

HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.246 OF 2001

Dated 16-3-2015

Between:

Kola Appanna and others.

..Appellants.

And:

Govinda Chandra Harischandana Jagadeo and others.

..Respondents.

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HONOURABLE SRI JUSTICE S.RAVI KUMAR

SECOND APPEAL No.246 OF 2001

JUDGMENT:

This Appeal is against judgment dated 5-12-2000 in A.S.No.76 of 1996 on the file of District Judge, Srikakulam whereunder judgment dated 26-4-1996 in O.S.No.12 of 1990 on the file of Senior Civil Judge, Sompeta, is reversed.

Brief facts leading to this appeal are as follows:

First respondent herein who is plaintiff filed O.S.No.12 of 1990 seeking direction against second respondent herein who is first defendant to receive principal amount of Rs.1,000/- and deliver back mortgage bond dated 27-6-1964 with an endorsement along with the land revenue receipts paid by her in respect of plaint schedule property and deliver possession to the 1st respondent-plaintiff.

The suit is filed against four persons showing four persons as defendants 1 to 4 contending that second defendant is appropriating income derived from the plaint schedule property and first defendant allowed D.2 to D.5 to be in occupation of plaint schedule property without consent of the plaintiff. During pendency of suit, second defendant died and his legal representatives are added as D.6 to

D.8.D.5 also died and D.9 and D.10 are added as legal representative of D.5. Trial court examined three witnesses and marked 11 documents on behalf of plaintiff and examined three witnesses and marked 24 documents on behalf of defendants and on an overall consideration of oral and documentary evidence, dismissed the suit. Aggrieved by which, plaintiff preferred appeal to the District Court, Srikakulam and the District Judge on a reappraisal of evidence allowed the appeal and passed a preliminary decree for redemption in favour of plaintiff and directed plaintiff to deposit principal amount of Rs.1,000/- within two months and on such deposit, defendant shall deliver possession of plaint schedule property to the plaintiff and also re-transfer the property to the plaintiff. Aggrieved by the said judgment, defendants 3, 4, 6, 7, 8, 9 and 10 preferred the present appeal.

Appellants-defendants urged the following as substantial questions of law that would arise for consideration in this Second Appeal.

- a. *Whether lower appellate court erred in finding that the so called usufructuary mortgage said to have been executed in favour of the 2nd respondent is proved as the original was not filed and execution not proved as per law?*
- b. *Whether the lower appellate court committed a substantial legal error as the possession was not delivered by plaintiff or 1st defendant to the 2nd defendant and others under alleged possessory mortgage document?*
- c. *Whether the lower appellate court failed to see that a suit for redemption of mortgage against the appellants is not maintainable as per the provisions of Order 34 of Code of Civil Procedure as the appellants are strangers and if so whether the same resulted in substantial legal error? Whether the lower appellate court erred in not directing the plaintiff to seek his remedy in another suit?*
- d. *Whether the 1st respondent can recover possession from the appellants herein without filing a separate suit for*

declaration of title and recovery of possession particularly when appellants were not given possession as per mortgage deed and they are utter strangers and there was no proof of their connection as they never claimed under the mortgage?

- e. *Whether the suit filed by the 1st respondent is not barred by time?*
- f. *Whether the lower appellate court erred in not considering Exs.B.1 to B.24 in a right manner which proved their adverse possession and whether the finding is baseless and vitiated by substantial legal error?*
- g. *Whether the lower appellate court erred in not framing a point for consideration about the effect of death of defendants 2 and 5 and also the effect of not bringing their legal representatives on record and if so, whether the entire claim of the plaintiff abated?*
- h. *Whether the present suit against third party trespasser is misconceived and under valued?*

Heard arguments.

Advocate for appellants-defendants mainly contended that when D.2 claimed independent title over the suit schedule property and when no specific relief is claimed against defendants, decree passed against them is not within the frame work of Order 34 C.P.C. It is further contended that appellate court committed error in deciding title of defendants and findings of the appellate court on that aspect have to be set aside because plaintiff has not placed any evidence to show that these defendants were inducted into suit schedule property by D.1 and that, in the absence of such positive evidence, the findings of the appellate court presuming that the appellants must have been inducted into the suit schedule property in or about 1986 is not at all correct and those findings would amount to perverse findings. It is further contended that appellate court having given most

of the findings in favour of the appellants-defendants and D.1, misconstrued the evidence on record in respect of the claim of the appellants-defendants over the suit schedule property and went on giving findings on presumptions and surmises. Those findings are not in accordance with law and therefore, liable to be set aside.

On the other hand, advocate for plaintiff submitted that from the evidence of D.W.1 who is D.1 and mortgagee, it is clear that D.2 and other appellants-defendants were inducted only to look after the property and that they have no independent right over the property and independent existence in respect of the schedule property. He further submitted that from the evidence, it is clear that the claim of appellants-defendants is only through mortgagee-D.1 and therefore, appellate court rightly decided the objection raised by the appellants-defendants by setting aside the plea of oral sale.

Other side advocate submitted that there were disputes among plaintiff and his brothers and suits were filed and partition was effected. Taking advantage of those internal disputes, D.1 inducted these persons only to harass the plaintiff and make it difficult to claim the relief against mortgagee. He further submitted that all the grounds urged by the appellants-defendants are only in respect of factual aspects, on which, a clear cut finding is given by the first appellate court basing on the evidence and that there is no question of law involved in this appeal and that the appeal is liable to be dismissed.

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

POINT:

Though as many as eight grounds are raised as substantial questions of law, the only ground that has to be seen is whether the suit against these appellants-defendants is maintainable or not under the provisions of order 34 of C.P.C.

Order 34 deals with suits relating to mortgage of immovable property. As per rule 1 of this order, all persons having interest either in the mortgage security or in the right of redemption shall be joint as parties to any suit relating to the mortgage. Here from the plaint pleadings, specific allegation is that mortgagee-D.1 inducted these appellants-defendants to the suit schedule property which is the security and when the suit is filed for redemption and when the third parties are inducted into the property covered by the mortgage, it is mandatory in a suit in respect of such property, therefore, preliminary objection that the suit is not maintainable as per the provisions of Order 34 C.P.C. is not at all tenable and the suit is well within the

frame work of Order 34 C.P.C.

Now coming to the facts and other disputes, according to the plaintiff, plaint schedule property originally belongs to his brother by name Brundavanachandra Harischandra Jagadeo and he died intestate on 23-9-1964 leaving plaintiff as his sole legal heir. It is also further contended that during the life time of the said Harischandra Jagadeo, the suit schedule property was mortgaged in favour of D.1 on condition that D.1 should enjoy the usufruct in lieu of interest payable on the loan amount and to redeem the mortgage within a period of two years. After the death of Harischandra Jagadeo, plaintiff requested D.1 and her son to receive principal amount and redeem the mortgage but they postponed the same on one pretext or the other. But, ultimately, a notice was given on 15-12-1989 but in the mean time, D.1 inducted the other defendants to occupy the plaint schedule property without the consent of plaintiff and as such, all the plaintiffs are liable to be evicted.

Appellants herein disputed the plaint averments and they contended that plaint schedule property was purchased by D.2 in the year 1950 from Harischandra Jagadeo for a sale consideration of Rs.15,000/- and since then, D.2 has been in possession and enjoyment of the suit schedule property and in the family partition between D.2 to D.5, the suit properties were allotted to D.2 to D.5 in the year 1986 and therefore, plaintiff has no right and even otherwise, the claim of plaintiff is barred by time and that the appellants have perfected their title even by adverse possession. The trial court has not accepted the plaintiff's case and dismissed the suit and the appellant court reversed the findings of the trial court.

Now the grievance of the appellants-defendants is that the appellate court without any material presumed that the appellants-defendants are inducted into possession in or about 1986, accepted the plea of plaintiff ignoring the fact that the suit schedule property was in possession and enjoyment of D.2 even from the life time of plaintiff's brother Harischandra Jagadeo. Appellants-defendants' specific case is that D.1 purchased this property in the year 1950 under an oral sale for a sum of Rs.1500/-.

Learned appellate judge held that oral sale is not permissible when the sale consideration was more than Rs.100/- on that ground, the plea of appellants-defendants was not accepted. With regard to possession from 1950, learned appellate court on the basis of Exs.B.1 to B.12 and B.17 disbelieved the version of appellants-defendants and fixed that the appellants were inducted only in or about 1986. According to appellants-defendants, this particular

finding of appellate court is on surmises and presumptions and not based on evidence. But the contention of the appellants-defendants cannot be accepted because as seen from the record, the appellants-defendants produced land revenue receipts relating to suit land which are marked as Exs.B.1 and B.12 and they are only from 1987 onwards. Appellants also got marked certified copies of adangals for Faslies 1396 to 1399 which means they are also for the period from 1986 to 1987. Even R.O.R. extract produced by appellants-defendants would also reveal the names of these appellants-defendants only from 1986. Entries and endorsements in those documents would only show the names of these appellants from 1986 but not from 1950 as claimed. Considering these documents, appellate court negatived the plea of appellants. Learned appellate court elaborately discussed these aspects in paragraph 9 of his judgment.

One of the objections raised on behalf of appellant-defendants is that the suit claim is barred by time as it is not filed within 12 years from 1950. For this proposition, advocate for appellants-defendants placed reliance on *DILBOO (SMT) (DEAD) BY LRS. AND OTHERS Versus DHANRAJI (SMT) (DEAD) AND OTHERS* () whereunder Honourable Supreme Court held that a suit for redemption of mortgage could be filed within 60 years, but, if the mortgagee had created an interest in excess of the right enjoyed by him, then to recover possession against the third party, the suit has to be filed under Article 134, within 12 years of the transfer becoming known to the plaintiff and on expiry of 12 years, the title of the third party transferee gets perfected.

The principle laid down by Honourable Supreme Court in the above referred case, is not in dispute. But, here, the evidence on record would only show that these persons were inducted into possession in or about 1986 and the suit was filed in the year 1980 and therefore, it is well within 12 years. The contention of appellant that they are in possession and enjoyment of schedule property from 1950 is not at all substantiated and even their own documents, i.e., revenue records, would show their possession from 1986 only. Therefore, the objection of the appellants-defendants with regard to limitation is not at all tenable.

Appellants-defendants contended that the appellate court fixed 1986 on surmises but that contention is absolutely incorrect in view of the specific evidence produced by appellants-defendants themselves, i.e., Exs.B.1 to B.12, B.17, B.22, B.23 and B.24. As rightly pointed out by advocate for plaintiff, all the grounds and objections raised are in respect of factual aspects and there is no question of law involved in the Second Appeal, much less,

substantial question of law.

On a scrutiny of the entire material, I am of the view that the appellate judge has rightly decreed the suit and it has not committed any error while appreciating the facts or law.

For these reasons, I am of the view that there are no grounds to interfere with the findings of the appellate court and therefore, this appeal is liable to be dismissed.

Accordingly, this Second Appeal is dismissed. No costs. Three months time is granted for complying the decree.

As a sequel to the disposal of this appeal, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE S.RAVI KUMAR

Dated 16-3-2015

Dvs.

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Dvs