
(2002) 10 AP CK 0058

In the Andhra Pradesh High Court

Case No : SA No's. 220 and 285 of 1991

Avutapalli Mangamma and Another

APPELLANT

Vs

Alluru Panduranga Rao and Another

RESPONDENT

Date of Decision : 29-10-2002

Acts Referred:

Citation : (2003) 1 ALD 190 : (2003) 1 ALT 765

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : P.M. Gopala Rao, for the Appellant; J. Venugopal Rao and M. Prabhakar Rao, for the Respondent

Judgement

G. Yethirajulu, J.—The parties in these appeals are none other than brother and sisters. One Alluri Punnamma was blessed with a son and three daughters viz., Panduranga Rao, Mongamma, Chittamma and Kanakamma. The dispute arose between the brother and sisters in respect of 57 cents of suit schedule property in R.S. No. 3/5. According to daughters, Punnamma executed a registered Will dated 26-3-1981 bequeathing the suit property in favour of Mangamma, Chittamma and one Mettapalli Sambaiah, son of Kankamma (since died), but according to the son Panduranga Rao, while in death-bed Punnamma executed an unregistered Will dated 5-11-1983 bequeathing the suit property in his favour. The factual matrix leading to the filing of these appeals in brief is:

Second Appeal No. 285 of 1991

2. This appeal is directed against the judgment and decree in A.S. No. 150 of 1989 on the file of the II Additional Subordinate Judge, Vijayawada reversing the judgment in OS No. 1570 of 1985 on the file of the I Additional District Munsif, Vijayawada.

3. The plaintiffs filed the suit to declare that the 2nd defendant and themselves have the title over the suit schedule property of an extent of 57 cents situated in R.S. No. 3/5, more fully described in the schedule, and they are entitled for

recovery of possession of the same in pursuance of a Will dated 26-3-1981 executed by Alluri Punnamma and to direct the 1st defendant to deliver vacant possession of the same with the value of the crop of Rs. 980/- and to grant future mesne profits with costs.

4. According to the plaintiffs, their mother Alluri Punnamma w/o Subbaiah was the owner of the plaint schedule property. The plaintiffs 1 and 2 are her daughters and the 1st defendant is her son. The 2nd defendant is the son of Punnamma's third daughter. The plaintiffs are claiming the suit property on the basis of Ex.A2- registered Will executed by their mother Punnamma bequeathing absolute rights to them after her death. The plaintiffs further contend that their brother (1st defendant) refused and neglected to maintain his mother Punnamma in her old age. Therefore, she stayed with them. They further contended that during the life time of their mother she filed OS No. 1645 of 1981 on the file of the District Munsif, Vijayawada against the 1st defendant for recovery of a sum of Rs. 960/- for the value of Maktha for the years 1980-81 and 1981-82 on account of the crops raised by him in the suit schedule land. The Court decreed the said suit on 30-11-1982. The plaintiffs further contended that Punnamma being vexed with the attitude and behaviour of her son i.e., the 1st defendant executed Ex.A2-registered Will on 26-3-1981 in a sound and disposing state of mind bequeathing the property to them and the 2nd defendant with absolute and equal rights after her death. They further contended that in the said Will their mother Punnamma stated that insofar as her share in the properties of her husband, which is the subject matter in OS No. 321 of 1981 on the file of the Subordinate Judge, Vijayawada, is concerned, the plaintiffs and the 2nd defendant shall enjoy those properties with absolute rights. They also contended that late Punnamma did not execute any Will, more particularly a Will dated 5-11-1983 as alleged by the 1st defendant and it was set up by him to defeat their claim and it was a forged and fabricated document. The plaintiffs further mentioned that the suit property was the absolute stridhana property of late Punnamma and she got the same as a gift from her brother. The plaintiffs contended that as their mother died on 7-11-1983, the 2nd defendant and themselves became the absolute owners to the property and are entitled to take possession of the same. Hence the suit for the reliefs mentioned above.

5. The 1st defendant filed a written statement resisting the suit by contending that the plaintiffs and the 2nd defendant were never in possession of the suit property, but he is in possession and enjoyment of the same since the death of his father. The 1st defendant further contended that the Registered Will said to be executed by his mother is not true, valid and a genuine one. It is not the last and final testament of her mother. He further contended that his mother executed another Will dated 5-11-1983 bequeathing all her properties in his favour and it was the last testament of his mother and by virtue of the said Will he continues to be in uninterrupted possession of the property. The suit is therefore liable to be dismissed with costs.

6. On the basis of the above pleadings the trial Court framed appropriate issues and the matter was taken up for trial.

Second Appeal No. 220 of 1991

7. This appeal is directed against the judgment of the II Additional Subordinate Judge, Vijayawada in A.S.No. 147 of 1989 reversing the judgment of the 1st Additional District Munsif, Vijayawada in OS No. 1128 of 1984.

8. Pandwanga Rao, the 1st defendant in the earlier suit OS No. 1570 of 1985, filed OS No. 1128 of 1984 for a perpetual injunction against his sisters and sister's son, who are the plaintiffs and the 2nd defendant in the earlier suit, seeking to restrain them from interfering from his peaceful possession and enjoyment of the suit property.

9. The pleadings of the parties in OS No. 1128 of 1984 are similar to the pleadings in OS No. 1570 of 1985. The property in dispute in both the suits is also one and the same. Therefore, the trial Court after framing appropriate issues in OS No. 1128 of 1984, clubbed both the suits and recorded evidence in OS No. 1570 of 1985.

10. The plaintiffs in order to prove their case examined PWs.1 to 5 and marked Exs.A1 to A7. The 1st defendant examined DWs.1 to 5 and marked Ex.B1.

11. The trial Court after considering the evidence adduced by both parties decreed OS No. 1570 of 1985 in favour of the plaintiffs and dismissed OS No. 1128 of 1984 refusing to grant injunction in favour of the 1st defendant.

12. The 1st defendant being aggrieved by the common judgment of the trial Court dated 16-10-1989 preferred AS Nos.150 and 147 of 1989 against the judgments and decrees in OS Nos.1570 of 1985 and 1128 of 1984 respectively.

13. The 1st appellate Court reversed the common judgment of the trial Court by allowing both the appeals filed by the 1st defendant and dismissing the suit covered by OS No. 1570 of 1985.

14. The plaintiffs being aggrieved by the common judgment of the 1st appellate Court dated 16-1-1991 preferred these appeals challenging its validity and legality.

15. At the time of admission of the appeals the following points, were taken into consideration as substantial questions of law:

(1) Whether the provisions of Indian Evidence Act are applicable to prove the genuineness or otherwise of the Will executed by the Testator?

(2) Whether is it sufficient to examine only the Attestor and Scribe to prove the execution of the Will without being properly explained about the suspicious circumstances surrounding it?

(3) Whether it is not the duty of the propounder to explain the suspicious

circumstances for executing the Will and whether the burden simply shifts to the other side who denied the Will to prove the suspicious circumstances?

16. After going through the points that were taken into consideration as the substantial questions of law at the time of hearing this Court framed another point as a substantial question of law, which reads thus:

Whether there is any perversity in the judgment of the 1st appellate Court and whether the material available on record was not taken into consideration by the 1st appellate Court in giving findings in the appeals?

Points:

17. It is an undisputed fact that the suit property belongs to the mother of the plaintiffs and the 1st defendant. The parties are not denying the relationship inter se. The plaintiffs and the 2nd defendant are basing their claim on Ex.A2 - Registered Will said to be executed by their mother Punnamma on 26-3-1981 bequeathing absolute rights to them after her death. The 1st defendant also relied on an unregistered Will (Ex.Bi) dated 5-11-1983 said to be executed by his mother Punnamma bequeathing the suit property in his favour. After considering the evidence adduced by both parties the trial Court accepted Ex.A2 as a genuine Will and accordingly decreed the suit in favour of the plaintiffs and dismissed the suit for injunction filed by the 1st defendant.

18. The evidence adduced by both parties is clearly indicating that the 1st defendant Panduranga Rao and his mother Punnamma were not in cordial terms and there were strained relations between them. Therefore, the mother was staying with the daughters. It is also an undisputed fact that late Punnamma filed OS No. 1645 of 1981 for recovery of a sum of Rs. 960/-towards value of Makta for the year 1980-81 from the 1st defendant, since he was enjoying her land by raising crops. She also filed a suit for partition in OS No. 321 of 1981 claiming share in the property of her husband. Both the suits were decreed in her favour and since then the relations further strained. The evidence adduced by both parties further discloses that the 1st defendant did not pay the Makta amount which was directed to be paid by him in the form of a decree till Punnamma took steps for attachment of paddy and his arrest. The 1st defendant admitted this fact in his evidence as DW1. It is therefore clear from the pleadings and the evidence adduced by both parties that the 1st defendant's mother Punnamma was not having any love and affection towards the 1st defendant and continued to live with strained relations. The recitals of Ex.B1 are also indicating that about two days prior to her death, Punnamma being sick and not in a position to move, gave up the bad impression she was having against her son and after sending for him expressed her desire to bequeath her property in his favour by cancelling the earlier Will executed by her in favour of the plaintiffs and the 2nd defendant. The contents of Ex.B1 are amply establishing that till the date of the alleged Will covered by Ex.B1, Punnamma and the 1st defendant were having strained relations. In the light of the above circumstances it has to

be considered as to what extent the 1st appellate Court made proper appreciation of the evidence adduced by both parties and it has also to be considered whether there is any perversity in the findings of the 1st appellate Court and whether the findings warrant interference.

19. PW1 stated in her evidence that the relations between their mother Punnamma and the 1st defendant were strained and she was living with them and since they were serving Punnamma., out of love and affection she executed Ex.A2 -Will and got it registered by bequeathing her property in their favour, which shall be vested with them with absolute rights after her death. PW1 denied the execution of Ex.B1-Will by her mother Punnamma as alleged by the 1st defendant.

20. In order to prove the genuineness of Ex.A2 Will the plaintiff examined a Scribe (PW4) and an Attestor (PW5) of the said Will. PW4 stated in his evidence that Ex.A2 was executed at his house on the instructions of late Punnamma and she executed the said Will in favour of the plaintiffs and the 2nd defendant, since the 1st defendant did not look after her properly. PW5 also deposed that as per the wish and desire of Punnamma Ex.A2 - Will was scribed by PW4 and that the contents of the said Will were read over to her and after she accepted the contents to be true, her thumb impression was obtained in the presence of himself and another attestor and that she was in a sound and disposing state of mind at the time of execution of the Will. In the cross-examination, the 1st defendant has not put any suggestion to PWs. 4 and 5 that whether the testator was sick or was not in sound and disposing state of mind at the time of execution of Ex.A2.

21. It is the further version of PWs.1, 4 and 5 that after writing the said Will, it was taken to the Registrar's Office along with the Testator and got it registered on the same day.

22. PWs.2 and 3, who are the mediators, also stated that they mediated in the disputes between the parties.

23. So far as the genuineness of Ex.A2 is concerned, the 1st appellate Court did not make any adverse comments and it concurred with the findings of the trial Court. However, the 1st appellate Court did not accept certain comments made by the trial Court regarding the genuinences of Ex.B1-unregistered Will. Before advertng to the findings of the 1st appellate Court, it would be appropriate to refer to the evidence adduced on behalf of the 1st defendant.

24. In his evidence as DW1, the 1st defendant conceded the relationship between the parties and stated that his mother called him and executed Ex.B1 - Will on 5-11-1983 and she died on 7-31-1983. DW1 further deposed that the Will was scribed by DW3 and attested by DW2 and another. In the chief-examination DW1 did not speak about the place and time of execution of the Will. He also did not give the names of the persons who attested the Will and simply mention that in the presence of attestors his mother executed Ex.B1. He however did not state

the name of the person who scribed the Will.

25. DW2, P.S. Sri Ramachandra Rao, who is said to be one of the attestors of Ex.B1 - Will and working in A.P. State Electricity Board along with DW1, deposed that he attested the Will dated 5-11-1983 executed by DW1's mother. According to him, DW1, one Nagabhushanam and Balaram were present at the time of executing the Will. Except this, he did not mention anything as to whether the testator gave instructions to writ the Will, at what place and time the Will was written, and whether the contents of the Will were read over to the Testator and she accepted that the contents to be correct, who obtained the thumb impression of the Testator was in the presence of scribe and attestors etc. He also did not speak whether the testator and whether the affixing of thumb impression by the Testator was in a sound and disposing state of mind at the time of the alleged execution of the Will. In the cross-examination, DW2 conceded that DW1 (1st defendant) is related to him, though distantly. He did not ascertain any particulars to why the mother of the 1st defendant was staying at Ailapuram.

26. DW3, a resident of Gunadala Village and the scribe of Ex.B1 - Will deposed that he scribed the Will at the instance of the Testator and one Balaram and Ramachandra Rao attested the said Will. He further deposed that it was executed at Ailapuram and the Testator put her thumb impression and signed it in his presence. He also stated that the Testator was in a sound state of mind at the time of execution of the Will. This witness also incidentally happens to be an employee working in the Electricity Department and working along with DWs.1 and 2 and there is no explanation from DW1 as to why they could not secure any witness from Ailapuram Village and under what circumstances the attestors and the scribe were taken to Ailapuram from Vijayawada for the purpose of attesting the Will.

27. The above evidence adduced on behalf of the 1st defendant is scanty and is not creating confidence in the mind, of the Court due to lack of many details regarding the mental capability of the Testator and the contents of the Will. None of the 1st defendant's witnesses speak about the contents of Ex.B1 Will.

28. Coming to Ex.B1, DW1, though hails from Vijayawada Town and present at the time of execution of the alleged Will, could not secure any stamped paper and Ex.B1 was written on a white paper and the thumb impression said to be affixed by the Testator is nothing but a black mark without any "ridges of the thumb and it is impossible for anybody to certify that the said impression relates to a person and it is also not fit for comparison if anybody wants to question the genuineness of the said thumb impression. Whoever it may be, the person who took the thumb impression did not take proper care that the thumb impression is clear.

29. Another infirmity that has to be taken into consideration is that Ex.B1 Will was produced before the Court for the first time is the year 1989 at the time of the 1st defendant giving evidence i.e., about more than four years after the filing

of the suit and the simple explanation given by the 1st defendant was that it was kept with his Advocate and it remained with him and therefore it could not be filed into Court.

30. The 1st appellate Court without going into these details regarding the question relating to the genuineness of Ex.B1 - Will observed that the trial Court erroneously came to the conclusion on the basis of Ex.A2 itself without discussing the genuinences or otherwise of Ex.B1. It was further observed that though there is a clear suggestion to PW1 about the execution of Will in favour of the 1st defendant, the observation of the learned District Munsif that there was no suggestion about the Will in favour of the 1st defendant and therefore the plaintiffs are the legal owners of the schedule property cannot be reasonable and therefore not sustainable. So, to that extent the findings of the learned District Munsif in respect of Issue No. 3 is liable to be set aside.

31. The 1st appellate Court concentrated more on the aspect about the comment made by the trial Court regarding the date of the Will viz., whether it is on 5-11-1983 or 8-11-1983 and observed that since the Will was executed on 5-11-1983 prior to the death of the testator and not on 8-11-1983 it cannot be said to be a forged document. Regarding the filing of the Will into Court, the 1st appellate Court comes to the rescue of the 1st defendant by saying that since there was an explanation from him that the Will was kept with the Advocate from the year 1983, it cannot be treated as a mistake on his part. Regarding the strained relations between the Testator and the 1st defendant, the 1st appellate Court observed that since the Testator mentioned in Ex.B1 that there were strained relations between her and her son and as she changed her bad opinion against her son and executed the Will in his favour and the evidence of DW1 that his mother has sent for him and informed him that she is going to execute the Will in the presence of one Venkaiah and another brother-in-law by name Venkateswarlu, the 1st appellate Court throws the blame on the plaintiffs by stating that they failed to examine those two persons to disprove their presence at the time of execution of Ex.B1. The 1st appellate Court further observed that the allegation of the plaintiffs that Ex.B1 is a forged document cannot be considered because the plaintiffs did not choose to refer the document for expert opinion even though the evidence adduced in support of Ex.B1 is unimpeachable with regard to its execution by Punnamma. The 1st Appellate Court further observed that since the recitals of Ex.B1 clearly go to show the intention of the Executant that she expressed her intention to cancel the earlier Will covered by Ex.A2, the observation of the learned District Munsif that Ex.A2 was not cancelled cannot be accepted.

32. The 1st appellate Court goes on making comments about the peripherals of the issue without going into the main issue in question and after considering the evidence adduced by both parties and the judgment of the 1st appellate Court, I am of the clear view that there is perversity in the findings of the 1st appellate Court. The 1st appellate Court failed to answer certain important issues relating

to the genuineness of the wills in question and failed to consider the evidence adduced by both parties. I am therefore of the further view that there is any amount of cloud regarding the genuineness of Ex.B1-Will and the trial Court was right in holding that it cannot be accepted.

33. Conveying a property without any consideration Will be done only when the person who proposes to give such property has so much love and affection towards the beneficiary or to a person who rendered yeomen service to him. Execution of a Will by the owner of the property in favour of one or some of the legal heirs is on the basis of goodwill against the persons to whom he proposes to bequeath and bad Will towards the persons who are denied such benefit of bequeathing the property. When a son quarrelled with the mother, neglected and failed to maintain her and driven her out forgetting that she gave birth to him and when she was looked after by the daughters and served her in her old age, it is hard to believe that the mother would continue to have affection towards such son without any affection towards the daughters who served her till her death. It is also hard to believe that a mother changes her mind overnight towards the son against whom she filed a suit for Makta from her property which was in his possession, and a suit for partition and recovery of possession of her share of properties from the properties of her husband and the son who refused to pay the amount due to the mother till the Court ordered attachment of paddy and his arrest through Court, calls him suddenly saying that she erased the bad impression against him from her mind and offered to bequeath her property in his favour without giving any part of it to the daughters who served her till last, unless there is a strong evidence adduced by the son that the mother actually changed her mind and offered to bequeath her property in the form of an unregistered Will from her deathbed.

34. When once Ex.B1 was excluded from consideration there remains Ex.A2-registered Will. Since its genuineness was not questioned by the 1st defendant also, it can be safely concluded that Ex.A2 is a true, valid and genuine Will binding on the 1st defendant and in pursuance of the mandate given by the Testator, the plaintiffs are entitled to get title over the property and consequently they are also entitled for recovery of possession of the same.

35. When once the title of the plaintiffs and the 2nd defendant is declared and there is a direction that the plaintiffs and the 2nd defendant are entitled for recovery of possession of the suit property, the relief of injunction over the suit property cannot be made available to the 1st defendant. Consequently, his suit must fail and that of the plaintiffs shall succeed.

36. In the light of the above findings, I find sufficient reasons to interfere with the findings of the 1st appellate Court and the judgments rendered by it. Accordingly, both the appeals are allowed by setting aside the judgment of the 1st appellate Court in AS Nos.147 and 150 of 1989 and the judgments and decrees of the trial Court are restored. In the circumstances, each party to bear its own costs.

37. The Court fee due in both appeals shall be recovered from the appellants.