

(1997) 04 AP CK 0083

In the Andhra Pradesh High Court

Case No : Second Appeal No. 289 of 1993

Vemula Jangaiah

APPELLANT

Vs

Vemula Peramma and Others

RESPONDENT

Date of Decision : 23-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (1997) 3 ALT 439

Hon'ble Judges : Ramesh Madhav Bapat, J

Bench : Single Bench

Advocate : P.S. Narayana, for the Appellant; Vilas V. Afzul Purkar, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Madhav Bapat, J.—The appellant herein was an unsuccessful plaintiff in a suit bearing O.S. No. 259 of 1980 which was filed by him in the Court of the Principal Subordinate Judge, Narasaraopet. The suit was filed by the plaintiff to set aside the decree passed in O.S. No. 41 of 1972, which was decreed by the learned District Munsif, Gurazala. When the present suit filed by the plaintiff was dismissed, he carried the matter in appeal by filing A.S. No. 76 of 1988 in the Court of the III Addl. District Judge, Guntur. The learned District Judge also dismissed the appeal confirming the decree and judgment of dismissal of the suit passed by the Principal Subordinate Judge, Narasaraopet. Being aggrieved by the aforesaid judgment and decree, the original plaintiff in O.S. No. 259 of 1980 has filed the present appeal.

2. The averments made in the present suit can briefly be narrated as follows: It was averred by the plaintiff that one Vemula Siddaiah of Cherlagudipadu died about 25 years back. He had a son named Pedakistaiah. Mr. Siddaiah and Pedakistaiah were owning the property as mentioned in "A" schedule attached to the suit. Pedakistaiah died on 22-11-1971 leaving behind his wife named Vemula Peramma i.e., first defendant herein and adopted son i.e., the plaintiff herein and

two daughters i.e., defendants 2 and 3 herein.

3. It was further averred by the plaintiff in the suit that Siddaiah died long prior to the death of Pedakistaiah. Thus, Pedakistaiah became absolute owner of the suit schedule property. First defendant i.e., Vemula Peramma, married Pedakistaiah after the death of the first wife of Pedakistaiah named Lakshmi Devamma. Pedakistaiah had two daughters from Lakshmi Devamma. They are defendants 2 and 3 herein.

4. It is the further case of the plaintiff that he was taken in adoption by Pedakistaiah and Peramma on 10-11-1971. A ceremony of adoption was performed in the presence of the respectable members of the village including the Village Officers and relations. Pedakistaiah died within few days after adoption and therefore the adoption deed could not be registered during the life time of Pedakistaiah. At the request of the natural father of the plaintiff, an adoption deed was executed and it was registered subsequent to the death of Pedakistaiah.

5. It is further averred by the plaintiff that by virtue of adoption deed, the plaintiff inherited his share in the joint family property along with the defendants. The suit was filed by the plaintiff for declaration that he is the adopted son of Pedakistaiah and consequential relief of partition and separate possession of his share in the plaint schedule properties.

6. It is the further case of the plaintiff that he learnt that his natural father was appointed as Guardian of the plaintiff in O.S. No. 41 of 1972 which was pending on the file of the District Munsif, Gurazala. The father of the plaintiff just mentioned in the aforesaid suit the factum of adoption but did not take proper steps to prove the same. It is the further case of the plaintiff that O.S. No. 41 of 1972 was filed by the 2nd defendant herein claiming 5/12th share in the property on the ground that the share of Siddaiah devolved upon Chandramma, the wife of Siddaiah. In the aforesaid suit, Peramma i.e., the first defendant herein had raised the plea that they had adopted the plaintiff on 19-11-1971 under a deed of adoption dated 14-1-1972 which was registered on the same day. The plaintiff herein was the defendant in the suit. He was a minor at that time and he was represented by his natural father as a next friend.

7. It is the further case of the plaintiff that the defendants 2 and 3 denied the adoption and set up a Will said to have been executed by late Chandramma, mother of Pedakistaiah bequeathing the properties in favour of the defendants 2 and 3 herein.

8. When the first defendant filed O.S. No. 37 of 1961 in the Court of the Subordinate Judge, Narasaraopet for maintenance, a collusive and nominal Will was set up by Pedakistaiah and his mother Chandramma under the evil advice of one late Duggiraju Papaiah, who was a veteran litigant and who was the scribe to the said document, in order to make believe that Siddaiah died subsequent to 1946 and half of the property possessed by Pedakistaiah belonged to his mother

Chandramma and as such the entire property possessed by Pedakistaiah shall not be taken into consideration, if at all the question of awarding maintenance arises in the suit.

9. It was further averred that after some years, Chandramma became half-blind and deaf and she was not able to attend even for domestic affairs. By that time Pedakistaiah's health failed and he also became helpless and therefore he felt the need of his wife's assistance. So he became sobre and sensible and invited his wife, the first defendant, to live with him and they lived together forgetting all their differences. Subsequently Pedakistaiah's health did not improve and therefore the plaintiff was taken in adoption.

10. It is the further case of the plaintiff that the natural father of the plaintiff behaved negligently and could not place the facts before the Court and therefore he lost O.S. No. 41 of 1972 and hence the present suit is filed by the plaintiff after attaining majority to set aside the decree passed in the aforesaid suit.

11. It appears from the record that on presentation of the suit, summons were issued to the defendants herein. The first defendant remained ex parte. The 2nd defendant filed her written statement and it was adopted by the 3rd defendant by filing a separate memo. The 2nd defendant denied all the averments made in the suit especially with regard to the adoption deed and its registration. It was also denied that the natural father of the plaintiff did not properly conduct the suit O.S. No. 41 of 1972 on behalf of the plaintiff. It was also denied that any Will was executed by Chandramma with an ulterior purpose. It was stated that the theory of adoption put forward by the plaintiff is totally false and the same point has been elaborately considered by the trial Court as well as the first appellate Court in O.S. No. 41 of 1972. The findings of the said Courts will operate as res judicata and the matter cannot be reopened again. It was also denied that there was gross negligence on the part of the father of the plaintiff to conduct the suit. It was specifically pleaded by the 2nd defendant that the father of the plaintiff had engaged the services of a, renowned lawyer in O.S. No. 41/72 and sufficient amount of evidence was adduced in that suit. It was also denied that the differences between Pedakistaiah and Peramma were settled and they started residing together from 1967. It was further denied that the plaintiff is entitled for declaration of his adoption and cancellation of the Will executed by Chandramma and as such he is not entitled for separate partition and possession of the properties described in the plaint "A" schedule. It was denied by the 2nd defendant that the plaintiff's averments regarding health conditions of Chandramma and Pedakistaiah. It was specifically pleaded that the plaintiff had shown his false age which was shown less than the true age so as to bring the suit in the period of limitation. It is the further case of the 2nd defendant that she is entitled to the suit property by virtue of the Will executed by Chandramma. It was specifically pleaded by the 2nd defendant that she had filed O.S. No. 41 of 1972 and the present plaintiff was the 3rd defendant therein. The non-examination of witnesses and non-production of witnesses in earlier suit cannot be a ground for

reopening the matter. With these averments it was prayed that the suit filed by the plaintiff be dismissed with costs.

12. It further appears from the record that the trial Judge recorded the evidence of P.Ws.1 to 6 on behalf of the plaintiff. The plaintiff also produced certain documents and they were marked as Exs.A-1 to A-13. The trial Judge also recorded the evidence of D.Ws. 1 and 2 on behalf of the defendants. The defendants also produced certain documents and they were marked as Exs.B-1 to B-4. Considering the oral as well as the documentary evidence, the learned trial Judge dismissed the suit of the plaintiff holding that there was no negligence on the part of the father of the plaintiff, who acted as Guardian of the minor in O.S. No. 41 of 1972 and thus the suit filed by the plaintiff came to be dismissed. Against the said judgment and decree of the trial Court, the appellant herein carried the matter in appeal in the Court of the III Addl. District Judge, Guntur by filing A.S. No. 76 of 1988. The learned III Addl. District Judge confirmed the decree and judgment of dismissal of the suit recorded by the trial Court by dismissing the appeal filed by the plaintiff.

13. Aggrieved by the aforesaid judgment and decree, the plaintiff-appellant herein has approached this Court in Second Appeal on various grounds as mentioned in the Appeal Memo.

14. The learned Counsel Mr. P.S. Narayana appearing on behalf of the plaintiff-appellant herein submitted that the plaintiff-appellant is entitled to a decree for setting aside the judgment and decree passed in O.S. No. 41 of 1972 as the father of the plaintiff acted negligently in conducting the aforesaid suit. The learned Counsel Mr. P.S. Narayana relied upon a ruling reported in Ayya Pillai v. Ayyadurai Goundan and Ors., AIR 1935 Madras 81 in which His Lordship of Madras High Court was pleased to hold as under:

"Minor - Decree against - setting aside - Negligence to raise plea -Negligence to offer evidence - No distinction exists - Suit affecting minor's ownership - Material documents with guardian - Guardian not appearing nor engaging pleader - Conduct of guardian amounts to gross negligence - Decree can be set aside.

Negligence is negligence whether it consists of not going to the Court and raising a plea at all or whether it consists of abandoning a plea practically after raising it without trying to support it by such evidence as is available to the guardian. In such cases the test is that it must be such negligence as leads to the loss of a right, which must have been successfully asserted if the suit had been conducted or resisted with due care. Where therefore the guardian of an owner of property did nothing in a suit by the result of which he will be bound and never appeared in Court or even engaged a Pleader but kept in his hands the material document which would have proved the minor's ownership, the conduct of the guardian in the suit can only be described as gross dereliction of duty. If cannot be permitted for a minor's guardian to take refuge under the plea that he entrusted his duty to some other party."

15. The learned Counsel Mr. P.S. Narayana also relied upon a ruling reported in *Bore Gowda and Anr. v. B. Nagaraju and Anr.* AIR 1969 Mys 8 in which His Lordship of the Mysore High Court was pleased to hold as under:

"Order 32 Rule 7 C.P.C. - Negligence" in conducting suit by guardian -Avoidance of decree by minor - Grounds.

A minor can avoid a decree passed against him on the ground of gross negligence of the guardian ad litem even if the minor had not succeeded in proving fraud and collusion on the part of the guardian. The right of a minor to avoid a decree obtained against him on account of the gross negligence of his guardian ad litem is a substantive right and not a mere matter of procedure and does not depend on any rule of evidence. But the negligence of the guardian in order to be a good ground for the avoidance of a decree must be of such character as to justify the inference that the minor's interests were not at all protected and in substance though not in form the minor went unrepresented in the trial Court.

Where the guardian is an illiterate person and engages a qualified lawyer, if the lawyer fails to raise a point of law which may well have been raised by him it cannot be held that the guardian has been grossly negligent in the conduct of the case."

16. The learned Counsel Mr. P.S. Narayana appearing on behalf of the appellant herein submitted at the Bar that the natural guardian of the minor had produced only adoption deed in O.S. No. 41 of 1972 but did not lead the oral evidence of attesting witnesses though there were as many as 10 witnesses who had attested the document. This fact itself would go to show that the father of the plaintiff acted negligently in conducting O.S. No. 41 of 1972 and therefore the plaintiff is entitled to reopen the issue which will not operate as "res judicata" against him.

17. As far as the legal proposition made by the learned Counsel Mr. P.S. Narayana is concerned, this Court has no hesitation in holding that the plaintiff is entitled to reopen the issue which was decided against him in the earlier suit, on attaining the majority on the ground that his guardian had acted negligently in conducting the aforesaid suit. But, on a fact, the plaintiff minor on attaining the majority has to prove that his father as guardian acted negligently in conducting the aforesaid suit.

18. While rebutting the aforesaid arguments of the learned Counsel for the appellant herein, the learned Counsel Mr. Vilas V. Afzul Purkar appearing on behalf of the respondents-defendants submitted at the Bar that as a matter of fact, there was no negligence on the part of the father of the plaintiff to lead documentary as well as oral evidence. The fact that the adoption could not be proved in the earlier suit will not go to prove by itself that the father of the plaintiff was negligent in conducting the previous suit. The learned Counsel for the respondents herein from the judgments of the trial Court as well as the first

appellate Court brought to my notice that the father of the plaintiff had taken necessary steps to summon the witnesses to lead their evidence in the earlier suit. But the witnesses did not come forward in the aforesaid suit when the father of the plaintiff wanted them to speak falsehood before the Court and therefore it was submitted by the learned Counsel for the respondents herein that the father of the plaintiff cannot be styled as a negligent guardian in conducting the aforesaid suit.

19. It is evident from the evidence on record that the father of the plaintiff had taken steps to produce the witnesses in the earlier suit. It was rightly pointed out by the learned Counsel for the respondents herein that they did not want to speak falsehood and therefore they did not attend the Court. There is no reason to believe that these witnesses were got up witnesses who refused to oblige the father of the plaintiff in conducting the earlier suit. It can be seen from the evidence on record that Chandramma had executed a Will bequeathing the property in favour of her grand-daughters. The said Will was not challenged by the plaintiff and therefore the plaintiff has no right to question the Will as Peramma had not questioned the same at any point of time in the earlier suit and the plaintiff claims through Peramma, who was the alleged adoptive mother.

20. It is well settled principle of law that the minor on attaining the majority can take steps to set aside any finding given in a suit filed against him provided that it is shown by the minor on attaining majority that his guardian was to tally negligent in conducting such suit. On facts, this Court has no hesitation in holding that there was no reason for the father of the plaintiff to be negligent in conducting the earlier suit. The father of the plaintiff was his natural father. In the earlier suit Peramma was appointed as guardian of the minor to protect his interest but by a subsequent order the natural father of the plaintiff stepped into the shoes of Peramma by the order of the Court. This fact itself would go to prove that the natural father of the plaintiff was appointed as guardian of the minor to protect the interest of the minor in the earlier suit. It is very difficult to digest the idea that the natural father would be negligent in protecting the interest of his own son.

21. The first Appellate Court has observed in its judgment that the natural father of the minor in the earlier suit had paid Batta but summons could not be served for the obvious reasons as they did not want to tell falsehood before the Court. Therefore, the first Appellate Court as well as the trial Court held that there was no negligence on the part of the natural father of the plaintiff in conducting the earlier suit. The finding given by both the Courts below is on facts. Therefore, it is not necessary for this Court to disturb the fact finding at the stage of Second Appeal.

22. It is evident from the evidence on record that by 1964 Pedakistaiah and Peramma were living separately. The suits were filed by both of them for restitution of conjugal rights and for maintenance. Therefore it was contended by the learned Counsel for the appellant herein that by 1967 Pedakistaiah had

become sufficiently old and thereafter the dispute was settled between them and they started living together as husband and wife. The learned Counsel for the appellant submitted that there is sufficient evidence to show that the appellant herein was adopted but the adoption deed could not be executed on the date of the adoption. The learned Counsel for the appellant herein further submitted that there is a presumptive value for registered adoption deed. The learned Counsel for the appellant herein relied upon a ruling reported in Smt. Chandan Bilasini (Dead) by LR. Vs. Aftabuddin Khan and others, . It was held by their Lordships as follows:

"Hindu Adoptions and Maintenance Act - Section 6 - Adoption -Validity - Adoptive mother being very old lady of 86 years of age could not be produced in Court for giving evidence - However three other witnesses who were present at the time of adoption ceremony were examined -One of them being priest and other one being a person who was also present at time when deed of admission of adoption was executed by adoptive mother and was an attesting witness to deed - Mere fact that some other persons who were also present at adoption ceremony were not examined, cannot be considered as making the adoption doubtful."

23. This Court has no hesitation in accepting the legal submission made by the learned Counsel for the appellant herein. But in the present case the witnesses, who were present at the time of adoption, were not examined and therefore both the Courts below negated the factum of adoption. The learned Counsel for the appellant herein also relied upon a ruling reported in Hirabai and Another Vs. Babu Manika Ingale, in which it was held by their Lordships as follows:

"Section 16 of Hindu Adoptions and Maintenance Act-Proof of adoption - Deed of adoption registered - Deed containing a recital that adoption ceremonies were performed according to caste custom - Adopted son living with adoptive mother and adoptive mother applying for mutation to surrender property in favour of adopted son - Held presumption in favour of adoption was fortified by conduct of adoptive mother and other circumstances in the case."

This Court is of the considered view that the aforesaid ruling is not applicable in the present set of facts.

24. The learned Counsel for the appellant herein further submitted at the Bar that there is no evidence regarding the date of death of Siddaiah whether he died prior to 1947 or subsequent to 1947. The learned Counsel further submitted that Chandramma i.e., the wife of Siddaiah claiming the share of her husband Siddaiah by virtue of Hindu Women's Rights to Property Act, 1937. It was further contended by the learned Counsel for the appellant that it was the duty of the defendants to prove the date of death of Siddaiah.

25. While rebutting the aforesaid arguments of the learned Counsel for the appellant herein, the learned Counsel Mr. Vilas V. Afzul Purkar appearing on behalf of the respondents herein pointed out Ex.A-5, which is the judgment in O.S. No. 41 of 1972 in which in para (11) it was held that Siddaiah died after

1946 in or about in 1952. Ex.A-5 is a finding given in O.S. No. 41 of 1972 which is in favour of the defendants-respondents herein. If at all the plaintiff-appellant herein wants to prove otherwise the onus was upon him to prove that Siddaiah died much before 1946 and thus Chandramma is not entitled to get half share in the property of her husband Siddaiah and she had no right to execute the Will in favour of the defendants 2 and 3.

26. Considering the above factual aspect, this Court has no hesitation in holding that both the Courts below on facts held that the adoption is not proved. They also held that on facts the father of the plaintiff was not negligent in conducting the earlier suit i.e., O.S. No. 41 of 1972. Therefore, this Court has no hesitation in holding that the finding arrived at by the Courts below is legally correct.

27. Now the question arises how far the finding of facts can be disturbed by the High Court in deciding the Second Appeal. It is well settled legal principle that if the correct finding is given on facts, the High Court would not interfere with the fact finding concurrently recorded by both the Courts below.

28. Considering the entire evidence on record, this Court has no hesitation in holding that both the Courts below came to the right conclusion that the plaintiff could not establish the fact his father was negligent in conducting O.S. No. 41 of 1972. Therefore, this Court finds no reasons to interfere with the fact finding of the Courts below. This Court further holds that there is no merit in the appeal and it is accordingly dismissed. No costs.