
(2013) 12 AP CK 0054

In the Andhra Pradesh High Court

Case No : L.P.A. No's. 302 and 322 of 2001

Mandala Yadagiri and Others

APPELLANT

Vs

Mandala Madhava Rao and Others

RESPONDENT

Date of Decision : 20-12-2013

Acts Referred:

Citation : (2014) 3 ALD 387 : (2014) 2 ALT 627

Hon'ble Judges : M.S.K. Jaiswal, J; L. Narasimha Reddy, J

Bench : Division Bench

Advocate : A. Narasimha Reddy, for the Appellant; Ashok Kumar Agarwal
Counsel for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—These two Letters Patent Appeals are filed against the judgment and decree, dated 31.03.2001, in C.C.C.A. No. 2 of 1988 on the file of this Court. The said appeal, in turn, arose out of a preliminary decree, dated 06.07.1987, passed by the Court of Additional Chief Judge, City Civil Court, Secunderabad, in O.S. No. 457 of 1983. While L.P.A. No. 302 of 2001 is filed by the plaintiff in that suit, L.P.A. No. 322 of 2001 is filed by the defendants 2 to 4. For the sake of convenience, the parties are referred to, as arrayed in the suit. The sole plaintiff, the 1st defendant and one Mandala Narasimha, the husband of the 2nd defendant and father of the defendants 3 and 4, are brothers. They are the sons of late Mandala Papayya and Venkatamma. The couple had five daughters (not parties to the suit). Papayya had a son, Pentayya, and a daughter, Bala Narasamma, through his first wife Lakshmakka.

2. The plaintiff pleaded that his father had three brothers and substantial properties were allotted to his share in the partition with his brothers. Papayya is said to have died on 01.11.1952. The plaintiff pleaded that after the death of Papayya, the properties left by him were partitioned between Pentayya, the son of Papayya through his first wife on the one hand, and Venkatamma on the other, took place under a registered partition deed, dated 29.09.1953 (Ex. A. 1) and all

the children of Papayya through Venkatamma remained joint. It was mentioned that Narasimha died in the year 1978, leaving behind him, his wife, the 2nd defendant, and son and daughter, the defendants 3 and 4 respectively. He alleged that inspite of repeated demands, the 1st defendant did not agree for partition, and that the 1st defendant is enjoying the properties to the exclusion of other members of the joint family.

3. The actual contest of the suit was by the 1st defendant. He stated that the plaintiff, one of his brothers, was given in adoption, and that he is not concerned with the properties left by late Papayya. He pleaded that during his lifetime, Papayya executed a Will, dated 01.05.1952 (Ex. B. 1) wherein it was mentioned that Pentayya, Bala Narasamma (children of Papayya through his first wife), and Narasimha, his eldest son through Venkatamma, were adequately provided with considerable properties, their marriage was performed; and since the plaintiff has gone in adoption; the entire property held by him is bequeathed to him i.e., the 1st defendant. It was pleaded that taking advantage of the fact that his mother, Venkatamma, is illiterate, Pentayya and the husband of the 2nd defendant, Narasimha, played fraud upon her and brought into existence, a deed of partition, Ex. A. 1. According to him, item 2 of the suit schedule properties was bequeathed upon his physically handicapped sister, by name, Shabari, and items 1 and 3 were bequeathed to him.

4. He has also made a mention of the proceedings in O.S. No. 474 of 1958 on the file of the I Additional Judge, City Civil Court, Secunderabad.

5. The 2nd defendant filed a written statement, almost supporting the case of the plaintiff and claiming a share in the suit schedule properties for herself and her children, defendants 3 and 4. She further pleaded that she is residing in item 2 of the suit schedule properties, and that in case it becomes inevitable to partition that item, she is entitled to be paid a sum of Rs. 30,000/- to Rs. 40,000/- for the constructions made by her in that plot. A memo was filed by the defendants 3 and 4 adopting the written statement filed by their mother, the 2nd defendant.

6. The trial Court passed a preliminary decree, directing partition, as prayed for. The request of the 2nd defendant was not acceded to. Assailing the preliminary decree, the 1st defendant filed C.C.C.A. No. 2 of 1988 before this Court. The appeal was allowed and the preliminary decree passed by the trial Court was set aside. While the plaintiff filed L.P.A. No. 302 of 2001, the defendants 2 to 4 filed L.P.A. No. 322 of 2001.

7. Learned counsel for the plaintiff submits that Ex. A. 1 is a registered partition deed and the "B" schedule properties mentioned therein were allotted jointly to the plaintiff, the 1st defendant and Narasimha (husband of the 2nd defendant and father of the defendants 3 and 4) in equal shares, and the learned Single Judge has taken the view that Ex. A. 1 is not legal and is without any basis. He contends that one of the parties to Ex. A. 1 was Pentayya, son of Papayya

through Lakshmakka, and Ex. A. 1 could not have been assailed by the 1st defendant, unless Pentayya was made a party to the suit. He further submits that Ex. B. 1, the Will propounded by the 1st defendant, was not at all proved, and still, the learned Single Judge has given primacy and importance to it. Learned counsel submits that D.W. 2, the only alleged attestor, has gone on record, saying that if he is paid a sum of Rs. 30,000/- to Rs. 40,000/-, he is prepared to depose that the Will was not executed, and even after that admission, no steps were taken by the 1st defendant to balance that. He contends that Papayya succeeded to considerable extents of ancestral property, and the joint family, comprising of himself and his sons through his both wives, acquired certain items, and all of them are the joint family properties, and thereby, Pentayya did not have right or capacity to execute Ex. B. 1 Will in respect of the properties left by him. He ultimately contends that the preliminary decree passed by the trial Court deserves to be sustained.

8. Learned counsel for the 1st defendant, on the other hand, submits that the Will Ex. B. 1 was proved to the satisfaction of the Court, and if the contents thereof are taken into account, Ex. A. 1, the partition deed, which came into existence one year later, cannot be said to be a legally enforceable document. He submits that the learned Single Judge has taken into account, the circumstances, under which both the documents came into existence, and found that Ex. A. 1 is tainted with factors like fraud and misrepresentation. He submits that though the trial Court expressed the same doubts about the nature of disposition under Ex. A. 1, it took the same as having been proved, and the finding recorded by the learned Single Judge in relation thereto, does not warrant interference.

9. The trial Court framed the following issues for consideration:

- 1) Whether the plaintiff is entitled to partition of the plaint schedule properties, as prayed for?
- 2) Whether item No. 2 of the plaint schedule is not liable to be partitioned?
- 3) Whether the 2nd defendant is entitled to the amount spent for repairs and for payment of property tax for item No. 2 of the schedule property?

10. The plaintiff examined himself as P.W. 1 and Exs. A. 1 to A. 4 were filed, on his behalf. On behalf of the defendants, D.Ws. 1 to 4 were examined and Exs. B. 1 and B. 2 were filed. Preliminary decree was passed.

11. In C.C.C.A. No. 2 of 1988, the learned Single Judge of this Court framed the following points for consideration:

- 1) What is the true construction of the Will - Ex. B. 1 dated 1.5.1952 and whether the first defendant was given "vested remainder" bequeathing only life interest to Venkatamma?
- 2) Whether Ex. A. 1-partition deed is null and void being vitiated by fraud and misrepresentation played by Narasimha and Pentayya on Venkatamma?

The appeal was allowed.

12. In view of the extensive submissions made by the learned counsel for the parties, the following points arise for consideration before us:

- 1) Whether Ex. B. 1 can be said to have been proved as required under law?
- 2) Whether Ex. A. 1 is tainted with any vitiating factors, such as, fraud or misrepresentation?
- 3) Whether any finding could have been recorded about Ex. A. 1 without impleading Pentayya, who is a party to that document?
- 4) Whether the properties under the management of late Pentayya were held by the joint family comprising of himself and his sons, or whether he had any exclusive properties of his own, enabling him to execute a Will in respect thereof?

POINT NO. 1:

13. The dispute in the suit is between the sons of late Papayya through his second wife Venkatamma. While the second son (plaintiff) and legal representatives of first son (D. 2 to D. 4) are on one side, the 3rd son (D. 1) is on the other side. Through his first wife, Lakshmakka, Papayya had a son, by name, Pentayya, and a daughter, by name, Bala Narasamma.

14. The sole basis for the plaintiff to plead the partition is Ex. A. 1, the registered deed of partition, dated 29.09.1953. Under this document, Pentayya was allotted plaint "A" schedule properties and his stepbrothers were allotted plaint "B" schedule properties. Out of the three sons of Venkatamma, Narasimha alone was major and he subscribed his signature on Ex. A. 1. Since Yadagiri, the plaintiff, and the 1st defendant were minors, they were represented by their mother, Venkatamma, and she signed upon it.

15. The 1st defendant did not dispute the existence of A. 1. However, he pleaded that the said document was brought into existence through misrepresentation of facts, to Venkatamma. This aspect would be considered a bit later. The main plank of argument of the 1st defendant was Ex. B. 1.

16. The contents of Ex. B. 1 are to the effect that Papayya performed the marriage of Pentayya, he gave considerable quantity of gold and other ornaments to him, and thereby, he did not intend to give any immovable property to him. Similar recitals are made regarding Narasimha, the first son through Venkatamma. He further mentioned that the plaintiff was given in adoption. After this narration, he proceeded to observe that the second wife, Venkatamma, shall be entitled to enjoy the rights of ownership vis-?-vis the properties, to meet the expenditure to get his minor sons and daughters educated, and to fulfill the family obligations; and that if any property remains thereafter, it shall devolve upon the 1st defendant. Item 2 was bequeathed to Shabari, a handicapped daughter.

17. By any standard, the disposition made under Ex. B. 1 is extraordinary. Out of the ten children, i.e., one son and one daughter through first wife Lakshmakka, and three sons and five daughters through second wife Venkatamma, the disposition in respect of items 1 and 2 of the suit schedule was only in favour of the last son i.e., the 1st defendant. An exception is that Shabari was conferred with the rights in respect of item 2 of the suit schedule. Since it has bypassed the natural flow of succession, the scrutiny of Ex. B. 1 is required to be careful and cautious. This is in addition to the requirement of proof. Absolutely, no effort was made by the 1st defendant to explain the suspicious circumstances. Assuming that Ex. B. 1 is not surrounded by the suspicious circumstances, it needs to be seen as to how far it has been proved.

18. Section 68 of the Evidence Act, 1872 requires that any document, which is required to be attested, can be proved only by examining at least one of such attestors. The procedure to be followed, in the event of none of the attestors being available, is also indicated.

19. D.W. 2 is said to be one of the attestors. He is none other than son-in-law of Papayya and Venkatamma. According to this witness, Ex. A. 1 was already prepared through typewriting, and after he went to the house of his father-in-law, he was required to sign upon it, as an attestor. He is said to have attested the document without verifying the contents thereof. There is some uncertainty as to the persons, who were present when the Will is said to have been signed by the testator. It was elicited from this witness that though the four brothers of Papayya were immediately available, none of them were present, when the Will was executed.

20. In case D.W. 2 was able to withstand the rigors of cross-examination, the fact that he happens to be a close relation of the testator, cannot be treated as an unfavourable circumstance, in the context of proof of Ex. B. 1. He was examined in chief on 20.04.1985 and cross-examined on behalf of the plaintiff on the same date. His cross-examination on behalf of the defendants 2 to 4 took place on 23.09.1985. Incidentally, he figured as P.W. 2 in O.S. No. 474 of 1958 which was filed by Venkatamma for recovery of certain amount from third parties. Narasimha figured as the 4th defendant in that suit. After recalling his memory in relation to that evidence, this witness was cross-examined in relation to his preparedness to depose in a different way, in case he is paid certain amount. The relevant portion reads as under:

It is not true to suggest that I offered give evidence in favour of the defendants 2 to 4 namely that the will Ex. B. 1 was not executed during the lifetime of Papayya, if they gave me Rs. 25,000/- or Rs. 30,000/- to me. I do not know if my conversation was tape recorded on that day. I can identify my voice on tape recorder. The learned counsel for D. 2 to D. 4 seeks permission of the Court to play the said tape recorded conversation so that the witness may hear the same and thereafter he wants to cross examine him with regard to the above conversation. Permission is accorded. The tape which is deposited and marked as

M.C. 1 is played in the open Court. The witness has heard the entire conversation.

A. In the tape which you have heard D2 and yourself conversation. What do you say?

Ans: It is true.

With this, the credibility of this witness completely gets shattered, particularly, when the 1st defendant did not take any steps to re-examine the witness. The trial Court took note of this fact, but adopted a peculiar approach. It proceeded on the assumption that Ex. B. 1 is proved and Venkatamma had absolute right under Ex. B. 1 to effect partition through Ex. A. 1.

21. The learned Single Judge, however, has taken the view that Venkatamma was conferred with life interest alone and vested remainder was conferred upon the 1st defendant. Point No. 1, framed in C.C.C.A. No. 2 of 1988 proceeds, as though Ex. B. 1 is proved, and the only controversy is about the nature of disposition made thereunder. Another aspect is that Ex. B. 1, if taken as proved, would have its own impact upon Ex. A. 1. As a matter of fact, the learned Single Judge has taken Ex. B. 1 as the sole basis for recording of a finding about Ex. A. 1. In the absence of an important party to Ex. A. 1, namely, Pentayya, this exercise could not have been undertaken. Therefore, we find that Ex. B. 1 cannot be taken as proved, on the strength of the evidence that is available on record. The point is, accordingly, answered.

POINT NOS. 2 & 3:

22. These points relate to the validity of Ex. A. 1. Being a registered document of more than 30 years old, even by the time the suit was filed, the document has its own inherent evidentiary value. The 1st defendant, who disagreed with the arrangement made under Ex. A. 1, took the plea that it was obtained by fraud and misrepresentation. The relevant portion of the written statement reads as under:

It is true that Sri Mandala Papayya left behind properties both movable and immovable. It is also true that in the year 1953 Sri Pentaiah got deed of partition executed. This defendant submits that by playing fraud upon Smt. Venkatamma, the deed of partition was brought into existence. Sri Pentaiah and Narasimha were responsible for getting the document executed. Smt. Venkatamma was illiterate and representing the document to be the will deed of late Sri Papayya, presented the deed of partition for registration. Smt. Venkatamma came to know about the fraud subsequently and the deed of partition of 1953 was declared to be null and void.

By the time the written statement was filed, Venkatamma was very much alive. She was not examined as a witness. The 1st defendant was a party to that document. Being a minor, he was represented by his mother. He attained the age of majority about four or five years from the date of Ex. A. 1. However, he did not manifest any demur about that document after he became major. The suit

was filed in the year 1980 (renumbered in the year 1983). He sought to justify his plea by placing reliance upon the judgment and decree in O.S. No. 474 of 1958. The judgment therein was taken on record, at the stage of appeal, as Ex. A. 5. That was a suit filed by Venkatamma, against one Sri Chitralla Narsimlu, for recovery of certain amount. The defendant in that suit took the plea that the amount was paid to the eldest son of Venkatamma, by name, Narasimha. Thereupon, the other defendants, including Narasimha, were added as parties. Ex. B1 herein was filed as Ex. A. 5 in that suit. An observation was made in the judgment in that suit, as under:

It is true that the existence of Ex. A. 5 is made known subsequent to the suit and by an amendment of the plaint allowed P.W. 1 bases her right to collect the suit debts by virtue of it. Therefrom alone, it does not follow that it is brought about fraudulently or fabricated subsequent to suit. I find it the circumstances therefore relying on the testimony of P.W. 1 and 2 which I see no reasons to disbelieve that Ex. A. 5 is true, valid and genuine and that consequently defendant 4 is bounded by it.

The legality or otherwise of the partition deed did not fall for consideration in that suit.

23. It has already been mentioned that the validity of Ex. A. 1 herein cannot be decided, unless all the beneficiaries under it are made parties. Consequently, the plea, as regards fraud and misrepresentation, is required to be stated in total, as required under Rule 4 Order VI of CPC. A casual statement in a suit, to which the beneficiaries of the document are not parties, would not serve the purpose. Therefore, the finding recorded by the learned Single Judge on Ex. A. 1 cannot be sustained in law. The points are, accordingly, answered.

POINT NO. 4:

24. Notwithstanding the uncertainty that surrounds Ex. B. 1, an important aspect arises for consideration viz., whether it was competent for Papayya to execute a Will in respect of the properties that were under his management. The parties herein are not at variance, to the extent that there existed a joint family comprising of Papayya and his sons. However, they did not pay any attention to the question, whether Papayya had any properties of his own, apart from the joint family properties. It is only when the 1st defendant is able to prove that late Papayya had certain items of self acquired properties, that he could have supported the alleged Will, Ex. B. 1. The burden squarely rests upon him to prove that Papayya had his own income, which is independent of the joint family nucleus, and that he acquired the properties mentioned in Ex. B. 1 with that, with a clear intention to enjoy such properties by himself and to the exclusion of the joint family. It is only on proof of those facts to the satisfaction of the Court, that the plea as to execution of Ex. B. 1 could have been examined. It has already been mentioned that the challenge to Ex. A. 1 could not have been permitted in the absence of Pentayya or his legal representatives as parties to

the suit, and Ex. B. 1 cannot be said to have been proved, on the basis of the evidence on record. The point is, accordingly, answered.

25. Though the life of this litigation is spread over the past three decades, we are of the view that an opportunity deserves to be given to the parties to take necessary steps, and for that purpose, it is essential to remand the matter to the trial Court.

26. We, therefore, allow the Letters Patent Appeals and set aside the judgment and decree in C.C.C.A. No. 2 of 1988 and the preliminary decree in O.S. No. 457 of 1983. The matter is remanded to the trial Court, directing that:

- a) In case the 1st defendant intends to substantiate his plea in relation to Exs. B. 1 and A. 1, he shall be under obligation to:
 - i. adduce further evidence, if he is so advised, keeping in view, the finding of this Court that the evidence, which is already on record, is not sufficient to hold that Ex. B. 1 is proved,
 - ii. implead Pentayya, son of Papayya through his first wife Lakshmakka or his legal representatives, as the case may be, and to
 - iii. file an application to amend the written statement, by supplementing the details of alleged fraud and misrepresentation in relation to Ex. A. 1.
- b) It shall also be the obligation of the 1st defendant to prove that the properties mentioned in Ex. B. 1 were the self acquisitions of late Papayya, and that
- c) The steps indicated above shall be taken, within a period of three (3) months from today, and in default, the preliminary decree passed by the trial Court shall be treated as upheld in these appeals.

There shall be no order as to costs.

The Miscellaneous Petitions, if any, pending in the appeal shall stand dismissed.