
(2011) 04 AP CK 0073
In the Andhra Pradesh High Court
Case No : C.M.A. No. 1 of 2011

Immadi Venkata Muttaiah @ Baburao	APPELLANT
Vs	
Sunkara Babaji Chowdary and Immadi Durga Rao	RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:

Citation : (2012) 1 ALT 99

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Dhanamjaya, for the Appellant; Aravind Kumar P.S., for the Respondent

Judgement

L. Narasimha Reddy, J.—This Civil Miscellaneous Appeal is filed against the judgment and decree in A.S. No. 40 of 2006, dated 25-10-2010, on the file of the I Additional District Judge, Eluru, West-Godavari District, which, in turn, was filed against the decree in O.S. No. 205 of 2001 passed by the Court of Additional Senior Civil Judge, Eluru, West-Godavari District. For the sake of convenience, the parties herein are referred to, as arrayed in the suit. The sole Plaintiff is the Appellant herein.

2. The suit was filed for the relief of declaration of title in respect of items 1 to 3; for recovery of possession of items 2 and 3 from the 1st Defendant, and for perpetual injunction against Defendants 1 and 2, in respect of item 1, of the plaint schedule.

3. The Plaintiff pleaded the following facts: Himself and the 1st Defendant are the sons of late Immadi Narayanamurthy and Bhavanamma and in the oral family partition, the suit schedule properties were allotted to their mother. Bhavanamma was being looked after by the Plaintiff till her death and out of love and affection, she executed a Will, dated 10-03-2000 (Ex. A-1), bequeathing the suit schedule properties in favour of the Plaintiff. When the 1st Defendant tried to interfere with the possession and enjoyment of some of the properties, the

Plaintiff got issued notice, Ex. A-2, and thereafter, correspondence ensued. It was ultimately found that the 1st Defendant executed a sale deed in favour of the 2nd Defendant, in respect of Ac.1.05 cents of land, from out of item No. 1 of the suit schedule.

4. The 1st Defendant, who is brother of the Plaintiff remained ex parte. The 2nd Defendant filed a written-statement, admitting the fact that he purchased Ac. 1.05 cents of land through a sale deed dated 01-10-2001, marked as Ex. B-1. He further stated that the 1st Defendant pleaded that his mother Bhavanamma executed a Will dated 07-02-1995 (Ex. B-2), bequeathing the said property to him and the purchase was made after due verification of records. He pleaded that the Will, Ex. A-1 relied upon by the Plaintiff is a fabricated one.

5. The trial Court decreed the suit through judgment dated 12-1-2005. The 2nd Defendant filed A.S. No. 40 of 2006 in the Court of I Additional District Judge, West-Godavari, at Eluru. The appeal was allowed, through judgment dated 25-10-2010 and the decree and judgment passed by the trial Court was set aside. The matter was remanded to the trial Court, mainly for the purpose of providing an opportunity to the 2nd Defendant to cross-examine PW-3, one of the alleged attestors of Ex. A-1. The lower Appellate Court had reversed the finding of the trial Court on Ex. B-2, and held that the said Will is proved. A direction was given to the trial Court that the finding on Ex. B-2 shall remain.

6. Sri Ch. Dhanamjaya, learned Counsel for the Appellant submits that the Plaintiff proved Ex. A-1 beyond any pale of doubt by examining various witnesses, including one of the attestors, and there was absolutely no basis for the lower Appellate Court in disturbing that finding. He further submits that the beneficiary under Ex. B-2 did not choose to enter appearance, and the lower Appellate Court was not justified in reversing the finding recorded by the trial Court on that document.

7. The suit filed by the Plaintiff was for the relief of declaration in respect of three items of the suit schedule; recovery of possession and mesne profits, in respect of items 2 and 3, against the 1st Defendant, and perpetual injunction in respect of item No. 1, vis-a-vis the Defendants 1 and 2. The Plaintiff pleaded, Ex. A-1, as the source of his title. His brother, the 1st Defendant, remained ex parte. The burden fell upon the 2nd Defendant alone to resist the suit. Though he is not the legatee under Ex. B-2, he had to propound and prove it, since the transfer in his favour under Ex. B-1 was dependant upon the validity of that Will.

8. The trial Court framed the following issues, viz.,

1. Whether the Plaintiff is entitled for declaration of his title to suit schedule properties as prayed ?

2. Whether Plaintiff is entitled for recovery of possession of item Nos. 2 and 3 of suit schedule property after ejecting the first Defendant therefrom?

3. Whether Plaintiff is entitled for future profits over item Nos. 2 and 3 of the suit

properties?

4. Whether Plaintiff is entitled for permanent injunction against the Defendants in respect of item No. 1 of suit property?

9. On behalf of the Plaintiff, PWs 1 to 6 were examined and Exs.A-1 to A-22 were filed. On behalf of the Defendants DWs 1 to 4 were examined and Exs.B-1 to B-5 were filed. Ex. X-1 is the copy of the ledger extract, containing the signature and thumb impression of Bhavanamma, marked through the Court.

10. The suit was decreed as prayed for. The 2nd Defendant felt aggrieved by the decree, in so far as the decree was in respect of Ac. 1.05 cents of land in item-1, of the suit schedule. In A.S. No. 40 of 2006 filed by him, the lower Appellate Court framed two points for consideration, viz.,

1. Whether the 2nd Defendant is able to prove that Ex. B-2 dated 7-2-1995 was duly executed by late Bhavanamma in a sound and disposing state of mind and that Ex. B-2 was not surrounded by any suspicious circumstances?

2. Whether Plaintiff is able to prove that late Bhavanamma in a sound and disposing state of mind executed Ex. A-1 Will Deed and there are no suspicious circumstances surrounding the execution of Ex. A-1 Will Deed?

11. Point No. 1 was answered in favour of the 2nd Defendant. On point No. 2, the lower Appellate Court felt that the Plaintiff did not prove Ex. A-1, since PW-3, one of the attesting witnesses, did not turn up for cross-examination. Therefore, it remanded the matter to the trial Court, limiting the consideration to the validity of Ex. A-1, and permitting the 2nd Defendant to cross-examine PW-3. It was observed that, its finding on Ex. B-2 shall remain as it is.

12. Since the appeal is the continuation of a suit, the lower Appellate Court examined each and every aspect of fact and law, in detail. The claim of the Plaintiff rested upon Ex. A-1, Will, dated 10-03-2000, said to have been executed in his favour, by his mother, Bhavanamma. The 2nd Defendant, on the other hand, relied upon Ex. B-2, dated 07-02-1995, a Will, said to have been executed by the same lady, but in favour of the 1st Defendant, in respect of the said property. Even if Ex. B-2 is validly executed and proved, it would be subject to any subsequent testament. Ex. A-1, if proved as required under law, would hold the field being a subsequent Will. Both of them cannot operate at one and the same time.

13. The trial Court held that Ex. A-1 is proved and that Ex. B-2 was not validly executed. That finding was reversed by the lower Appellate Court. While it remanded the matter for consideration of proof of Ex. A-1, it recorded a clear finding on Ex. B-2 that it is proved. The observation made by the lower Appellate Court that its finding on Ex. B-2 shall remain untouched, needs to be clarified. If, after permitting PW-3 to be cross-examined, the trial Court comes to the conclusion that Ex. A-1 is validity executed, Ex. B-2 would cease to be operative, notwithstanding its valid execution. If the finding goes against the Plaintiff on Ex.

A-1, after remand, Ex. B-2 would certainly be a source of title.

14. Another aspect is that, there is no necessity to disturb the decree in the suit, to the extent it is not against the 2nd Defendant. In other words, the grievance of the 2nd Defendant can be only vis-a-vis the decree for perpetual injunction in respect of part of item-1 of the suit schedule property, admeasuring Ac. 1.05 cents. Rest of the decree was directed against the 1st Defendant, and he did not choose to prefer an appeal.

15. Therefore, the C.M.A. is partly allowed, directing that,

a) the remand by the lower Appellate Court shall be confined to the decree, in so far as it is against Defendant No. 2;

b) the decree to the extent it is exclusively against Defendant No. 1, shall remain intact;

c) the 2nd Defendant shall be entitled to cross-examine PW-3 on the validity of Ex. A-1; and

d) the enforceability of Ex. B-2 shall depend upon the finding of the trial Court on Ex. A-1.

16. There shall be no order as to costs.