

Nerusu Seetharavamma Vs. Nerusu Durgaiah

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Court : Andhra Pradesh

Decided On : Nov-28-2006

Reported in : 2007(4)ALT52

Judge : P.S. Narayana, J.

Acts : [Evidence Act, 1872](#) - Sections 92; [Transfer of Property Act, 1882](#) - Sections 123; Code of Civil Procedure (CPC) - Sections 100

Appeal No. : Second Appeal No. 570 of 1996

Appellant : Nerusu Seetharavamma

Respondent : Nerusu Durgaiah

Advocate for Def. : G. Dharma Rao, Adv.

Advocate for Pet/Ap. : T.S. Anand, Adv.

Disposition : Appeal dismissed

Judgement :

P.S. Narayana, J.

1. Nerusu Seetharavamma, the unsuccessful defendant in both the courts below had preferred the second appeal under Section 100 of the Code of Civil Procedure (herein after in short referred to as 'Code' for the purpose of convenience). Nerusu

Durgaiah, respondent herein, the plaintiff filed the suit O.S.No.85 of 1984 on the file of the Principal Munsif Magistrate, Repalle, for declaration that the schedule property belongs to the plaintiff with absolute rights and for possession of the said property and also for future profits and costs of the suit.

2. Before the court of first instance, on the respective pleadings of the parties having settled the issues, the evidence of P.Ws.1 to 5 and Dws.1 and 2 was recorded and Exs.A-1 to A-9 were marked and ultimately the court of first instance came to the conclusion that the respondent in the present second appeal, the plaintiff in the suit, is entitled to a decree and directed the defendant, the appellant herein to deliver item No. 1 of the plaint schedule property along with standing trees and crops and deliver item No. 2 after removing the standing structures or trees thereon, standing in the way of delivery of item No. 2 of the schedule property to the plaintiff at her costs within one week from the date of judgment. Otherwise, the plaintiff is at liberty to get it delivered through court and recover the expenses from the defendant and the future mesne profits to be ascertained by a separate application. Aggrieved by the same, the defendant in the said suit carried the matter by way of appeal A.S.No.77 of 1990 on the file of the Principal Subordinate Judge, Tenali and the appellate court dismissed the said appeal with costs. Aggrieved by the same, the present second appeal is preferred.

3. The following substantial questions of law arise for consideration in this second appeal.

(a) Whether the gift deed dated 09.8.1954 is true, valid and binding on the defendant?

(b) Whether the oral arrangement pleaded by the plaintiff is true and not hit by Section 92 of the Evidence Act?

(c) Whether the defendant has perfected her title by adverse possession?

(d) Whether decree for delivery of possession of the suit properties (undivided half) is executable?

4. Contentions of Sri T.S. Anand:

Sri T.S. Anand, learned Counsel representing the appellant-defendant would contend that the evidence on the aspect of oral arrangement said to have been made is inadmissible in evidence in the light of the specified bar imposed under Section 92 of the Indian [Evidence Act, 1872](#). The learned Counsel also had taken this Court through the findings recorded by the court of first instance and also the appellate court and would contend that the gift in question was not proved in accordance with law, and at any rate, the acceptance and delivery of possession had not been established, and in view of the same, it cannot be said that the courts below recorded correct findings in relation thereto. The learned Counsel also had taken this Court through the recitals made in Ex.A-1 and would contend that in the light of the same, the evidence of P.W.3 would be of no consequence at all. While further elaborating the submissions, the learned Counsel would maintain that respondent-plaintiff kept quiet for sufficiently long time even after attaining majority and hence it is a clear case of perfection of adverse possession by the appellant-defendant. Even otherwise without praying the relief of partition, the decree as such cannot be put into execution. Hence, viewed from any angle inasmuch as the gift itself is not proved in accordance with law, the plaintiff is liable to be non-suited. The learned Counsel placed strong reliance on a decision of the Apex Court in *Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker and Ors.* : (1997)2SCC255 .

5. Contentions of Sri G. Dharma Rao:

Sri G.Dharma Rao, learned Counsel representing the respondent-plaintiff placed strong reliance on a decision of the Apex Court in *Gurdev Kaur and Ors. v. Kaki and Ors.* 2006 AIR SCW 2404 and would contend that in the light of the limitations placed on this Court by virtue of Section 100 of the Code, this Court normally not to interfere with the concurrent findings recorded by both the courts below. While further elaborating the submissions, the counsel would maintain that there is clear evidence in relation to the oral understanding and this aspect is predominantly a question of fact and even otherwise the same may have to be appreciated in the background of the close relationship between the parties. The learned Counsel pointed out to the concurrent findings recorded relating to the factual aspects of both the courts below and also would further submit that in the light of the same,

the plea of adverse possession also cannot be sustained, and at the best, in the light of the understanding it may be said that the possession is just permissive and nothing beyond thereto. The learned Counsel also had further taken through the evidence available on record and would submit that in the light of Ex.A-1 and also the other oral evidence and further in the light of Ex.A-5, deposition of the Finger Print Expert, the concurrent findings recorded by both the courts below cannot be found fault in any way. Even otherwise the counsel would contend that the gift, in fact, was executed in accordance with the provisions of the [Transfer of Property Act, 1882](#), and the same was proved in accordance with law. Hence, the counsel would contend that the second appeal is liable to be dismissed.

6. The substantial questions of law on the strength of which the contentions had been advanced by the counsel on record already had been referred to supra. Strong reliance was placed on the decision in Gurdev Kaur and Ors. v. Kaki and Ors. 2006 AIR SCW 2404 (supra) for the purpose of convincing this Court on the aspect of limitations of interference mandated by Section 100 of the Code. There cannot be any quarrel or controversy relating to the limitations imposed on this Court by virtue of Section 100 of the Code in interfering especially with concurrent findings recorded by both the courts below.

7. The parties hereinafter would be referred to as plaintiff and defendant as arrayed in O.S.No.85 of 1984 on the file of the Principal Munsif Magistrate, Repalle, for the purpose of convenience.

8. As already referred to supra the suit was decreed and the unsuccessful defendant met the same fate even in the appeal A.S.No.77 of 1990 on the file of the Principal Subordinate Judge, Tenali. It was pleaded by the plaintiff that the defendant is his junior maternal aunt and daughter of one Kalapala Achayya and the said Achayya had got four daughters and had no sons and the plaintiff is son of the third daughter of the said Achayya. The said Achayya died on 09.8.1954 and before his death on 02.6.1952 he executed a gift deed in favour of the defendant for the plaint schedule property. The plaintiff was brought up for two years by the defendant, as the defendant had no issues. Under these circumstances the plaintiff was chosen to perform the obsequies and funeral

ceremonies of the deceased Achayya and as such out of love and affection the defendant gifted half of her property received from her father under a registered gift deed to the plaintiff and a gift deed was executed by the defendant on 09.8.1954. As per the terms and conditions of the gift deed, the plaintiff got possession of the schedule property with absolute rights. It is further stated that at the time of the said gift deed, the plaintiff was minor and that the defendant was having an obligation to maintain her mother Mahalakshamma after the death of her father, the elders viz., Nerusu Bhavannarayana, Kalapala Govindu, Appaiah, Kasturi Venkateswarlu, Gottumukkala Seetharamaswamy had made an arrangement with the defendant as to enjoy the usufruct of the schedule property by keeping possession and pay land revenue on behalf of the plaintiff till the death of her mother and after the death of her mother, she should deliver possession of the same. Later Mahalakshamma died in October 1982 and the plaintiff performed her obsequies and other ceremonies. As per the arrangement, the plaintiff became entitled to recover the possession of the schedule property and accordingly the plaintiff demanded the defendant to deliver possession of the schedule property to him in the presence of the elders Gottumukkala Kotaiah, Sajja Bapanaiah and Pullivarthi Subbarao. The defendant admitted about the previous family arrangement and requested time till the receipt of the crop in the year 1983-84 and for delivery of the possession so as to adjust the expenses incurred. Accordingly after receipt of the crops in the year 1983-84 from the schedule property by the defendant, the plaintiff again asked the defendant in the presence of elders in the second week of February 1984 for delivery of possession. The defendant, in spite of giving possession, refused to deliver the possession of the schedule property. Therefore, the plaintiff got issued a notice dated 16.2.1984 to the defendant for which the defendant did not give any reply and had not delivered possession. Hence, the suit.

9. The defendant filed written statement admitting the relationship and further pleading that the said Achayya had no male children and her father brought her husband viz., Pothaiah to his house and the defendant and her husband lived with the said Achayya and his wife and that the said Pothaiah was an illatam son-in-law of said Achayya and the said Achayya had gifted away the property to the defendant. The said Pothaiah pre-deceased Achayya and later Achayya died on

09-8-1954. The defendant never brought up the plaintiff as alleged in the plaint and the defendant never had love and affection towards the plaintiff. It is also stated that the father of the plaintiff selected the plaintiff for lighting the funeral pyre, as he is the grandson of late Achayya and that for that purpose the plaintiff's parents were amply rewarded by the defendant. The defendant was ill when her father died and she was bed ridden for about 15 days thereafter and the defendant never executed any gift deed dated 09.8.1954 in favour of the plaintiff. The father of the plaintiff might have obtained the thumb impression of the defendant while she was bed ridden and was unconscious without her knowledge. The defendant never went to the Sub- Registrar's office in order to register any document, more so, a gift deed and as such it is not enforceable and void according to law. There is no agreement or arrangement with the defendant to enjoy the property till the death of her mother as alleged in the plaint. The said alleged mediators Nerusu Bhavanarayana, the father of the plaintiff and Gottumukkala Seetharamaswamy were alive and that the said Seetharamaswamy is inimical to the defendant for several years and were not even in talking terms and the alleged gift deed is rank forgery. It is further stated that the mother of the defendant died in 1982 and that the plaintiff was asked by his father for lighting funeral pyre and he did the same. The plaintiff did not perform the obsequies of the mother of the defendant and that the plaintiff was amply rewarded for lighting of funeral pyre by the defendant. It is also stated that no mediation at any point of time took place as alleged in the plaint and that the defendant was not aware of the alleged gift deed dated 9.8.1954 and hence the suit is liable to be dismissed.

10. The defendant filed her additional written statement subsequent thereto raising the plea that she had been in possession of the property for more than 30 years as of right openly, publicly and adversely without any hindrance by plaintiff or anybody and hence she had perfected her title by adverse possession.

11. A rejoinder was also filed by the plaintiff denying the allegations of the defendant and stated that he is absolute owner of the plaint schedule property.

12. On the strength of these pleadings before the court of first instance, the following issues and additional issue had been settled.

1. Whether the gift deed in favour of the plaintiff said to have been executed is true, valid and binding on the defendant?
2. Whether the agreement as pleaded by the plaintiff is true, valid and binding on the defendant?
3. Whether the plaintiff is entitled to claim possession of the suit schedule property?
4. To what relief?

Additional issue:

1. Whether the defendant had perfected her title to the suit property by adverse possession?
13. The under noted oral and documentary evidence had been let in by the parties before the court of first instance as specified hereunder.

On behalf of plaintiff P.Ws.1 to 5 were examined and Exs.A-1 to A-9 were marked. Ex.A-1 is the registered gift deed dated 9.8.1954 executed by Nerusu Seetharavamma in favour of the defendant; Ex.A-2 is the office copy of registered notice dated 16.2.1984 got issued to the defendant; Ex.A-3 is the postal acknowledgment of defendant; Ex.A-4 is the reply notice dated 26.3.1984 issued to the plaintiff's advocate by the defendant's advocate; Ex.A-5 is the deposition of Finger Print Expert; Ex.A-6 is the chart; Ex.A-7 is the photo copy of the finger impression marked as 'D' as marked as Ex.A-7; Ex.A-8 is the photo copy of the finger impression marked as 'D' as marked as Ex.A-8 and Ex.A-9 is the sheet contained the admitted thumb impression obtained in open court.

On behalf of defendant D.Ws.1 and 2 were examined and no documents were marked.

14. The whole controversy revolves around Ex.A-1, the registered gift deed said to have been executed by the defendant in favour of the plaintiff dated 09.8.1954 and the alleged oral understanding which is not reduced to any writing between the parties. Submissions at length were made in relation to this aspect in the light of

Section 92 of the Indian [Evidence Act, 1872](#). Further submissions also were made on the ground that the evidence available on record is not sufficient to arrive at a conclusion that Ex.A-1, in fact, was executed and even otherwise it was contended that the same was not proved in accordance with law and hence the plaintiff is bound to fail. Incidentally, the question of adverse possession also had been canvassed. The evidence of P.W.1, the plaintiff and P.W.2 who was one of the elders in whose presence the mediation after the death of the mother of the defendant said to have taken place and P.W.3 another mediator in whose presence the mediation at the time of death of Achayya is said to have taken place had been examined. P.W.4 is yet another witness in whose presence it was stated that the mediation for realization of crop of 1983-84 had taken place. This witness was examined with a view to strengthen and probablise the stand taken by the plaintiff as P.W.1. P.W.5 is the expert, examined by the commissioner and Ex.A-5 is the deposition of the Finger Print Expert marked by commissioner-advocate.

15. In substance, the defence of the defendant is that she was ill when her father died and she was bed-ridden for about 15 days thereafter and she had never executed any gift deed at all and the father of the plaintiff might have obtained some thumb impressions of the defendant while she was bed-ridden or unconscious. Certain other additional facts were pleaded and the same was deposed by D.W.1. Apart from D.W.1, D.W.2 was also examined and it is stated that D.W.2 attended funeral obsequies of the father of the defendant. On the aspect of the validity of Ex.A-1, strong reliance was placed on Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker case (1997)2 Supreme Court Cases 255 (supra), wherein the Apex Court at para 7 observed as hereunder.

It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in

his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime. The recitals in the cancellation deed are consistent with the recitals in the gift deed. He had expressly stated that the respondent had cheated him and he had not fulfilled the conditions subject to which there was an oral understanding between them. Consequently, he mentioned that the conditional gift given to him was cancelled. He also mentioned that the possession and enjoyment remained with him during his lifetime. He stated, 'I have to execute immediately this deed of cancelling the conditional gift deed between us. Therefore I hereby cancel the conditional gift deed dated 15.5.1965 of Rs. 9,000/- in words rupees nine thousand presented at Serial No. 2153 on 15.5.1965 in the Office of the Sub-Registrar, Baroda for registration. Therefore, the said conditional gift deed dated 15.5.1965 is hereby cancelled and becomes meaningless. The property under the conditional gift has not been and is not to be transferred in our name'. Thus he expressly made it clear that he did not hand over the possession to the respondent nor did the gift become complete during the lifetime of the donor. Thus the gift had become ineffective and inoperative. It was duly cancelled. The question then is whether the appellant would get the right to the property? It is not in dispute that after the cancellation deed dated 9.6.1965 came to be executed, duly putting an end to the conditional gift deed dated 15.5.1965, he executed his last will on 17.5.1965 and died two days thereafter.

16. The appellate Court at para 13 framed the following points for consideration.

- (1) Whether the gift deed dated 09.8.1954 is true and valid document or not?
- (2) Whether the agreement in between the plaintiff and the defendant is true?

(3) Whether the defendant perfected her title to the property by way of adverse possession? And

(4) Whether the plaintiff is entitled to the reliefs prayed for and whether there are grounds to set aside the decree and judgment of the lower court?

17. The appellate court discussed the oral and documentary evidence commencing from paras 14 to 23 and ultimately dismissed the appeal with costs.

18. The main question in controversy is in relation to validity of Ex.A-1. However, in the light of the opinion of the hand writing expert and also the evidence of P.W.3, the courts below arrived at a conclusion that the contention of the appellant-defendant that the document is a forged one cannot be sustained.

19. Ex.A-1 is registered at Sub-Registrar's office in Repalle on 11.8.1954. It is needless to say that in the light of the concurrent findings recorded by both the courts below on the factual aspects in relation to Ex.A-1, this Court need not express any further opinion. It is no doubt true that the recitals of Ex.A-1 as such do not reflect the oral understanding. On the strength of the same, it is contended that Ex.A-1 is hit by Section 92 of the Indian [Evidence Act, 1872](#). It is pertinent to note that when the validity of Ex.A-1 as such is accepted, the aspect of oral understanding may have to be incidentally looked into only for the purpose of nature of possession. It is also pertinent to note that the relationship of the parties also may have to be taken into consideration while appreciating the plea of adverse possession. The evidence on record had been dealt with at length and concurrent findings had been recorded in relation thereto by both the courts below. Hence, in the light of the facts and circumstances, especially in the light of the evidence of P.Ws.1, 2, 3 and 4, this Court is of the considered opinion that the findings recorded in relation to Ex.A-1 and also in relation to the nature of the possession and on the plea of adverse possession, cannot be found fault in any way. Certain submissions are made in relation to the inexecutability or non-executability of the decree. This is an attempt, which is being made at the stage of second appeal and this aspect needs no serious consideration at the hands of this Court.

20. Hence, in the light of the limitations imposed on this Court while dealing with second appeal preferred as against the concurrent findings, this Court is of the considered opinion that the findings recorded by both the courts below cannot be found fault and accordingly the said findings are hereby confirmed and the second appeal shall stand dismissed. However, in view of the close relationship between the parties to the litigation, they shall bear their own costs.

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