

(2003) 01 AP CK 0066

Andhra Pradesh High Court

Case No: Second Appeal No. 684 of 1991

S. Ratnavathi

APPELLANT

Vs

A. Narasimhamurthy and
Another

RESPONDENT

Date of Decision: Jan. 22, 2003

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 99
- Limitation Act, 1908 - Article 44, 65, 122

Citation: AIR 2004 AP 29 : (2005) 5 ALT 560

Hon'ble Judges: Dubagunta Subrahmanyam, J

Bench: Single Bench

Advocate: M.V. Durga Prasad, for the Appellant; V. Venkataramana, for the Respondent

Final Decision: Allowed

Judgement

Dubagunta Subrahmanyam, J.

This appeal is filed against the judgment and decree dated 17th September, 1991 in A.S. NO. 69 of 1983 on the file of Subordinate Judge, Tanuku confirming the judgment and decree dated 30-08-1982 in O.S. No. 638 of 1978 on the file of I Additional District Munsif, Tanuku.

2. Reference to the parties will be made as they are arrayed in the suit. Plaintiff's father Suranna executed a registered settlement deed dated 26-07-1963 (Ex.A1) in favour of the plaintiff gifting the plaint schedule property to the plaintiff. However, plaintiff's father retained the life estate in himself and gifted only the vested remainder to the plaintiff. Subsequently, plaintiff's father individually and as guardian of the minor plaintiff sold the suit property to the 1st defendant under a registered sale deed dated 22-1-1975 (Ex.B1). Plaintiff's father died intestate on 07-06-1975. After the death of his father, plaintiff demanded the defendants who are wife and husband to vacate and deliver possession of the suit property to the

plaintiff and to pay him rents at the rate of Rs.60/- per month from 07-06-1975. Plaintiff pleaded in his plaint that he attained majority on 15-03-1978 and he is entitled to file the suit within three years from the date of attaining majority. He filed the suit on 13-09-1978. He sought declaration of his title to the suit property, for ejectment of the defendants, for the possession of the suit property, for recovery of Rs.3,240/- as past mesne profits from 07-6-1975 to 07-9-1978 and also for future mesne profits till delivery of possession. The defendants resisted the suit. They pleaded that the plaintiff was born in the year 1956 and as the suit is filed beyond three years from the date of plaintiff attaining his age of majority, the suit is barred by limitation. They also pleaded that Civil Court has no jurisdiction to entertain the suit and the plaintiff has to file eviction petition before the Rent Controller. They disputed the genuineness of settlement deed Ex.A1. They also disputed that the plaintiff is the legitimate son of A. Suranna. They pleaded that as Suranna sold the suit property to the 1st defendant for discharge of a mortgage debt, plaintiff cannot question the alienation dated 22-01-1975 and he has no right whatsoever as the property belonged to Suranna who purchased the same under a deed dated 08-06-1957. They pleaded that in case the court comes to the conclusion that the sale deed Ex.B1 is unenforceable the 1st defendant is entitled to the amount paid by her discharging the mortgage debt with subsequent interest. They denied that they were the lessees over the plaint schedule property. They pleaded that occupation by 1st defendant is only as an owner and in such circumstances the claim for damages for use and occupation does not arise. On the basis of pleadings of the both the parties, the trial Court settled appropriate issues and additional issues. Both parties adduced documentary and oral evidence. On a consideration of entire evidence the trial Court decreed the suit as prayed for. Aggrieved by that judgment 1st defendant preferred an appeal before the lower appellate Court. The lower Court on a consideration of various contentions raised before it dismissed the appeal. Aggrieved by the judgment of the lower appellate Court, 1st defendant preferred the present appeal.

3. At the time of admission of this appeal the learned Admission Judge treated the following points formulated in the grounds of appeal as substantial questions of law that arise for consideration in the present appeal.

- (i) Whether the plaintiff-respondent is not a universal donee and therefore, liable to reimburse the consideration paid under Ex.B1 and B3 mortgaged by the appellant?
- (ii) Whether the plaintiff is not liable to pay the amounts due under the doctrine of pious obligation?
- (iii) Whether the suit is maintainable for declaration of title and recovery of possession without seeking for the cancellation of the absolute sale deed executed by late A. Suranna from whom both the plaintiff and the defendant claim title?
- (iv) Whether the suit is within the period of limitation?

(v) Whether the civil Court can entertain the suit when tenancy is alleged by the plaintiff in respect of Rent Control building without first approaching the Rent Controller and obtaining the finding as to the dispute of the title?

(vi) Whether Article 65 of the Limitation Act can be applied in cases where there is a registered Sale deed executed by the original owner?

(vii) Whether the bona fide purchaser of the property who discharged the prior mortgage of the vendor is not entitled for subrogation against any person who claims title through such vendor?

(viii) Whether the defendant who came into possession of the property for valuable consideration under a registered sale deed is liable to pay mesne profits when his possession is not wrongful?

(ix) Whether the settlement deed can be valid when there is no proof of natural love and affection as consideration and acceptance on the part of or on behalf of the donee as required u/s 122 and that it has been acted upon?

4. The plaintiff claimed that under settlement deed Ex.A1 his father Suranna retaining life estate in himself gifted vested remainder to the plaintiff. The two courts below found that the gift deed Ex.A1 is valid and binding on the defendants. One of the pleas taken by the defendants is that the plaintiff is not the legitimate son of Suranna. The defendants claimed title to the suit property under registered sale deed Ex.B1. Suranna executed the said sale deed not only on his behalf but also representing the plaintiff describing the plaintiff as his son. Settlement deed Ex.A.1 also shows that Suranna described plaintiff as his son and gifted the property as such. Having purchased the said property under Ex.B1 treating the plaintiff as the son of Suranna, the plea of the defendants that the plaintiff is not legitimate son of Suranna can not be accepted. Another plea taken is that civil Court has no jurisdiction to entertain the suit. According to the plea of the defendants it is only Rent Controller under the provisions of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 who can order the eviction of the tenant from the suit premises. In the written statement they had taken a specific and categorical plea that the 1st defendant is in occupation of the suit premises not as a tenant but as a owner thereof. They also denied that they are the lessees of plaintiff. As there is no jural relationship of tenant and landlord between the parties, the Rent Controller will have no jurisdiction to order eviction of 1st defendant. In view of their specific pleas regarding tenancy, the defendants are not entitled to question the jurisdiction of the civil Court to entertain the suit for declaration of title of the plaintiff and for possession of the suit property after evicting the defendants. As per the recitals in Ex.B1 sale deed a portion of the sale consideration amount represents a mortgage debt payable by the plaintiff's father Suranna and allegedly discharged by 1st defendant. It is the plea of the defendants that in case the eviction of the defendants is to be ordered, the plaintiff is bound to reimburse the mortgage debt

discharged by the 1st defendant with interest there on. The defendants did not pay any court fee on the counter claim made by them. Therefore this claim does not survive for consideration.

5. The important questions that fall for consideration by this court are (1) Whether the suit is filed within the time prescribed? and (2) Whether the suit for declaration without asking for the relief of setting aside the sale deed Ex.B1 so far as it relates to the rights of the plaintiff in the suit property is maintainable?

6. Ex.B1 sale deed is executed by two persons Father of the plaintiff and plaintiff, being minor represented by his father, sold the suit property to the 1st defendant under Ex.B1 sale deed. The plaintiff's father is de jure guardian of the plaintiff. Therefore, he is entitled to alienate the property of his minor son even without sanction of the court provided the alienation was for the benefit of the minor's estate. The minor after obtaining his age of majority is entitled to question the alienation made by his natural-guardian on any of the grounds permitted by law. However, he has to avoid the alienation already made by his natural-guardian by filing a suit within three years from the date of his attaining his age of majority. The transfer of property of the minor by his natural guardian during his minority is not a void transaction. It is only a voidable transaction at the instance of the minor and such a right must be exercised by the minor within three years of attainment of majority by him. According to the plaintiff he attained majority on 15-3-1978. The burden is on the plaintiff to prove that he filed the suit within the period of limitation prescribed for. The defendants pleaded that the plaintiff was born during the year 1956. On the issue relating to the limitation the trial court observed that in the absence of any proof that the plaintiff was born in the year 1956, it must be held that the plaintiff attained majority on 15-03-1978. After making such observation, the trial Court further observed that the plaintiff is an employee, he must have studied, he must have got his date of birth entered in public records and the defendants did not give notice to produce the registers relating to the date of birth of plaintiff and as such the lower court held that the plaintiff attained majority on 15-3-1978. This approach of the trial Court is quite contra to established principles of law relating to discharge of burden of proof. On the issue relating to limitation, the lower appellate court after noticing a decision reported in AIR 1933, Oudh 39, in which it was held that the burden squarely lies upon the plaintiff stated that no document was filed by plaintiff to show his date of birth in spite of the fact that he was admittedly an employee. It further observed that the plaintiff did not discharge the burden of proving his date of birth, except making an averment in the plaint. Having regard to the sale deed Ex.B1 which came into existence on 22-01-1975 the lower appellate court held that the plaintiff could not have been born in 1956. It observed that though it would have been proper for the plaintiff to file his birth register extract or any other material to show his date of birth, in view of the inconsistency of the defendants stand the plaintiff's contention that he attained majority on 15-03-1978 can be accepted. It is therefore clear from the judgments of

the two courts below the plaintiff failed to establish that he filed the suit within three years from the date of his attaining the age of majority. The issue relating to the limitation was held in favour of the plaintiff by the two courts below only on the ground that the defendants who pleaded that the plaintiff was born during the year 1956 failed to establish that the plaintiff was born during the year 1956. Such approach of the two courts below regarding proof of the date of birth of the plaintiff is quite contra to the well-established principles of law. It is for the plaintiff to satisfy the court that he filed the suit well within the period of limitation. It is not for the defendants to prove that the suit is not filed by the plaintiff within the period of limitation. It is thus clear that the plaintiff failed to establish that he filed the suit within three years from the date of his attaining his age of majority.

7. On the issue relating to limitation, the two courts below mentioned two grounds. The first ground, which was already rejected by me, is that the defendants failed to show that the suit is not filed within the period of limitation. The second ground is that the defendants can continue in possession of the suit property till the death of father of plaintiff and therefore plaintiff can file the suit for possession within twelve years from the date of death of his father. Both the grounds are untenable and cannot be accepted. If a minor fails to avoid a voidable transaction within three years from the date of his attaining his majority by filing a civil suit the transaction binds him even after he became a major. In the present suit though the plaintiff is aware of the sale transaction covered by Ex.B1 sale deed as clear from the averments in the plaint, he did not ask for the necessary relief namely relief to set aside the sale transaction under Ex.B1. The learned counsel for the respondents contended that the plaintiff asked for the relief of declaration of title, it is a wider relief and so he need not ask for the relief of setting aside the transaction covered by Ex.B1 sale deed. I find no force in the said contention. By the date of the suit under Ex.B1 suit property was already sold by his de jure guardian namely his father. Therefore plaintiff lost his title and interest in the suit property. Through his guardian, he conveyed his title to 1st defendant. If he desires his title to Ex.B1 property restored to him he had to avoid necessarily the said transaction. Till he avoids the said transaction in a manner known to law, he cannot become the owner of the said property. He has necessarily to ask for specific relief of setting aside the alienation covered by the sale deed Ex.B1. The wider relief to be asked for is setting aside the alienation covered by Ex.B.1. Then only he can get the other relief of declaration of his title to the suit property. I am, therefore, satisfied that the suit as framed by the plaintiff is not maintainable and it is liable to be dismissed. Even if it is presumed that as the plaintiff asked for the relief of declaration of his title, he need not ask for the specific relief of setting aside the alienation under Ex.B1 sale deed, even then as the plaintiff did not prove that he filed the suit within three years from the date of his attaining the age of his majority, his suit is liable to be dismissed as barred by limitation.

8. The learned counsel for respondent relied upon some decisions. The first decision is a judgment of Orissa High Court reported in *KELUNI DEI v. KANHEI SAHU*(1). Reliance was placed on the observations made by the said court in para 10 of its judgment. The Orissa High Court held that the sale in that case is by the de facto guardian of the plaintiff and the enlarged period of limitation of 12 years applied. In the present case the alienation is not by de facto guardian. It is by de jure guardian. In the above decision itself it is clearly held that it is well-settled that to an alienation by de jure guardian without legal necessity Article 44 of the Limitation Act, 1908 applies, while for an alienation by de facto guardian the enlarged period of limitation of 12 years of time applies. The Orissa High Court followed one of its earlier judgments in *NARAYAN PRASAD RATH v. SUKUMARI DEI* (AIR 1964 Cut.298).

9. Another decision relied upon is a judgment of Calcutta High Court reported in *RABI NARAYAN v. KANAK PROVA DEBI* (2). The facts of that case are that the suit property owned by the minor was sold to the plaintiff by the father of a minor. The High court held that the sale by the guardian to the plaintiff was good and valid being for the benefit of the estate. The plaintiff was dispossessed from the suit property by the defendant. The High Court held that transfer of property by guardian during the minority of a person is not ipso facto void but is only voidable at the instance of minor and such a right has to be exercised within three years of attaining of majority by the minor in terms of Art. 44 of the Limitation Act. The court further held that no suit having been instituted either by the minor or by the defendant to avoid the sale of 1945, the period expired and therefore the defendants under no circumstances could succeed. In my considered opinion, the principle of law laid down in this decision would not render any assistance to the plaintiff. On the other hand it helps the appellant.

10. Reliance was placed on a judgment of the Supreme Court reported in *KONDIBA DAGADU KADAM v. SAVITRIBAI SOPAN GUJAR* (3). The Supreme Court held that the second appeal cannot be decided on merely equitable grounds. It further held that the concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of powers u/s 100 C.P.C. This principle of law is of no assistance to the respondents in the present appeal. The two courts below did not record any finding of fact to the effect that the plaintiff attained majority on 15-03-1978. On the other hand the two courts below stated clearly that the plaintiff failed to prove that he attained majority on 15-03-1978 and he did not produce documentary evidence regarding his date of birth. They held the issue relating to limitation in favour of the plaintiff on the ground that the defendants failed to establish that plaintiff was born during the year 1956. The logic adopted by the two courts below is perverse. This court cannot be considered as disturbing any finding of fact recorded by the two courts below regarding the date of birth of the plaintiff.

11. Placing reliance on Section 99 C.P.C., the learned counsel for the plaintiff contended that the decrees of the two courts below need not be reversed due to

any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or jurisdiction of the court. According to the learned counsel for the plaintiff omission to ask for the relief of setting aside the sale under Ex.B1 transaction is to be treated as error, defect or irregularity in the suit proceedings and on account of such omission the suit need not be dismissed. In this connection reliance was placed on a judgment of this court reported in K.ANANTHA RAO v. ARUNA (4). I have carefully considered the above decision. No observation made in the said judgment is coming to the rescue of the plaintiff in the circumstances of the present appeal. When a minor's property is sold either by de jure guardian or de facto guardian for whatever reason, if the minor after attaining his majority wants to avoid the said transaction as a voidable transaction, he has necessarily to file a suit to avoid the said transaction within a period of three years from the date of he attaining his age of majority. Otherwise the said transaction binds him. Therefore, failure on the part of the plaintiff to ask for such a necessary relief in his suit cannot be considered as an error, defect or irregularity within the meaning of Section 99 C.P.C.

12. The last decision relied upon is a judgment of the Supreme Court reported in NINGAWWA v. BYRAPPA (5). This decision relates to a transaction arising out of a fraudulent misrepresentation as to character of document and fraudulent misrepresentation as to contents of the document. The Supreme Court held that a contract or other transaction induced or tainted by fraud is not void but only voidable at the option of the party defrauded. It further held that until it is avoided the transaction is valid, so that third parties without notice of the fraud may in the mean time acquire rights and interests in the matter which they may enforce against the party defrauded. It further held that the starting point of limitation under Article 95 Limitation Act 1908 is not the date of execution of the gift deed but time when fraud becomes known to the party wronged. This decision is not applicable to the facts of the present appeal.

13. The foregoing discussion shows that the transaction under Ex.B1 sale deed is a voidable transaction at the instance of the plaintiff and unless the plaintiff avoids the transaction by filing a civil suit within a period of 3 years from the date of his attaining his majority, it binds him. It is for the plaintiff to prove his actual date of birth and further that his suit is well within the period of limitation prescribed by law. In any suit if the plaintiff fails to prove that he filed the suit within a period of three years from the date of his attaining the age of majority, notwithstanding the failure of defendants to prove their plea, the suit is liable to be dismissed. In the present case the plaintiff failed to establish that he filed the suit within a period of three years from the date of he attaining majority. He did not ask for the specific relief of setting aside the alienation. It is thus clear that his suit is liable to be dismissed. I therefore hold that the judgments of the two courts below deserve to be set aside.

14. In the result the appeal is allowed with costs. The judgments of the two courts below are set aside. The suit of the plaintiff is dismissed with costs. The appellant is entitled to recover his costs in the appeal before the lower appellate court also.