

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.767 of 2006

Date:23.02.2015

Between:

Sivakoti Appa Rao and another.

.....Appellants.

AND

Seekoti Subba Rao

.....Respondent.

The Court made the following:

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.767 of 2006

JUDGMENT:

This appeal is preferred against judgment dated 05-06-2006 in A.S.No.164/2002 on the file of VII Additional District Judge, Kakinada whereunder judgment dated 30-10-2002 in O.S.No.210/1997 on the file of II Additional Junior Civil Judge, Kakinada was confirmed.

2. Appellants herein are defendants in the above referred suit O.S.No.210/1997 and respondent herein is plaintiff and they are herein after referred to as plaintiff and defendants

as arrayed in the suit.

3. Brief facts leading to filing of this appeal are as follows:-

Plaintiff filed the above suit for relief of eviction and recovery of possession of suit schedule property from the defendants contending that the defendants are residing in the suit schedule house since January, 1992 and after death of plaintiff's mother, plaintiff requested the defendants to receive Rs.5,000/- and vacate the premises, as the defendants refused to vacate and set up a plea that plaintiff's mother sold the schedule property to them, plaintiff is constrained to file the suit. It is also contended by plaintiff that as the plaintiff was in need of money, he obtained a loan of Rs.5,000/- from defendants in January, 1992 and gave the schedule property to defendants to stay in it without rent with an understanding that they should vacate as and when his advance amount of Rs.5,000/- is paid back.

4. Now the defendants resisted the claim on the ground that suit filed by plaintiff without deposit of Rs.5,000/- is not maintainable as the transaction would fall under usufructory mortgage. The defendants also contended that plaintiff's mother sold the suit schedule property for Rs.8,000/- and that they are in occupation of the house as per part performance of the oral contract of sale and that the plaintiff is not entitled for the reliefs claimed.

5. To prove his case, plaintiff examined three witnesses and got marked three documents and to support their

defence, defendants examined one witness and got marked one document and on a over all consideration of oral and documentary evidence, trial Court disbelieved the version of defendants and decreed the suit. Defendants, having aggrieved with the decree passed against them, preferred appeal to the District Court and VII Additional District Judge, Kakinada, on a reappraisal of oral and documentary evidence, confirmed the decree of the trial Court and dismissed the appeal. Now aggrieved by the same, present Second Appeal is preferred.

6. This Court admitted the second appeal treating the following grounds as substantial question of law, which are as follows:

“(1) Whether the suit for eviction is maintainable when the plea of the respondent is that there was a oral usufructory mortgage in favour of appellants?”

(2) Whether oral usufructory is enforceable under law?

3) Whether the Courts below are right in granting a decree for redemption of mortgage in a suit for eviction?

(4) Whether the judgment of the lower appellate Court is vitiated for not considering the additional evidence filed under Order 41 Rule 27, which is fatal to the case?”

7. Heard arguments.

8. The main argument of Advocate for appellants is that the suit for eviction is not maintainable and the facts pleaded would attract a oral usufructory mortgage, which is not

enforceable under law and both the Courts erred in treating the suit as one for eviction. He further submitted that both the Courts erred in granting a decree of redemption and these two aspects are the substantial question of law that have to be decided by this Court.

9. On the other hand, Advocate for plaintiff submitted that there is no decree for redemption as contended by the defendants, the decree is only for eviction and delivery of possession and both the Courts have not committed any error in granting such decree. He further submitted that if the decree is for redemption or enforcement of a usufructory mortgage, the Court has to pass a preliminary decree first and later on separate application a final decree has to be passed, but the procedure adopted by trial Court is not on those lines and the suit is treated as one for eviction and delivery of possession and by disbelieving the defence set up by defendants the suit was decreed.

He submitted though as per the pleadings, plaintiff took loan from defendants and the suit property was given to them, but the facts and evidence would only attract a kind of usufructory lease for which no document is required and therefore, the objection of the defendants is not tenable.

10. Now the point that would arise for my consideration in this appeal is whether there is any substantial question of law involved for determination by this Court?

11. **Point:-** As already referred above, plaintiff filed the suit for eviction and delivery of possession. The main objection of the defendants is that the facts pleaded in the plaint would attract a case of usufructory mortgage and as a oral usufructory mortgage is not enforceable, the suit is not maintainable. But as rightly pointed out by Advocate for plaintiff, though the facts pleaded refer to a loan transaction, the ultimate relief claimed in the suit is for eviction and delivery of possession. Defendants resisted such relief on the ground of a oral sale, which was not believed by both the Courts on evidence and therefore, the plaintiff being owner, he is held to be entitled to recover possession from the defendants. In fact, this very same objection with regard to maintainability of the suit was also raised before the trial Court and the learned trial Judge, on an elaborate discussion of facts with reference to evidence, held that the suit is only for eviction and delivery of possession and not for the relief of redemption on the basis of usufructory mortgage and negated the objection. Admittedly, suit property was allotted to plaintiff by Government and it is a assigned land. It is also clear from the evidence that the plaintiff's mother was given this site and a house was constructed with the loan provided by Housing Board and plaintiff examined Technical Inspector of A.P. State Housing Corporation to prove that the suit house was constructed with the financial help extended by State Housing Corporation. As seen from the evidence towards loan, the house was mortgaged to

Housing Society and it was subsisting by the date, the property was delivered to the defendants. On the other hand, defendants contended that plaintiff's mother sold this property for a sum of Rs.8,000/- under an oral agreement of sale, but the defendants failed to substantiate it and the trial Judge held that the suit is maintainable for eviction and recovery of possession and I do not find any wrong appreciation of facts or law by both the Courts. So as rightly pointed out by Advocate for plaintiffs, if the suit is filed enforcing mortgage transaction, the form of suit would be different, so also the decree that has to be passed should be a preliminary decree. As seen from the record, both the Courts treated the suit as one for eviction and as the plaintiff is owner and defendants failed to substantiate their defence of oral purchase, the trial Court ordered for eviction and delivery of possession and the same is confirmed by the appellate Court, therefore, there are absolutely no grounds to interfere with such concurrent findings. On a scrutiny of the entire material, I am of the view that there is no substantial question of law involved and the grounds raised by the appellants as substantial question of law are not at all tenable.

12. For these reasons, I am of the view that there are no merits in the appeal and the same is liable to be dismissed.

13. Accordingly, appeal is dismissed and the appellants are granted two months time to deliver possession.

14. As a sequel, miscellaneous petitions, if any, pending in this Second Appeal, shall stand dismissed.

JUSTICE S. RAVI KUMAR

Date:23.02.2015

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