
(1997) 01 AP CK 0008
In the Andhra Pradesh High Court
Case No : SA No. 987 of 1997

Pannayala Venkataswamy Goud and others	APPELLANT
Vs	
Rudra Veeraiah	RESPONDENT

Date of Decision : 21-01-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 73

Citation : (2000) 4 ALD 85 : (2000) 1 ALT 440

Hon'ble Judges : C.V.N. Sastri, J

Bench : Single Bench

Advocate : Mr. Vilas v. Afzul Purkar, for the Appellant; Mr. K. Rathangapani Reddy, for the Respondent

Judgement

1. The unsuccessful plaintiffs who have lost in both the Courts below have come up in second appeal. The suit is filed for setting aside an ex parte decree dated 28-8-1969 passed in OS No.31 of 1969 on the file of the Chief Judge, City Civil Court, Hyderabad on the ground that it was obtained by fraud and consequently to cancel the sale deed dated 23-4-1981 got executed by the defendant through Court in execution of the said decree. The facts leading to the second appeal may be briefly stated:

The plaintiffs 1 and 2 are the sons and plaintiff No.3 is the widow and plaintiffs 4 to 8 are the daughters of one late Pannayala Balaiah who died on 12-4-1978. The plaintiffs 1 and 2 and their father borrowed a sum of Rs.9,000/- from the defendant who is a money lender under two promissory notes dated 9-4-1961 (Exs.B1 and B2). They also executed an agreement (Ex.B3) on the same date agreeing to mortgage the properties mentioned in Schedules 1 and 2 of the said agreement to the defendant if they fail to repay the amounts borrowed within one year. It is the case of the plaintiffs that they have subsequently discharged the entire amount borrowed by them by paying a sum of Rs.740/- which was acknowledged by the defendant in the letter Ex.A1 and a further sum of

Rs.4,580/- under Ex.A2 receipt dated 22-4-1962 and the balance was repaid in kind as per the request of the defendant. The defendant, however, fabricated and created three more promissory notes marked as Exs.C1, C2 and C3 and also an agreement dated 18-6-1967 marked as Ex.C4 by forging their signatures. The defendant subsequently fabricated an arbitration agreement (Ex.C8) dated 17-3-1968 purporting to refer the disputes to an arbitrator one P. Pentaiah, who was wholly unknown to the plaintiffs and who was a henchman of the defendant. The arbitrator is stated to have passed an award on 16-7-1968 (Ex.C 15). The plaintiffs were not served with any notice by the arbitrator and they have no notice of the alleged award. The defendant filed OS No.31 of 1969 on the file of the Chief Judge, City Civil Court, Hyderabad for making the said award rule of the Court and managed to obtain an ex parte decree dated 28-8-1969 (Ex.A3) by suppressing notices to the plaintiff with the help of the Process Server of the Court. After keeping quiet for more than eleven years after obtaining the said decree, the defendant almost on the verge of the period of limitation, got the decree transmitted to the Court of Subordinate Judge, Sanga Reddy, Medak District. In the said Court, the defendant filed EP No.7 of 1981 and obtained a registered sale deed got executed by the Court in his favour on 23-4-1981 (Ex.A4). The defendant managed to get the sale deed executed by playing fraud on the Court by managing to get an endorsement that the plaintiffs refused the notices sent to them. Thereafter, the defendant filed EPNo.21 of 1981 for delivery of possession of the lands covered by the sale deed. It is only when the Bailiff came to the village to deliver possession on 17-7-1981, the plaintiffs came to know about the fraud played by the defendant. Thereupon they filed an application being IA No.1802 of 1981 in OS No.31 of 1969 to set aside the ex parte decree as per the legal advice tendered to them. They, however, withdrew the said application on 16-11-1981 and filed the present suit.

2. The suit was resisted by the defendant denying that any fraud was played by him and stating that the promissory notes Exs.C1 to C3 and C4 agreement as well as the arbitration agreement are all true and valid, that the Plaintiffs had full knowledge of all the proceedings before the arbitrator as well as before the Courts at every stage, as notices were duly issued to them by the arbitrator as well as the Courts. But the plaintiffs deliberately refused to receive them and they ultimately came forward with the present suit with totally false and baseless allegations with a view to deny the fruits of the decree to the defendant and to harass him. The defendant further pleaded that the order dismissing the application filed under Order 9, Rule 13 CPC operates as res judicata and it is also barred by limitation.

3. After framing issues and after considering the oral and documentary evidence adduced on both sides, the trial Court dismissed the suit with costs holding, inter alia, that the plaintiffs failed to establish the fraud alleged and that the suit is barred by res judicata in view of the order dismissing the application filed under Order 9, Rule 13 CPC and the suit is also barred by limitation. On appeal, the Appellate Court concurring with the view of the trial Court confirmed the

judgment and decree of the trial Court and dismissed the appeal.

4. Sri Vilas V. Afzul Purkar, learned Counsel appearing for the plaintiffs-appellants sought to assail the judgments and decrees of both the Courts below by contending that the Courts below have committed a grave error of law in holding that the suit is barred by res judicata and limitation and that even on merits on the question of fraud, the judgments of both Courts below are vitiated by the wrong approach and the judgments are perverse and unsustainable.

5. Considering the fact that the appeal involves a substantial extent of valuable land and in view of the allegation that a huge fraud has been perpetrated by the defendant not only against the plaintiffs but also against the Court, I have heard the learned Counsel for both parties at length who have taken me through the entire material on record.

6. So far as the question of res judicata is concerned, it must be held that both the Courts below have committed an error in holding that the dismissal of the application filed under Order 9, Rule 13 CPC to set aside the ex parte decree operates as res judicata. In this context, reference may be straightway made to the decision of the Division Bench of the Patna High Court in Janki Kitcr v. Thakur Rat, AIR 1924 Pat. 241. In the said decision, the Patna High Court, following the decisions of the Privy Council in (1) Ratha Raman Saha v. Pran Nath Roy (1901) 28 Cal. 475 (PC) and (2) Khagendranath Mahata v. Pran Nath Roy (1902) 29 IA 99 held that rejection of an application filed under Order 9, Rule 13 CPC does not bar a suit to set aside the decree as fraudulent.

7. Still the main question remains whether the plaintiffs have established the fraud pleaded by them. The burden is undoubtedly on the plaintiffs in this behalf. The only witness examined for the plaintiffs is the 2nd plaintiff who was examined as PW1. Another prominent feature which strikes anyone is the nature and extent of the fraud alleged. It is not merely the fabrication or creation of one or two documents. But it is alleged that a whole series of documents ranging from several pronotes, agreements, an arbitration agreement and award of an arbitrator have been fabricated and also suppression and fabrication of notices in the arbitration proceedings as well as before the Court at various stages has been resorted to. On the face of it, the said allegations appear to be rather farfetched and improbable. However, the learned Counsel for the appellants has mentioned and relied upon a number of circumstances which according to him taken cumulatively, are sufficient to establish fraud:

(1) Though the decree in OS No.31 of 1969 was obtained by the defendant on 28-8-1969, no attempt was made to execute the decree for more than eleven years and the defendant, deliberately waited till the records in the suit are destroyed and there is no explanation for this undue delay on the part of the defendant.

(2) One Suryanarayana,, Police Patel appears as a stock witness in all the disputed documents.

(3) The signature of the 2nd plaintiff in the disputed documents does not tally with his admitted signatures.

(4) Though an application was filed in the trial Court by the plaintiffs for sending the disputed writings to a Handwriting Expert for his opinion, the application was dismissed by the trial Court on the ground of delay without any justification.

(5) The father of the plaintiffs Balaiah suffered Paralysis on his right side in the year 1962 and he was not in a position to sign them.

(6) If really, the plaintiffs executed Exs.CI to C4, there was no necessity or occasion to refer the dispute to an arbitrator at all and that too to a person who was wholly unknown to the Plaintiffs.

(7) The whole scheme is an engineered scheme and the Courts below should have examined the matter more carefully and the documents should have been sent to an expert for his opinion and more so in a case where fraud is alleged to have been played on the Court as well.

(8) The Courts below ought not to have assumed the role of Handwriting Expert for comparing the disputed writings.

8. To be fair to the Courts below, it must be said that they have examined carefully all these circumstances in the light of the documentary evidence available on record and they have given cogent reasons for holding that the plaintiffs failed to establish the fraud alleged to have been played by the defendant. Basically the question raised is one of fact and I do not find any illegality or infirmity in the assessment of the evidence by the Courts below or the conclusions reached by them on an appreciation of the evidence on record. It is true that as a matter of prudence, the Court should not assume the role of a Handwriting Expert for comparing the writings. But at the same time, it is well settled that in view of Section 73 of the Evidence Act, the Court can compare the disputed writings with the admitted writing for coming to a conclusion with regard to the genuineness or otherwise. In the instant case, Exs.BI to B3 are not disputed and they are admitted. As the entire foundation of the case of the Plaintiffs rests on the allegation that the subsequent pronotes and agreements marked as Exs.CI to C4 and C8 have been fabricated by forging the signatures of the plaintiffs, with a view to satisfy myself about the correctness of the conclusions reached by the Courts below, I have carefully examined the signatures in the admitted documents as well as the disputed documents and I am inclined to agree with the Courts below that the signatures found in the disputed documents appear to be genuine. So far as the signatures of plaintiffs 1 and 3 are concerned, there is practically no difference whatsoever, and the signatures are similar in all the documents. Only with regard to the 2nd plaintiff, he signed in English in some documents, whereas he signed in Telugu in the subsequent documents. Even in some of the disputed documents, the 2nd plaintiff has signed in English only in the same manner as he did in the admitted documents. The mere fact that he signed in a different language in some of the

documents is not a ground to doubt their genuineness. That apart, even though the records relating to the service of notices in the suit OS No.31 of 1969 were destroyed and not available, the Courts below found that notices were duly issued to the Plaintiffs herein in EP No.7 of 1981 as well as EP No.21 of 1981 and the plaintiffs refused to receive the notices sent to them. This is established by the depositions of the Process Server and the Police Patel who figured as. an attestor, which are marked as Exs.B5 and B6. It may be mentioned that these two persons were examined by the Plaintiffs themselves as witnesses on their side, but they did not support the Plaintiffs and as such they were not cross-examined by the plaintiffs. The plaintiffs have not examined any other witness on their side.

9. For all the aforesaid reasons, I do not find any valid grounds to interfere with the concurrent findings recorded by the two Courts below on the question of fraud. I do not, therefore, find any merit in the second appeal and it is accordingly dismissed, hut without costs.