
(1993) 09 AP CK 0029

In the Andhra Pradesh High Court

Case No : Letters Patent Appeals No's. 203 and 204 of 1991

Addepalli Venkata Laxmi

APPELLANT

Vs

Ayinampudi Narasimha Rao and others

RESPONDENT

Date of Decision : 22-09-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 13, Order 1 Rule 9, Order 7 Rule 7, 96

Succession Act, 1925 — Section 283

Citation : AIR 1994 AP 72 : (1994) 1 APLJ 188

Hon'ble Judges : Ramakrishnam Raju, J; Radhakrishna Rao, J

Bench : Division Bench

Advocate : M/s. K.V. Satyanarayana and V.V.S. Rao, for the Appellant; P.R. Prasad, for the Respondent

Judgement

G. Radhakrishna Rao, J.—These two Letters Patent Appeals arise out of two suits -- O. S. No. 55 of 1977 and O.S. No. 109 of 1975 originated from the Court of the Subordinate Judge at Tenali.

2. In Original Suit No. 55 of 1977, originally one Ayinarnpudi Subrahmaniam was the owner of the plaint schedule properties. He died on December 26, 1943 leaving behind his first and second wives Veeramma and Pari-purnamma. Subrahmaniam had no issues through his first wife Veeramma. Through Paripurnamma, he got four children three daughters and a son. At the time of death of Subrahmaniam, his son was aged about 6 months. His daughters are Addepalli Venkata Lakshmi, plaintiff in O.S. No. 55 of 1977, Ramaratnam and Hanumayamma. Venkatalaxmi married to one Subbarao and after her marriage, she was residing at Tenali. While the matters stood thus, Venkatalaxmi filed the suit O.S. No. 55 of 1977, claiming that she is entitled to the properties that fell to her share as they were in the enjoyment of her foster-mother, Veeramma. Those properties comprise the Western portion of the terraced building in Ramalingeswarapeta and adjacent vacant site, Ac.1-02 cents in Chinaravur village and a house at Bose Road.

3. Ayinampudi Narasimha Rao who is the brother of the plaintiff in O.S. No. 55 of 1977, filed the original Suit No. 109 of 1978 stating that his sister's husband, Addepalli Subbarao is the tenant of the house at Bose Road, Tenali and he is entitled to recover the same, or alternatively he pleaded for partition of the suit property into four equal shares and for allotment of two such shares to him. Since the parties to the two suits are common, and also in view of the joint memo filed by both parties requesting the Court to try the suits jointly, both the suits were tried together and disposed of by a common Judgment.

4. In order to prove her case, the plaintiff Venkatalaxmi in O.S. No. 55 of 1977 examined herself as P.W. I besides examining P.Ws. 2 to P.W. 6 and got marked Exs.A-1 to A-71, documents. On the other hand, the defendants examined D.Ws. 1 to 12 and got marked Exs.B-1 to B-133. In addition to that Ex.X-1 to X-4 were marked by the witness and Ex.C-1 was marked by the Court.

5. The learned Subordinate Judge, after scanning through the evidence on record, found that the family settlement alleged to have been made by both the parties has not been satisfactorily proved. He also found that the will under Ex.A-2 dated October 25, 1968 said to have been executed by Inampudi Veeramma has not been proved, since it was executed unde suspicious circumstances and the same cannot be relied upon. With regard to the contention that the plaintiff in O.S. No. 109 of 1978 is entitled for recovery of the entire suit property basing on the oral relinquishment since Veeramma did not acquire any absolute title by adverse possession to the entire property and as the oral relinquishment set up by the plaintiff was disbelieved, it is is found that the plaintiff is entitled for partition and separate possession of his 11/20th share in the suit property. Aggrieved by the findings arrived at by the Court below, Appeal Suits Nos. 54 of 1981 and 1767 of 1980 have been filed before this Court.

6. In these appeals, the learned single Judge while agreeing with the conclusions drawn by the trial Court in disbelieving the version set up by the plaintiff, found that the will put forward was executed under suspicious circumstances. The learned single Judge has also found that the family settlement as alleged by both parties is not correct and ultimately confirmed the judgment and decree made by the trial Court. Aggrieved by the said finding, these two Letters Patent Appeals are filed.

7. For the sake of convenience, the parties to these Letters Patent Appeals are arrayed as they were referred to by the trial Court.

8. The first contention that has been raised by Sri K. V. Satyanarayana, the learned Counsel for the appellant, is that the suit as framed and filed by the plaintiff in O.S. No. 109 of 1978 is not maintainable. In support of his contention, he relied upon the provisions of O.1, R. 9, C.P.C. which read as follows:--

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in contorversy so far as regards the rights and interests of the parties actually before it."

Harping much on the aforesaid provision and relying upon a decision reported in *Gulabchand Makanji Vs. Motapondha Vibhag Tenants' Co-operative, Agricultural Society Ltd.*, the learned counsel contends that, since the Courts have come to the conclusion that it is a case of joint family property and the parties are entitled to a share, as the other two daughters who are also entitled to a share along with the parties on record and since they are not brought on record, the suit ought to have been dismissed. We should not lose sight of the existence of the provision under O.1, R. 13 of Civil Procedure Code. In our view, it is the duty of the party to raise the said objection in the written statement at the earliest point of time about the maintainability of the suit on the ground of not bringing on record the necessary party or parties or proper party or parties in determining the issues involved in the matter. Neither at the trial stage nor at the appellate stage, the appellant has raised that objection; nor in the grounds of appeal before us. The objection was sought to be raised for the first time when the arguments are advanced before us. We are of the opinion that a party is not entitled to take objection at the appellate stage and that too without taking any such plea while setting forth his defence. Therefore, the contention of the appellant that the suit ought to have been rejected on the ground that it is not maintainable does not hold good.

9. The second contention is that when two reliefs have been claimed in the suit, the lower Court ought to have directed the party to choose either one of it. When the suit is filed seeking two alternative reliefs, it is the duty of the Court to find out whether it has got jurisdiction to try the suit or not and simply on the basis of the allegations, it cannot throw away the case, particularly when the alternative relief that has been claimed by the party is within the power of that Court to grant a decree. Two reliefs have been claimed in the suit, one relief can be granted by the Court and the other relief can be decided after making full dressed trial and proof. The contention that the party can choose one of the remedies at the earliest point of time and since the party did not choose the same, the suit has to be dismissed has no force.

10. The entire case rests on the family settlement alleged to have been set up by both the parties. The will that has been set up by the parties under Ex.A-2 has also got a material bearing. The validity of the will has to be determined on the correctness or otherwise of the statements that have been made by the attestors. The surrounding circumstances preceding the execution of the will have to be gone into to arrive at a finding on the validity of the will executed while disposing of the property in favour of the a particular party or person. It is to be seen that on the death of Subrahmaniam, his two wives have become helpless and they are not having any male assistance to look after their family affairs and properties. Venkatalaxmi, who is the first daughter of Paripurnamma, was married in December, 1944. Since a male member has joined the family through their first daughter Venkatalaxmi, it is common in all the Hindu families that they will naturally take the assistance of their first male member. So, taking assistance of the son-in-law at the time when the other children are minors and

are not able to look after the family affairs, cannot be a reason to state that the son-in-law has invested money of his own and constructed the "Daba" house; but that money must have come either from Veeramma or Paripurnamma. Not even an iota of evidence has been placed to show the source of income for the construction of "Daba" house in Bose Road by Sri Subbarao either in the year 1948 or 1949. In Ex.A-2 will, it has been mentioned that the house had also fallen to the share of Veeramma. When the house itself has not been in existence in 1944 i.e. at the time when the alleged family settlement had taken place, it cannot be said that the house, which is said to have been constructed either in the year 1948 or 1949, was also allotted to her in the year 1944 and this is a vital circumstance to throw the case of the plaintiff. Another strong circumstance that has been taken by the trial Court is that in the will it has been stated that the plaintiff has not been given any property either moveable or Immovable and so, Veeramma is willing away the property that fell to her share. This recital in Ex.A-2 belies the factual version that has been spoken to or admitted by both the parties, as Ac. 1-45 cents of wet land in Chinaravuru village has already been given to the plaintiff. That means, Venkatalaxmi has either directly or through a document come into possession of Ac.1-45 cents of land. This land was purchased in the name of his first wife Veeramma by late Subrahmaniam and this land has ultimately come into possession of Venkatalaxmi. It is very surprising to note that when that land was already given to her at the earliest point of time how a recital to that effect had found its place in Ex.A-2. Perhaps in a hurry mood, as Veeramma was taken ill and was not in a position to move about, Ex.A-2 might have been got into existence and got the same registered at Tenali even though the place of Registration (execution is not) is at Tenali. The explanation that has been given for this is that she was taken ill and was taken to Guntur and while she was undergoing treatment, Ex.A-2 was executed. If that is so, there is no particular reason to take Veeramma all the way to Guntur, particularly when the distance is very little and had the facility of taking her to Guntur and bringing her back on the very same day itself. But the evidence of P.Ws. 4 and 5 is otherwise. In their evidence they stated that they are ignorant about the factum of stay of Veeramma in connection with her treatment for jaundice, or the Doctor who treated Veeramma. If the disease with which Veeramma was suffering requires treatment by a specialist, definitely the name of the Doctor or the specialist would have taken note of by P.Ws. 3 and 4. The treatment that has been provided to Veeramma or the purpose of their visit to Guntur are genuine or not cannot be entertained at this stage. It is to be noted that immediately after the execution of the will under Ex.A-2, Veeramma died. If such is the situation, the mental faculty at the time of execution of the deed has to be explained particularly, when she was at the fag-end of her life and death took place immediately after the execution of the same. Examination of one attester has been commented upon by the lower Court. Admittedly, Ex.A-2 is attested by three persons. P.W. 3 is one among them. The law is that all the attestors have to be examined when the will is executed in suspicious circumstances. Admittedly, along with P.W. 3 another attester was also alive but

he was not examined for the reasons best known to the plaintiff. When one/ of the attestors who is closely related to the husband of the plaintiff and is found to be interested witness and has given self-interested testimony, the common thing that is expected is that at least one independent person who is not related to the person in whose favour the properties are willed should be examined to dispel the suspicious circumstances throwing a doubt on the genuineness of the will. These circumstances naturally throw a doubt and accordingly, the lower Court arrived at the conclusion that much relevance cannot be attached to the evidence of P.W. 3. So, viewing the case from any angle, it can be said that the lower Court has rightly come to the conclusion that Ex. A-2 is not the will that has been executed by Veeramma in a sound and disposing state of mind. When Ex. A-2 does not reflect the true state of affairs, the lower Court was quite justified in arriving at the conclusion that it is not properly executed.

11. Even with regard to the family settlement, it must be held that the same must have been oral. When the pleading is that it is oral, it must be believed by circumstantial evidence. The circumstantial evidence consists of not only the property and its user and they have to be confirmed or affirmed by the person known in the locality and the relations also. Here, in this case, none of the persons having knowledge to the same have been examined to show that there is a family arrangement effected in a particular way. The persons that were examined on both sides are interested persons. When interested persons have given different and divergent versions and particularly when the will under Ex. A-2 is found to be incorrect, the family settlement as alleged at that point of time also cannot be accepted.

12. The family settlement had found a place in Ex. A-2. It appears that in the plaint which was filed in the year 1968 also a mention has been made with regard to the family settlement, but the date, or the month have not been given. When it comes to evidence part, the family settlement, as pleaded by the plaintiff, relates to the will at or about the time of her marriage. The plaintiff's marriage took place in December, 1944. In the evidence, it is stated that the same took place in June, 1944 itself. With regard to the family settlement and as alleged by the plaintiff, it is not correct since she is not the direct witness to that and by that arrangement, it completely puts the son of Subrah-maniam not having the property which he is entitled to as per the Hindu Law. Depriving a son who is alive and taking away his rights by any party or person either as a guardian or otherwise, it must be said that the family settlement as alleged by the plaintiff throws any amount of doubt about the manner in which the settlement is said to have taken place. Another infirmity is also there. If really the allegation that there are disputes between the two co-widows after the marriage of the plaintiff is true, Veeramma would not have performed the marriage of the plaintiff who is the daughter of another co-widow, who is at loggerhead. The performance of the marriage in the year 1944 by one co-widow on the active part played by another co-widow, amply justifies that there were no strained relations between the two co-widows. Perhaps, after the marriage, may

be at or about March, 1944, there might have been some arrangement and that arrangement must be to provide some maintenance to the first widow i.e., Veeramma and as she was already been given Ac. 1-45 cents purchased in her name, that might have been settled, if at all there was any settlement. The lower Court after giving reasons found that the family settlement as pleaded by the plaintiff appears to be quite unreasonable and arrived at a right conclusion.

13. Tax receipts have been filed by both parties to show that they are in enjoyment of the property. The first son-in-law who is in the management and particularly when the money comes from the in-laws family, it cannot be said that the first son-in-law paid the tax money. After the death of Subrahmaniam, may have been mutated in the name of Veeramma, but not in the name of Venkatalaxmi. The first son-in-law is only assisting the co-widow after his marriage with the daughter of another co-widow in the year 1944. The assistance rendered by the first son-in-law will not be of any help in arriving at a conclusion that he was in exclusive possession of the property, or throw away one of the widows in whose possession the property stands. The tax receipts that have been filed indicate one important factor, i.e., dispute has been raised after the death of Veeramma. Veeramma died in the year 1966. The plaintiff filed the suit in the year 1968. Immediately after the death of Veeramma, an application has been filed for mutation. That means disputes arose between the brother and sisters only subsequent to the death of Veeramma and each wants to oust the other. But the circumstance will be in the other way. As the remaining two daughters were given Ac. 0-50 cents each and documents have been executed and they are to the knowledge of the plaintiff also. So, when documents have been executed, and two daughters were given Ac. 0-50 cents each and alienations were not questioned at any point of time, they cannot now be permitted to say that Ac. 1-02 cents had fallen to the share of Veeramma in view of the family arrangement. This circumstance also throws a doubt about the setting up of the family settlement.

14. Even if the family settlement said to have been made in 1943 as pleaded by the plaintiff is correct, she would not have been a party to allow Ac. 1-02 cents to be gifted in favour of the remaining two daughters of Ayinampudi Paripurnamma.

15. Viewing the same from another angle, we feel that Subrahmaniam died intestate and when he died intestate, the law has to take its own course. The division of the property arrived at by the lower Court is in conformity with the shares that are entitled to by the Hindus, in a case where the original person dies intestate.

16. In the suit filed by Ayinampudi Narasimha Rao, who is the only son of Subrahmaniam through Ayinampudi Pari-purnama, the second wife of late Subrahmaniam in O. S. No. 109 of 1978, he had asked for partition of his half share, but he was given 11/20 share. To meet the ends of justice or any other relief which is appropriate has to be granted by the Court. Taking into account

the plea set up by the parties, it is competent for the Court to grant the relief which is not barred by limitation. In this case the question of limitation does not arise as they are co-owners. So, granting of relief of 11 / 20 share to the plaintiff in O. S. No. 109 of 1978 and 1/20 share to the plaintiff in O. S. No. 55 of 1977 is in conformity with the well settled proposition of law and the provisions of Hindu Succession Act. With regard to the devolution of property in case of person who dies intestate, the decree is in conformity with the settled principles of law and we see. no ground to interfere with the decree and judgment under appeal.

17. The two Letters Patent Appeals are accordingly dismissed. No costs.

18. Appeals dismissed.