. 241 of 1999 and also one Kallem Narasimha Reddy (defendant No. 1), and Abdul Jabbar (defendant No. 5), who is son of Abdul Razak Miya (plaintiff No. 1 in O.S. No. 241 of 1999) through his first wife, and also Smt. Shameem Sulthana, who is daughter of Abdul Razak Miya through his second wife.

5. Now both these appeals are filed by the plaintiffs in O.S. No. 241 of 1999, who are defendant Nos. 3, 2, 4 and 7 to 12 respectively, in O.S.No. 742 of 1999. In both the appeals, respondent Nos. 1 to 3 are defendant Nos. 1 to 3 in O.S. No. 241 of 1999 and plaintiffs in O.S. No. 742 of 2001, however respondent Nos. 4 and 5 are defendant Nos. 4 and 5 in O.S. No. 241 of 1999 and defendant Nos. 5 and 6 in O.S. No. 742 of 2001; and respondent No. 6 in S.A. (S.R.) No. 1472 of 2012 is defendant No. 1 in O.S. No. 742 of 2001.

6. Since the trial Court clubbed both the suits together and common evidence was recorded in O.S. No. 241 of 1999, and for the sake of convenience, the parties herein are referred to as they are arrayed in O.S. No. 241 of 1999.

7. Since the parties, subject matter and schedule of properties in both the appeals are one and the same, they are being disposed of by this common judgment.

8. The facts of both the appeals are as under:

(a) O.S. No. 241 of 1999 was filed for declaration and perpetual injunction restraining the defendants from interfering with their peaceful possession and enjoyment over the suit schedule property admeasuring 3-24 guntas of agricultural land i.e. Ac.1-24 guntas in Survey No. 357, Ac.0-11 guntas in Survey No. 359 and Ac.1-29 guntas in Survey No. 360, situated at Nadergul Village, Saroomagar Mandal, Ranga Reddy District, stating that plaintiff No. 1 is absolute owner and possessor of the same.

(b) The case of the plaintiffs is that Smt. Mahaboob Begum, who is first wife of plaintiff No. 1, died leaving her children Abdul Jabbar - defendant No. 4 and Badrunnisa. Thereafter, plaintiff No. 1 married Smt. Durdana Begum and she also died leaving her sons - defendant Nos. 1 to 3 and a daughter - defendant No. 5. Since all the children born through the first and second wives were minors and there was nobody to look after their welfare, plaintiff No. 1 married plaintiff No. 3 Kareemunnisa Begum about 29 years back from the date of filing the suit and she gave birth to plaintiff Nos. 4 to 9. Plaintiff No. 3 looked after the welfare of all the children born through the first and second wives of plaintiff No. 1 and performed their marriages including defendant Nos. 1 to 3 and from then they

are living separately by doing their own business. Since plaintiff No. 1 has five daughters and a son through plaintiff No. 3 and has no source of income to meet their marriage expenses, he sold Acs.2-10 guntas of agricultural land in Survey No. 365 for the marriage expenses of the first daughter through plaintiff No. 3. Likewise, to perform the marriage of his second daughter through plaintiff No. 3, he entered into an agreement of sale with plaintiff No. 2 - A. Madhava Reddy to sell the subject property by receiving Rs. 1,00,000/- towards advance sale consideration vide cheque dated 13-02-1999. Then, coming to know about the said agreement, defendant Nos. 1 to 3 approached plaintiff No. 1 and demanded their share in sale consideration, for which he refused to give any share since he has four unmarried daughters and a minor son. Therefore, in order to extract some amount from plaintiff No. 1, defendant Nos. 1 to 3 have brought into existence Ex.B2 - family arrangement dated 26-09-1982 and other documents consequent thereto, and based on the same, they filed a suit in O.S. No. 203 of 1999 on the file of the Principal Junior Civil Judge, East and North, Ranga Reddy District against plaintiff Nos. 1 to 3 herein and one Kallem Narsimha Reddy for perpetual injunction, and obtained ex parte temporary injunction order dated 23-02-1999 and under the guise of the same, dug a bore-well in the subject property. Then, plaintiff Nos. 1 to 3 herein filed counter and got the ex parte temporary injunction order modified as one of status quo, but in spite of that defendant Nos. 1 to 3 are causing interference in the peaceful possession of the plaintiffs over the subject property and the development work being done by plaintiff No. 2 with the permission of plaintiff No. 1.

(c) The case of defendant Nos. 1 to 3, who have filed O.S. No. 742 of 2001, is that their father - plaintiff No. 1 had succeeded to various properties of their grandfather and in view of his marriage with plaintiff No. 3 as third wife, at their request to" allot their shares in the properties and in order to make an end to family disputes, plaintiff No. 1 executed family arrangement dated 26-09-1982 and as per the said arrangement, he gave subject property to them which was already under their possession and from then they are in continuous possession of their individual shares of Acs.1-08 guntas each. Subsequently, they got mutated their names in the revenue records, and pattedar pass books were also issued to them vide orders dated 20-09-1993 of the Mandal Revenue Officer, Saroor Nagar Mandal. While so, when plaintiff No. 1 in collusion with plaintiff No. 2 tried to trespass into the subject property on 20-02-1999 for levelling the subject property, they filed O.S. No. 203 of 1999 on the file of Principal Junior Civil Judge, Ranga Reddy District for partition against plaintiff Nos. 1 and 2 and two others and got temporary injunction. While so, to defeat their interest, plaintiffs brought into existence Ex.A.23 and filed O.S. No. 241 of 1999 seeking declaration of title and for perpetual injunction.

9. Both the suits i.e. O.S. No. 241 of 1999 and O.S. No. 742 of 2001 were clubbed together by the trial Court and recorded common evidence in O.S. No. 241 of 1999.

10. To prove their case, plaintiffs got examined PWs.1 to 3 and got marked Exs.A-1 to A-23 on their behalf. On behalf of the defendants, DWs.1 to 3 were examined and Exs.B-1 to B-12 were marked apart from Exs.X-1 to X-3.

11. The trial Court taking the entire evidence and other material on record into consideration, by common judgment dated 19-07-2008, decreed the suit in O.S. No. 241 of 1999 holding that plaintiff No. 1 is absolute owner, possessor and pattadar of the subject property and dismissed the suit in O.S. No. 742 of 2001 holding that the defendants failed to prove Ex.B-2 family arrangement dated 26-09-1982 which was said to have been executed by plaintiff No. 1. Challenging the same, defendants preferred A.S. Nos. 198 and 1999 of 2008 and the first appellate Court after re-appreciating the entire evidence and other material on record allowed both the appeals reversing the common judgment of the trial Court and assailing the same, plaintiffs preferred these appeals, as already stated hereinabove.

12. Now, Sri Gangaiah Naidu, learned senior counsel appearing for the plaintiffs (appellants), would contend that the first appellate Court erred in upholding the validity of Ex.B.2 - family arrangement dated 26-09-1982 simply relying on the opinion of DW.3 - finger print expert that the disputed thumb marks of plaintiff No. 1 and his admitted one belong to himself. The first appellate Court failed to notice that the trial Court after examining the entire oral and documentary evidence adduced by both sides came to the conclusion that Ex.B-2 family arrangement is a fabricated one. The first appellate Court ought to have noticed that Ex.B-2 - family arrangement is an unregistered document and the contents of it are not corroborated by the evidence of DWs.1 and 2. It failed to see that survey number of the subject property was not mentioned in Ex.B-2 family arrangement. It also failed to see that when it is the case of the defendants that before the third marriage of plaintiff No. 1 with plaintiff No. 3, Ex.B-2 was made, as to how and why plaintiff No. 3 is a party to the same. It failed to see that there is no validity to Ex.B-2 when it was denied by its executant himself. It also failed to see that though Ex.B-2 arrangement was made in 1982, why mutation was made in 1993. No material is placed to show the application for mutation, consequent notice by the Mandal Revenue Officer inviting objections for mutation and whether any objections were received from anyone, as such, Exs.B-2 and B-3 are nothing but fabricated one. In the circumstances, it is contended that when the genuineness of Exs.B-2 and B-3 is in dispute and not proved, it cannot be said that the defendants have proved their title and possession over the subject property, as such, the first appellate Court is not justified in finding fault with the well considered judgment of the trial Court and reversing the same.

13. Per contra, Sri R. Mahender Reddy, learned counsel for the defendants (respondents), contends that the first appellate Court rightly reversed the common judgment of the trial Court and there are no grounds warranting interference of this Court. The first appellate Court rightly found fault with the trial Court in not considering the evidence of DW.3 - finger print expert which

categorically says that the disputed thumb marks of plaintiff No. 1 are of himself. It also rightly found fault with the trial Court since it failed to see that mutation has taken place under Ex.B-3 in 1993, which is much prior to arising disputes between the parties in 1999, and plaintiff No. 1 has not raised any dispute during those six years; and that Ex.B-4 pahanies for the years 1997-98, which are just before filing of the suits, clearly show ownership and possession of defendant Nos. 1 to 3 over the subject property. Accordingly, the first appellate Court rightly pointed out that issuance of Exs.B-5 to B-10 title deeds and Ex.B-11 certified copy of panchanama establish possession of defendant Nos. 1 to 3 over the subject property and the same strengthens the case of defendant Nos. 1 to 3 that plaintiff No. 1 has executed Ex.B-2 family arrangement and through the same they got ownership and possession of the subject property and based on Ex.B.2, Ex.B.3 - R.O.R. proceedings were issued in their name.

14. Now the only point that arises for consideration is whether the first appellate Court has committed any error or irregularity in passing the impugned common judgment?

POINT:

15. Coming to the genuineness or otherwise of Ex.B-2 family arrangement dated 26-09-1982, no doubt, DW.3 finger print expert opined that the thumb impressions on it (Ex.B-2) are of plaintiff No. 1. However, when plaintiff No. 1 himself is denying execution of Ex.B-2, the burden is on defendant Nos. 1 to 3 to prove its genuineness. To prove the same, defendant No. 3 got examined himself as DW.1 and one Shaik Shiyauddin, who is a witness to Ex.B-2, as DW.2 and the finger print expert as DW.3. As rightly pointed out by the trial Court there are major discrepancies in the evidence of DWs.1 and 2 themselves. The evidence of DW.1, who is defendant No. 3, shows that his father, plaintiff No. 1, is an illiterate and he never used to sign, whereas the evidence of DW.2, who is a witness to Ex.B-2 and also a close relative to defendant Nos. 1 to 3 as he is son of the sister of their mother and at his and others request plaintiff No. 1 said to have executed Ex.B.2, shows that plaintiff No. 1 put his thumb impressions and also his signatures on Ex.B-2. This part of their evidence gives rise to the question as to execution of Ex.B-2 and presence of the parties therein at a time, which goes to the root of the defendants' case. Further, in his cross-examination, DW.2 clearly stated that Ex.B-2 was executed for the welfare of children of second wife of plaintiff No. 1. But, Ex.B-2 shows that Abdul Jabbar - defendant No. 4, who is son of the first wife of plaintiff No. 1, is also a party to it along with defendant Nos. 1 to 3 herein, but surprisingly he is not claiming any share out of the subject property. This circumstance shows that if Ex.B-2 is really a genuine one, Abdul Jabbar, who has share in the subject property according to Ex.B-2, would not keep quite particularly when it is the case of defendant Nos. 1 to 3 that they alone are entitled to subject property as they are owners of the same and are in possession of Ac.1-08 guntas each. Furthermore, this Jabbar is a witness to Ex.A-23 agreement of sale dated 13-02-1999 under which plaintiff

No. 1 agreed to sell the subject property to plaintiff No. 2, which shows that if Abdul Jabbar is really a party to Ex.B-2 family arrangement, he would not have stood as a witness to Ex.A-23. It is also not the case of defendant Nos. 1 to 3 that Abdul Jabbar has no share in the subject property or he sold/relinquished his share in their favour or he colluded with the plaintiffs. Apart from this DW.2 stated in his cross-examination that Ex.B-2 family arrangement was made by plaintiff No. 1 before his marriage with plaintiff No. 3 and the ages of defendant Nos. 1 to 3 were 10, 8 and 4 years respectively at that time. But, when he was confronted with Ex.B-2, he stated that Ex.B-2 was executed subsequent to the third marriage of plaintiff No. 1 and the ages of defendant Nos. 1 to 3 were 25, 21 and 19 years respectively and his earlier statement in that regard is wrong. Furthermore, the case of defendant Nos. 1 to 3 is that Ex.B.2 family arrangement dated 26-09-1982 was made to safeguard their interest at the time of plaintiff No. 1's third marriage, but as per plaintiffs' case the third marriage of plaintiff No. 1 took place about 29 years back prior to filing of the suit which means approximately in 1970 and the same proves with the ages of children of plaintiff No. 3. Thus, there is no corroboration to the case of defendant Nos. 1 to 3 that at the time of third marriage of plaintiff No. 1 Ex.B.2 was made, since Ex.B.2 is of 1982 and the third marriage was taken place in 1970 and there is about 12 years gap. All these circumstances coupled with the discrepancies in the evidence of DWs.1 and 2 and the instance of Abdul Jabbar being a party to Ex.B-2 family arrangement not claiming any share and also his being a witness to Ex.A-23 agreement of sale creates any amount of doubt as to genuineness of Ex.B-2.

16. Coming to the evidence of DW.3, no doubt, he has opined after comparing the disputed signatures of plaintiff No. 1 with his admitted signatures that they are of plaintiff No. 1. But, the opinion of the finger print expert does not bind the Court when the Court is of the considered opinion that there is no necessity to consider the same since it is discretion of the Court to rely upon it or not to come to a just conclusion in given circumstances. In the case on hand also, plaintiff No. 1, who is said to have executed Ex.B-1 (sic. B-2), himself has denied execution of the same and the evidence of DWs.1 and 2 is untrustworthy, as such, opinion of the finger print expert which can only be considered for collateral purpose need not be taken into consideration to come to a just conclusion, and therefore, the trial Court rightly did not take the evidence of DW.3 finger print expert into consideration. However, the first appellate Court relying on the evidence of DW.3 and Ex.B-3 ROR proceedings, Ex.B-4 pahanies, Exs.B-5 to B-10 title deeds and pass books, Ex.B-11 certified copy of a panchanama and Ex.B-12 tax receipt, which are based on Ex.B-2, came to an erroneous conclusion that Ex.B-2 is a genuine document.

17. Coming to Ex.B-3 - ROR proceedings, though it is mentioned in it that on the application of defendant Nos. 1 to 3, it was issued, there is no mention about the date of application for mutating their name for the subject property and it also does not show that the required procedure was complied with in doing so. It is

also not mentioned that as to on the basis of which document, the ROR authority has deleted the name of plaintiff No. 1 and incorporated the names of defendant Nos. 1 to 3. Further, though Ex.B-3 shows that their names were incorporated basing on their application (date of which is not mentioned as referred supra) that the subject property is ancestral property and in partition, they got it, the same cannot be accepted since according to Mohammedan Law during the lifetime of father, his children cannot inherit the same, particularly in view of denial of the same by its executant himself. Furthermore, there is no satisfactory material to show as to why there was delay in mutation of the subject property till 20-09-1993 though Ex.B-2 was said to have been executed on 26-09-1982. In the circumstances, this Court is of the view that Ex.B-3 was issued without following due procedure, as such, the same is invalid and therefore, the subsequent documents -Exs.B-4 to B-12, which were issued based on Exs.B-2 and B-3, which are held to be fraudulent and invalid documents, are also invalid and the same cannot be taken into consideration.

18. The trial Court, in the case on hand, based on the material available on record and also having the opportunity of observing the demeanour of the parties, came to the conclusion that Ex.B-2 is a fabricated and fraudulent one. The trial Court is fully justified in doing so and the first appellate Court is wrong in finding fault with the trial Court in this regard.

19. For the aforesaid reasons, this Court is of the considered opinion that the first appellate Court has committed error and irregularity in allowing the first appeals by reversing the well considered judgment of the trial Court. The point is accordingly answered. Therefore, Second Appeal No. 108 of 2012 and Second Appeal (SR) No. 1472 of 2012 are allowed setting aside the common judgment in A.S. Nos. 198 and 199 of 2008 dated 27-10-2011 of the first appellate Court and confirming the common judgment in O.S. Nos. 241 of 1999 and 742 of 2001 dated 19-07-2008 of the trial Court. No order as to costs.