

(2006) 07 AP CK 0014

In the Andhra Pradesh High Court

Case No : CCCA No. 37 of 1988 and Cross-Objections (SR) No. 9752 of 2005

M. Padmavathi

APPELLANT

Vs

Siddahamsetty Rajeshwar Rao and Others

RESPONDENT

Date of Decision : 04-07-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Limitation Act, 1963 — Section 17, 17(1)

Citation : (2007) 2 ALD 99 : (2007) 4 ALT 187

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : Venkateswara Rao Gudapati, in CCCA, for the Appellant;
Venkateswara Rao Gudapati, in Cross-Objections, G. Anandam, in CCCA and Cross-Objectors in Cross-Objections and R.A. Actuthanand, in CCCA and Cross-Objections, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—The unsuccessful plaintiff in a suit for declaration of title and recovery of possession is the appellant. For the sake of convenience, the parties to the appeal would herein-after be referred to as they are arrayed in the trial Court.

2. Plaintiff is the daughter of the first defendant. First defendant and his brother S. Madhava Rao were members of a Hindu Joint family. In the partition that was effected between them in 1937, Mulgi bearing No. 3903, Market Street, Secunderabad and house bearing No. 2154 at Hill Street, Secunderabad were allotted to the share of S. Madhava Rao along with some other properties. Mulgi bearing No. 3904 and other properties were allotted to the share of first defendant S. Madhava Rao, out of love and affection towards the plaintiff, gifted the Mulgi bearing No. 3903 and house bearing No. 2154 to the plaintiff through a registered gift deed, when she was aged 5 years and that gift was accepted by the first defendant on her behalf as her guardian. But plaintiff was not aware of

the said gift till 1976. The Secunderabad Cantonment Town Improvement Trust while demolishing old Mulgies for road widening, also had demolished Mulgies bearing Nos. 3903 and 3904 and gave plots Nos. 3 and 4 in lieu thereof on lease for construction of new buildings therein. With an intention to remodel her house, plaintiff made an application for loan to the Bank. When the Bank insisted on production of her title deed, she obtained a copy of the gift deed executed by her uncle Madhava Rao in her favour and then only she came to know about the mulgi bearing No. 3903 also being gifted to her along with the house, and the enquiries got made by her revealed that first defendant had obtained lease of plots 3 and 4 in his own name and made constructions in those plots as if they were his own plots, and had gifted the building constructed therein to the second defendant, who is his second wife, who in turn had sold flats to Defendants 3 and 4. Since first defendant played fraud on her and had not given her possession of the plaint schedule property, which was allotted in lieu of the Mulgi No. 3903 gifted to her by her paternal uncle, she filed the suit for declaration of her title to the said property and recovery of possession thereof from the defendants.

3. The case, in brief, of the first defendant is, in the partition between him and his brother Madhava Rao under the partition deed dated 8-2-1937, house bearing No. 2154, Hill Street, Secunderabad and Mulgi bearing No. 3903 of Market Street were allotted to his brother and Mulgi bearing No. 3904, Market Street, Secunderabad was allotted to his share. As the Secunderabad Cantonment Town Improvement Trust wanted to develop market area, it acquired the Mulgies bearing Nos. 3903 and 3904 of 1938, but did not pay any compensation. After the marriage of the plaintiff he gave Rs. 4,700/- to her husband on 4-4-1947 and obtained a receipt towards the value of the mulgi No. 3903. By the time of gift House No. 2154, Hill Street, Secunderabad was in the occupation of his mother and his brother Madhava Rao. Subsequently, plaintiff obtained possession of the said house and got her name mutated in the municipal registers. The original gift deed was handed over to the plaintiff long time back. So, her contention that she is not aware of the existence of the gift deed till 1976 is not true. He took on lease Plots 3 and 4 and constructed building thereon with his own monies. Thereafter, it was partitioned between him and his sons under a registered partition deed. Later he gifted the property to his wife (second defendant) on 25-6-1958 and she obtained a transfer of the lease of the land in her favour, and sold the said property to Defendants 3 and 4 under registered sale deed dated 12-6-1969 and thereafter they obtained transfer of the lease hold rights in their favour from the Estate Officer. For the above reasons and as the suit is barred by limitation plaintiff is not entitled to any relief.

4. Second defendant filed a memo adopting the written statement of first defendant.

5. Defendants 3 and 4 filed a separate written statement contending that inasmuch as they are bona fide purchasers for value, of the plaint schedule property, they cannot be evicted therefrom more so because the suit is barred by

time.

6. Basing on the above pleadings, the trial Court initially framed ten issues for trial, and thereafter recast them as seven issues. In support of her case, plaintiff besides examining herself as P.W. 1, examined three other witnesses as P.Ws. 2 to 4 and marked Exs. A1 to A23 and Exs. X1 to X14. In support of their case, defendants examined the first defendant as D.W. 1, fourth defendant as D.W. 2 and marked Exs.B1 to B16. The trial Court held that the Secunderabad Cantonment Town Improvement Trust dismantled the Mulgi Nos. 3903 and 3904, General Market, Secunderabad and granted Plots 3 and 4 in lieu thereof on lease without awarding any compensation and that the gift deed dated 25-6-1958 executed by the first defendant in favour of second defendant and the sale deed executed by the second defendant in favour of Defendants 3 and 4 in respect of the suit property are not binding on the plaintiff and that the plaintiff is entitled to claim rents from the first defendant, but dismissed the suit on the ground that it is barred by time. Hence the appeal by the plaintiff. Defendants 3 and 4 filed cross-objections belatedly with a petition to condone the delay questioning the adverse findings against them.

7. The point for consideration is whether the suit is in time?

8. The main contention of the learned Counsel for the plaintiff is that the trial Court, which held on all the issues in favour of the plaintiff, was in error in finding that the suit is barred by time, without keeping in view the fact that it is only because of the fraud played on the plaintiff by the first defendant, she was not aware of the existence of the gift deed and that she and immediately after coming to know about the gift deed in her favour she obtained a copy of the gift deed and came to know about the gift of the Mulgi also in her favour, and filed the suit and so the suit is well within time. The contention of the learned Senior Counsel for Defendants 3 and 4 is that the trial Court, without properly appreciating the evidence on record and Section 17 of the Limitation Act erroneously found against the Defendants 3 and 4 on Issue No. 3 relating to the validity of the sale deed in their favour and contended that since the evidence on record clearly establishes that Defendants 3 and 4 are bona fide purchasers of valuable consideration and since there is nothing on record to show that they could have knowledge about the defect, if any, in the title of the second defendant, their vendor, the finding on Issue No. 3 recorded by the trial Court is unsustainable. It is his contention that even assuming that the delay in filing the cross-objections cannot be condoned, since this Court has ample powers to set aside wrong findings recorded by the trial Court by virtue of Rule 33 of Order 41 C.P.C., the wrong finding of the trial Court can be set aside. He placed strong reliance on M/s. Bihar Supply Syndicate Vs. Asiatic Navigation and others, ; Chaya and Others Vs. Bapusaheb and Others, ; Koksingh Vs. Smt. Deokabai, ; Choudhary Sahu (Dead) by Lrs Vs. State of Bihar, ; M.D. Thiruvalluvar Transport Corporation v. Santhalakshmi 2000 (3) CCC 5 (Mad.) in support of the said contention.

9. As rightly contended by the learned Senior Counsel for Defendants 3 and 4 merely because Defendants 3 and 4 did not prefer cross-objections within time this Court is not bound to accept the findings recorded by the trial Court, if those findings are not in accordance with the evidence on record, in view of Rule 33 of Order 41 C.P.C. which empowers the appellate Court to interfere with the findings of the trial Court even in the absence of cross-objections, as held in the decisions relied on by the learned senior Counsel.

10. The gift deed in favour of the plaintiff is of the year 1937. Plaintiff admittedly was married in 1943. Her name stood mutated in the municipal records in respect of the house that was gifted to her by her uncle Madhava Rao, long back. Since she filed the suit in 1979 i.e., more than 42 years after the gift, and nearly 10 years after the second defendant alienated the suit property in favour of Defendants 3 and 4 and about 20 years after the first defendant gifted the property to second defendant, plaintiff has to establish that she in fact was not aware of the existence of the gift deed till a few years prior to the filing of the suit i.e., till 19-8-1976.

11. As per Section 17 of the Limitation Act ("the Act"), in cases of fraud or mistake, limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it. As per proviso to Sub-section (1) of Section 17 of the Act if property is purchased for valuable consideration by a person who was not a party to the fraud, and if he did not, at the time of purchase, know or have reason to believe, that any fraud had been committed, exemption given by Section 17 of the Act would not apply. The parties that would be effected by the relief sought in the suit are Defendants 3 and 4, but not Defendants 1 and 2 who are the father and step mother of the plaintiff. Since it is not even the case of plaintiff that Defendants 3 and 4 have played any fraud on her, if Defendants 3 and 4 are able to establish that they are bona fide purchasers for value, without knowledge of the fraud that was allegedly played by the first defendant on the plaintiff, plaintiff cannot claim any relief from Defendants 3 and 4. The evidence on record clearly establishes that Defendants 3 and 4 are bona fide purchasers for value of the plaint schedule property. The evidence adduced by the plaintiff does not establish that they i.e., Defendants 3 and 4 have any role to play on the fraud allegedly played by the first defendant on the plaintiff. The evidence adduced by the plaintiff also does not establish that Defendants 3 and 4 have knowledge of the fraud allegedly played by the first defendant and the plaintiff. Therefore plaintiff cannot invoke Section 17 of the Act against Defendants 3 and 4.

12. In *Ramanathapuram Market Committee Virudhunagar v. East India Corporation Ltd. Madurai* AIR 1976 Mad. 323, a Division Bench of the Madras High Court held that the object of the statute of limitation is preventive and not curative and that its provisions should be interpreted strictly in accordance with the language used and held:

By the use of the phrase "with reasonable diligence" in Section 17, the

Legislature has given scope to the defendant to contend that the date of knowledge or discovery pleaded is not the sure date of such discovery of mistake or fraud. It is open to the defendant to establish that "with reasonable diligence", the plaintiff could have discovered the fraud or the mistake earlier. The plaintiff, therefore, is not mechanically permitted to adduce a plea over the matter in issue as a step in aid to maintain the action.

If the plaintiffs allegation as to the date of the knowledge of the mistake is adopted and accepted as a matter of course, then he would automatically be licensed to prejudice his adversary. A fortiori in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake "with reasonable diligence" on a date earlier than that on which the plaintiff bases his cause of action. Reason varies according to times and circumstances in which the individual thinks. Thus, the word "reasonable" has always been understood in law as prima facie meaning, reasonable in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know.

Keeping in view the above observations, in order to find out if the suit is in time, it has to be seen whether plaintiff is able to establish that the first defendant, by playing fraud on her, could prevent her from obtaining a copy of the gift deed in her favour prior to 1976. During chief-examination, plaintiff as P.W. 1, stated:

nobody told me that my uncle gifted the suit property to me. Six months before her death my grandmother told me that after her the house belong to me as it was gifted by my uncle.

During cross-examination she stated that her grand mother died about 15 years back. Assuming that "15 years" stated by P.W. 1 is a date from which she gave evidence, since she gave evidence in 1982 her grandmother must have died some where around 1967. So, it is clear that the plaintiff had knowledge about a gift deed being in existence even by 1967, and so she could have obtained a copy thereof even in 1967. During cross-examination P.W. 1 stated that in 1975-1976 she asked her uncle about the gift deed and in 1975 when she asked her uncle, he told her that he gave the gift deed to her father. This statement of her shows that she (the plaintiff) is very much in touch with her uncle, who is the donor of the plaint schedule and property, who could not have failed to inform her about his gifting a mulgi also along with the house in her possession. Plaintiff, for reasons best known to her, did not examine her uncle Madhava Rao, who could have spoken to the fact as to when he informed the plaintiff about his executing a gift deed. An adverse inference has to be drawn against the plaintiff for her not examining her uncle Madhava Rao. In the above circumstances it cannot be said that plaintiff could not have scope for knowing about the existence of a gift deed in her favour prior to her obtaining Ex. A3. Even from her evidence she had ample opportunity to know about the gift in her favour even in 1967 itself, if not earlier.

13. Even otherwise also as rightly observed by the trial Court since plaintiff specifically stated that she went to the Municipal Office with her Advocate and that the municipal authorities gave particulars to her and that she on the above basis made an application to the Sub-Registrar and obtained the copy, it is clear that even long prior to Ex. A3 plaintiff had knowledge about the gift deed and so it is clear that the suit is barred by time. The point is also answered accordingly.

14. In the result, the appeal is dismissed with costs. Gross-Objections which as in S.R. stage are dismissed as unnecessary.