

(2007) 03 AP CK 0093
In the Andhra Pradesh High Court
Case No : SA No. 327 of 1997

Jupalli Swami Reddy and Another	Vs	APPELLANT
Jupalli Chandraiah (died) by LR		RESPONDENT

Date of Decision : 28-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92
Evidence Act, 1872 — Section 17

Citation : (2007) 5 ALD 120

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : C. Sadasiva Reddy, for the Appellant; R.V. Subba Rao, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—The unsuccessful defendants 4 and 5 in both the Courts below had preferred the present second appeal. Respondent-plaintiff died and his legal representative as respondent No. 2 was brought on record by an order dated 16-12-2005 in CMP. No. 3085 of 2005.

2. This Court on 18-6-1997 made the following order:

In view of the substantial questions of law raised in ground Nos. 1 to 3, the second appeal is admitted.

3. On 18-6-1997 in CMP No. 6502 of 1997 this Court made the following order:

There shall be stay of execution of the decree in OS No. 59 of 1987. Notice.

4. Subsequent thereto, on 3-12-1997 this Court made the following order:

Interim stay of passing of final decree only and the other proceedings as to enquiry into mesne profits may go on.

5. The under noted are the substantial questions of law, on the strength of which

the second appeal was admitted by this Court:

(1) Whether the lower Court erred in relying on Ex.A2 the so called admission of the first defendant made by him in another suit, OS No. 297 of 1976 and treating it as conclusive proof of the suit property being the joint family property of the defendants 1 to 3 ignoring the fact that the first defendant had made such an admission to claim the benefit of Act 7 of 1977 in that suit to which suit the plaintiff and the defendants 4 and 5 in the present suit are not the parties?

(2) Whether the lower Court failed to see that the property, which is the subject-matter of the instant suit was not the subject-matter in OS No. 297 of 1976 on the file of the District Munsif, Nandyal filed by one T. Mrugapani against defendants 1 and 2 alone and hence any admission made by the first defendant therein to which the present plaintiff is not a party would not estop him from contending and proving that the suit property is his separate property?

(3) Having noticed that the first defendant discharged the mortgage debt borrowed by him from Bheemasena Rao under Ex.B14 by mortgaging the same property to the wife of Bheemasena Rao under Ex.B5 and that the said mortgage-deed Ex.B5 was executed by the first defendant alone in his individual capacity as the owner and that in the mortgage deed Ex.B14 executed by the first defendant in favour of Bheemasena Rao, it is recited that the borrowing was for purchase of the suit property, whether the Courts below ought to have held that the suit property is the self-acquired and separate property of the first defendant?

6. Contentions of Sri C. Sadasiva Reddy : Sri C. Sadasiva Reddy, the learned Counsel representing the appellants-defendants 4 and 5 made the following submissions:

7. The learned Counsel would maintain that the first defendant was in fact the exclusive owner of the property in question. The learned Counsel would also submit that the mere fact that in a prior litigation an admission was made, cannot be stated to be conclusive at any rate, especially in the facts and circumstances, the admission being in terrorem and especially in the light of the fact that it was just a money litigation. Further, in the light of the clear rebuttal documentary evidence available on record in this regard, Exs.B5 and B.14 in particular the findings recorded by the Courts below that on the strength of the alleged admission a decree can be made, cannot be sustained. The learned Counsel would also place strong reliance on the decision of the Apex Court in Syed Mohd. Salie Labbai (Dead) by L.Rs. and Others Vs. Mohd. Hanifa (Dead) by L. Rs. and Others, . While further elaborating his submissions, the learned Counsel pointed out to the relevant portions of the findings in relation thereto and would comment that though admission is not a conclusive one and the same can be rebutted by documentary and oral evidence, the appellate Court had not considered this aspect in proper perspective, except making certain observations in three or four lines and there is no further detailed discussion in this regard and in the light of the same, the decree and judgment of the appellate Court cannot

be sustained and at any rate this question may have to be reconsidered. The learned Counsel also had pointed out to the relevant portions of the findings of the Court of first instance and also the appellate Court and made elaborate submissions that both the Courts below had totally erred in appreciating the scope and ambit of an admission within the meaning of Section 17 of the Indian Evidence Act, 1872.

8. Contentions of Sri Nagabhushana Rao : Sri Nagabhushana Rao, the learned Counsel representing the respondent would submit that here is an unfortunate Court auction purchaser who had been fighting this litigation sufficiently for a long time. It is really unfortunate that these defendants 4 and 5 are now contending as though the transaction is a bona fide one and as though Judgment-debtor is not entitled to any share, though by virtue of Court auction he purchased the property. The Counsel would comment that the transaction itself is not a bona fide transaction. Having received the telegram, the purchase was made and that itself would show that the transaction, which had been entered into is a speculative one and definitely not a bona fide one. The learned Counsel would also submit that there is no specific plea to the effect that the admission made in the prior litigation viz., in a money suit was an admission made in terrorem and all other factual foundations are being laid for the first time in the second appeal, which cannot be permitted. These aspects had not been specifically pleaded and in the absence of such factual foundation, the said question cannot be permitted to be raised in a second appeal. Even otherwise, the learned Counsel would submit that on facts, it is clear that it is a binding admission and at any rate the decision of the Apex Court referred in Syed Mohammed's case (supra), is not applicable to the facts of this case and the same is distinguishable.

9. Heard the Counsel on record.

10. The substantial questions of law, which had been raised in the second appeal had already been referred to above. For the purpose of convenience hereinafter the parties would be referred to as plaintiff and defendants. It is needless to say that the appellants herein are defendants 4 and 5 in the suit in O.S. No. 59 of 1987 on the file of the Subordinate Judge, Nandyal. It is also needless to say that the plaintiff is no more and the legal representative who was brought on record is the contesting respondent in the second appeal.

11. The plaintiff Thamballa Chandraiah originally instituted O.S. No. 577 of 1981 on the file of the Principal District Munsif, Nandyal which was subsequently transferred as per the orders of the District Court, Kurnool on 22.4.1987 in O.P. No. 80 of 1987 to be tried along with O.S. No. 49 of 1982 on the file of the learned Subordinate Judge, Nandyal and the same was renumbered as O.S. No. 59 of 1987.

Averments in the plaint:

12. The averments made in the plaint are as hereunder:

The plaintiff purchased the plaint schedule property in the Court auction held in E.P. No. 166 of 1979 in O.S. No. 297 of 1976 on the file of the Principal District Munsif, Nandyal on 19.2.1981 and the said sale was confirmed on 6.5.1981 and the plaintiff purchased one third undivided share of the second defendant in the property in which defendants 1 and 3 are co-sharers. By virtue of the Court sale, the plaintiff has become a co-sharer along with defendants-1 and 3 and hence, he filed the suit for partition and separate possession of his share in the plaint schedule property. It is also pleaded that subsequent to the filing of the suit, the plaintiff learnt that the defendants 4 and 5 obtained sale deed from first defendant. The said sale deed is a nominal and concocted document brought about clandestinely in spite of telegram notice issued by the plaintiff informing about the Court sale in his favour. Hence, defendants 4 and 5 are added as parties.

Averments in the written statement of 1st defendant:

13. The 1st defendant filed a written statement taking a specific plea that he is not aware of the Court sale and its confirmation. Even if the Court sale is true, it is not binding on the 1st defendant. It is also pleaded that in O.S. No. 297 of 1976, the 1st defendant was also one of the defendants and the suit against him was dismissed on the ground that he is a small fanner and there was no decree against him. As there was no decree against the first defendant, the question of his alleged share being brought for sale does not arise. A further stand was taken that the plaint schedule property is self-acquired property of the 1st defendant and defendants 2 and 3 have no right in the said property. As the plaint schedule property is the exclusive property of the 1st defendant and as defendants 2 and 3 are never co-owners along with him and as the suit filed against the 1st defendant in O.S. No. 297 of 1976 was dismissed, the question of the plaintiff filing the suit for partition on the ground that he is entitled to undivided share, cannot be sustained.

Averments in the written statement of D4 and D5:

14. As already stated supra, I.A. No. 639 of 1982 was filed to implead defendants 4 and 5 as parties on the ground that they purchased the suit property from the 1st defendant during pendente lite. Defendants 4 and 5 filed written statement and also further got amended the written statement taking virtually the substantial stand, which had been taken by the 1st defendant that these defendants purchased the plaint schedule property for a valuable consideration and it is a bona fide transaction. Further, the particulars relating to the payment of consideration and other details had been specified and specific stand had been taken that inasmuch as these defendants are bona fide purchasers for value, the sale in their favour is binding on the plaintiff as well. It was also pleaded that the alleged telegram by the plaintiff was subsequent to the sale in favour of these defendants. It was also pleaded that one Komineni Chinna Lingana had filed a suit in O.S. No. 49 of 1982 on the file of the Subordinate Judge, Nandyal against these defendants and their vendor for declaration of title

and for permanent injunction. In that suit, the plaintiff herein was added as one of the defendants and the said Linganna contended that the auction sale in favour of the plaintiff is not binding on him. The said Linganna and his legal representatives were brought on record as plaintiffs 2 to 5 and defendant No. 12 and therefore, the legal representatives of Komineni Chinna Linganna would also become necessary parties to the suit and without their presence, no decree can be effectively passed and so, the suit is bad for non-joinder of parties.

Averments in the Additional written statement of D1:

15. After defendants 4 and 5 were added, the first defendant filed an additional written statement pleading that the sale in favour of the plaintiff is invalid and is not operative and the sale deeds executed by the 1st defendant in favour of defendants 4 and 5 are for valuable consideration and those documents are true, valid and binding on the plaintiff. Defendants 2 and 3 had not contested the suit and remained ex parte. During pendency of the suit, the 1st defendant died and defendants 6 to 9 were brought on record as legal representatives and they filed a memo adopting the written statement filed on behalf of the 1st defendant. Subsequent thereto, a rejoinder was filed by the plaintiff to the effect that the suit filed by Komineni Chinna Linganna has nothing to do with the suit. The adding of the plaintiff herein as defendant in that suit does not ipso facto make it incumbent on the part of the plaintiff herein to add the legal representatives of Chinna Linganna. Having purchased one third share in the plaint schedule property, the plaintiff has not entered into possession of the property because of this litigation. The legal representatives of Chinna Linganna are not necessary parties to the suit.

Issues and Additional Issue:

16. On the strength of the pleadings and also the additional pleadings, the following issues and additional issues were settled:

1. Whether the plaintiff purchased one third share in the suit property in Court auction and if so, is it valid and binding on first defendant?
2. Whether the plaintiff is entitled for partition and separate possession of his share?
3. To what relief?

Additional Issue:

1. Whether the suit is bad for nonjoinder of parties?

Evidence on record:

17. On behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs. A1 to A10 were marked. On behalf of the contesting defendants, D.Ws.1 to 3 were examined and Exs. B-1 to B14 were marked.

Findings of the Court of first instance in nut shell:

18. The Court of first instance recorded the findings in detail and came to the conclusion that in the facts and circumstances, since an admission was made in the prior litigation, the same is binding and at this stage, it cannot be said that these are the self acquired properties of the 1st defendant alone and hence, inasmuch the plaintiff is the Court auction purchaser of one of the sharers, he is entitled to a share and accordingly, preliminary decree was granted in his favour.

19. Aggrieved by the same, the matter was carried by way of an appeal in A.S. No. 18 of 1993 on the file of the learned III Additional District Judge, Kurnool.

Points for determination framed in appeal:

20. The appellate Court at paragraph No. 7, framed the following points for determination in the appeal:

(1) Whether the suit lands are the joint family properties of defendants 1 to 3 or absolute properties of the first defendant?

(2) Whether Exs.B1 to B4 registered sale deeds obtained by the defendants 4 and 5 from the first defendant are valid and binding on the plaintiff?

(3) Whether the Court sale of the undivided 1/3rd share of the second defendant in the suit lands in E.P. No. 166 of 1979 on the file of Principal District Munsif Court, Nandyal is valid and binding on defendants?

(4) Whether the suit is bad for non-joinder of plaintiff in O.S. No. 49 of 1982?

(5) To what relief?

Findings of the appellate Court in brief:

21. The learned Judge proceeded to discuss the points commencing from paragraphs Nos. 8 to 12 and ultimately came to the conclusion that the appeal is devoid of merits and accordingly, the appeal is partly allowed granting preliminary decree in favour of the plaintiff for 1/3rd share of the 2nd defendant purchased by him in the auction held in Court and the remaining 2/3rd share in favour of defendants 4 and 5 who are wife and husband instead of 1st and 2nd defendants as Exs.B1 to B4 sale deeds in favour of defendants 4 and 5 are held to be valid only for 2/3rd share in the suit lands.

22. Aggrieved by the same, the present second appeal is preferred.

23. Section 17 of the Indian Evidence Act, 1872 dealing with admission reads as hereunder:

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Strong reliance was placed on the decision of the Apex Court in Syed Mohd. Salie Labbal (Dead) by L.Rs and Ors. v. Mohd. Hanifa (Dead) by L.Rs and Ors. (supra),

wherein the Apex Court while dealing with admissions made in previous criminal proceeding held that:

Subsequent suit by them u/s 92 C.P.C. for framing a scheme -Admission, if in terrorem, loses much of its significance -At any rate, the plaintiffs could not be said to have acted against the admission because they have availed of the remedy which was open to them under the law.

24. The stand taken by the plaintiff about the subsequent purchasers pendente lite as well as the stand taken by the 1st defendant in their respective pleadings, had already been referred to above.

25. Ex.A1 is the certified copy of the judgment dated 12.7.1977 in O.S. No. 297 of 1976 and Ex.A2 is the certified copy of the deposition of the 1st defendant in the said suit i.e., O.S. No. 297 of 1976, which was contested by him. The first defendant claimed that the plaint schedule properties were the joint family properties of the family i.e., himself and his two sons the 2nd and 3rd defendants and specific stand was taken that as father, he was entitled to only 1/3rd share and the other sons were entitled to 1/3rd each. In the light of said computation of the extent, further specific stand was taken that he would fall within the meaning of a small farmer and thereby, he is no more liable to discharge the debt in question in the said suit. Further details had been pleaded and such specific stand had been taken in the light of the provisions of A.P. Act 7 of 1977. The learned Principal District Munsif, Nandyal, accepted the said plea of the first defendant therein who had also been shown as first defendant in the present litigation and by the judgment specified above, having accepted that the suit lands are joint family lands of the father, the first defendant had only 1/3rd share in it, arrived at the conclusion that he was a small farmer and he was entitled for the benefits of the Act 7 of 1977. As can be seen from the evidence available on record, the original owners of the property, the 2nd defendant or the 3rd defendant or the legal representatives of the first defendant viz., defendants 6 to 9, who were brought on record by virtue of the death of 1st defendant had not given any evidence before the Court of first instance. Defendants 4 and 5 no doubt as purchasers had contested the litigation. In the light of the prior admission made by the father, the Courts below came to the conclusion that the inconsistent stand cannot be permitted to be taken in a subsequent litigation to the effect that these are not the joint family properties, but these are to be treated as self-acquired properties of the first defendant. It is stated that such stand was taken for the purpose of warding off the blow in relation to the recovery of a debt specified above. The first defendant had taken a specific stand that these are the joint family properties and having been successful by raising the said plea, at present he is putting forth a plea stating that it was an admission made in terrorem and hence, it cannot be treated as an admission in the eye of law at all and these purchasers/defendants 4 and 5 are bona fide purchasers and sale transaction is valid. It is pertinent to note that the first defendant being no more may be that his evidence could not have been

recorded. The other defendants 2 and 3 also had not entered into the witness box and, at least, the other legal representatives, who were brought on record after the death of the first defendant, also were not examined. So, evidently, except the purchasers, who are otherwise interested in the litigation, as far as the original owners are concerned, no acceptable evidence as such had been placed on record to view the admission in an earlier litigation with any kind of suspicion whatsoever. It is true that an admission cannot be taken as a conclusive proof always. It is also true that an admission can be rebutted.

26. Submissions at length were made by the learned Counsel representing the appellants on the strength of the recitals made in Ex.B5, registration extract of the mortgage deed executed by the 1st defendant dated 12.10.1970 and also Ex.B-14 copy of another registered mortgage deed. The recitals were strongly relied upon to show that these were the amounts which had been raised for the purpose of purchase of these properties and in the light of the same, the Courts below should have arrived at a conclusion that the admission made by the 1st defendant in the prior litigation to be taken as an admission in terrorem and hence, the same is not binding in a subsequent litigation with regard to the nature of the property. It is pertinent to note that the controversial question between the parties is as to whether they are the joint family properties of the family as such or the self-acquired property of the father alone. With regard to the nature of the properties, the father himself made an admission in a prior litigation. Therefore, it cannot be said that for the purpose of resisting the suit claim in a money suit, the said stand was taken and hence in a subsequent litigation, the same is not binding. These contentions cannot be accepted. Even on a careful scrutiny of the facts in the decision of the Apex Court in Syed Mohd. Salie Labbai (Dead) by L.Rs and Ors. v. Mohd. Hanifa (Dead) by L.Rs and Ors. (supra), this Court is of the considered opinion that the present facts of the case are clearly distinguishable. Here, it is the typical case where, father, contesting as party in a prior litigation had taken a stand as to the nature of the properties and as the selfsame question as to the nature of the properties, is in controversy in the present litigation, the purchasers cannot be permitted to contend otherwise unless there is convincing and acceptable evidence which can be taken as a clearly rebuttable evidence so as to rebut the admission made by the 1st defendant.

27. Except these contentions, no other contentions had been advanced by both the Counsel.

28. The learned Counsel no doubt had pointed out that detailed findings had not been recorded by the appellate Court.

29. It is no doubt true that the detailed findings in relation to certain documents had not been recorded, but it is needless to say that the appellate Court while confirming the findings of the Court of the first instance need not repeat all the findings in detail and in that view of the matter, though this Court is satisfied that the appellate Court had not discussed the documentary evidence in elaboration

on the principal question of admission and the other important aspects, but, it has confirmed the findings and partly allowed the appeal to the extent referred to above. Therefore, this Court is not inclined to disturb such concurrent findings recorded by both the Courts below.

30. Hence, viewed from any angle, this Court is thoroughly satisfied that the second appeal is devoid of merits.

31. Accordingly, the appeal shall stand dismissed. In the light of the peculiar circumstances of the case and since the appellate Court upheld the sale transaction as a bona fide one, the parties to the litigation to bear their own costs.