

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Second Appeal No.727 of 2011

JUDGMENT:

This is an appeal by the unsuccessful plaintiff under Section 100 of the Code of Civil Procedure, 1908 assailing the decree and judgment dated 30.04.2011 of the learned I Additional District Judge, Vizianagaram passed in AS.No.14 of 2010. The learned Additional District Judge while dismissing the said appeal had confirmed the decree and judgment dated 30.09.2009 of the learned Principal Junior Civil Judge, Vizianagaram passed in OS.No.75 of 2002 filed for partition of the plaint schedule property.

2. I have heard the submissions of the learned counsel for the appellant/plaintiff and the learned counsel for the respondents/defendants. I have perused the material record. During the pendency of the appeal, the sole appellant/plaintiff had died and his legal representatives were brought on record as appellants 2 to 5.

3. The parties in this appeal shall hereinafter be referred to as the plaintiffs and the defendants for convenience and clarity.

4. The learned counsel for the plaintiffs would contend as follows:

The Courts below did not properly appreciate the facts and the evidence brought on record as well as the legal propositions that are applicable to the facts of the case. The Courts below ought not to have entertained the counter claim in a suit for partition. The Courts below are not justified in holding that the sole plaintiff had failed to prove that the plaint schedule property is a joint family property and in further holding that exhibit A2 is a valid and genuine document and that the 3rd defendant is the absolute owner of the property by virtue of exhibit A2. The Courts below had committed an error in appreciating the recitals of the exhibit B1-agreement.

4.1 He had further contended that the following substantial questions of law

are involved and, therefore, the appeal deserves admission and disposal on merits.

1. **Whether the courts below were justified in allowing the counter claim of the respondents without they being relegated to file a separate suit for declaration and consequential eviction, when the appellant has filed the suit for partition?**
2. **Whether the courts below were justified in holding that the appellant failed to prove that the plaint schedule property is a joint family property, when the appellant has produced ample evidence to prove his case?**
3. **Whether the courts below were justified in setting aside the evidence adduced by the appellant in support of his contention that the plaint schedule property is a joint family property?**
4. **Whether the courts below were justified in ignoring the established principle of law while non-suiting the appellant?**
5. **Whether the courts below were justified in holding that Ex.A2 is a valid and genuine document when the title of the 4th defendant has not been proved by the respondents?**
6. **Whether the courts below were justified in holding that the evidence available on record is sufficient to hold that the 4th defendant had independent source of income to purchase the property under Ex.A2?**
7. **Whether the courts below committed a substantial legal error in interpreting Ex.B1?**

[Reproduced verbatim]

5. *Per contra*, the learned counsel for the respondents/defendants having supported the concurrent findings in the judgments of the courts below had stated that none of the questions raised are pure questions of law and that they are only a blend of facts and law and that no substantial questions of law are involved and that there is no necessity to interfere with the decrees and judgments of the courts below which are rendered after recording concurrent findings supported by cogent and valid reasons. He had finally urged that since no substantial questions of law are involved the second appeal is liable to be dismissed at the stage of admission.

6. Now, this court has to examine as to whether or not any substantial questions of law are involved in this second appeal and whether the appeal deserves admission for disposal on merits or is liable to be dismissed at the

stage of admission.

7. The facts, in brief, are as follows: -

7.1 The sole plaintiff (since died) had brought the suit stating that the 1st defendant (since died) had purchased the plaint schedule shop under the original of exhibit A2 sale deed dated 09.11.2001 from Raja Saheb of Vizianagaram out of the joint family funds and that since the date of purchase, the plaintiff and the defendants 1 to 4 are in joint and constructive possession of the plaint schedule shop with absolute rights and that since it is a joint family property the plaintiff is entitled to a 1/3rd share in the plaint schedule shop.

7.2 After the death of the 1st defendant during the pendency of the suit, the 5th defendant was brought on record. After the death of the 5th defendant, the 6th defendant was brought on record. After the death of the father, the plaintiff claimed that he is entitled to a 1/2 share in the plaint schedule shop.

7.3 The defendants had contended that the deceased 1st defendant and his brother late Appa Rao are legal heirs of late Pydithalli and that they got the plaint schedule shop and abutting portion by succession and that the deceased 1st defendant is the absolute owner of the leasehold rights of the plaint schedule shop and that after the death of his brother Appa Rao he was carrying on business till the time he was hale and healthy and that later he had stopped the business due to ill health in the year 1988 and that he had permitted the defendants 2 to 4 to carry on business in the Eastern portion and that he had further permitted the plaintiff to occupy the Western portion of the suit shop and that an agreement was executed to that effect by the 1st plaintiff, the 2nd defendant and the son of the said Appa Rao by name Ravi in favour of the 1st defendant on 13.04.1988 under exhibit B1 and that since the date of exhibit B1 agreement, the defendants 2 to 4 have been independently carrying on businesses in their portions and that the plaintiff has been carrying on business independently in his Western portion and that the

businesses are not joint and that the property acquired under exhibit A2 is the exclusive property and that, therefore, the plaintiff is only in permissive possession by virtue of exhibit B1 agreement and that, therefore, the contention of the plaintiff that the plaint schedule property is a joint family property is not correct.

7.4 While contending so, the 3rd defendant had also made a counter claim and it is not necessary to refer to the counter claim and rejoinder as no appeal is preferred before this Court by the plaintiff though the counter claim was decreed in favour of the 3rd defendant and as this second appeal is confined to challenging the dismissal of the suit of the plaintiff. .

7.5 Having regard to the pleadings, the trial Court had framed the following issues for trial.

- 1. Whether the plaint schedule properties are the joint family properties? If so, the plaintiff is entitled for 1/3rd share?**
- 2. Whether the plaint schedule property is purchased by the defendants 2 to 4 in the name of 3rd defendant and that the 3rd defendant is the absolute owner of the plaint schedule property? If so, entitled for eviction of the plaintiff from the Western portion as described in the counter claim schedule and also entitled for consequential relief of permanent injunction?**
- 3. To what relief?**

7.6 At trial, the plaintiff and his supporting witness were examined as PWs1 and 2 and exhibits A1 to A5 were marked. On the side of the defendants, the 2nd defendant was examined as DW1 and exhibit B1 was marked.

7.7 After full fledged trial, the trial Court while dismissing the suit of the plaintiff had decreed the counter claim as prayed for. The first appeal suit preferred by the unsuccessful sole plaintiff was dismissed. Therefore, the plaintiff is before this Court. The learned counsel fairly concedes that except this appeal, no other appeal is filed though the counter claim of the defendant is decreed while dismissing the suit of the plaintiff.

8. Having come to Court by pleading that the plaint schedule property is a joint family property, it is for the plaintiff to establish that the plaint schedule

property is a joint family property. The law is well settled that there is no presumption that simply because a Hindu family is joint it possesses joint property. The view of this Court is reinforced by the decision in **Appalaswami v. Suryanaranamurthi.**^[1] There are a catena of decisions on this settled principle that there is no presumption that a property held by a Hindu family is a joint family property and that the burden of proof that a property is a joint family property is upon the person who claims it as a joint family property and, therefore, there is no need to multiply decisions on this settled legal position.

9. PW1 though had reiterated his pleaded case in his examination in chief, he had admitted the execution of exhibit B1-agreement in favour of the deceased 1st defendant in respect of the plaint schedule shop. Under this agreement dated 13.04.1988, the plaintiff is carrying on business in the Western portion of the shop. In his evidence, the plaintiff had admitted the recitals in exhibit B1 by stating so and had further stated that the defendants 2 to 4 are doing business on the Eastern side of the schedule shop. Therefore, both sides admit the execution of exhibit B1 agreement by virtue of which the respective parties are carrying on their respective business in their respective portions. PW1 also stated that his father got the schedule shop towards his share. But, did not plead and prove as to when the partition was affected. Therefore, the plaintiff, who was in possession of the Western side portion of the suit shop was not in joint possession of the suit schedule shop. When the parties are carrying on businesses separately there was nothing credit worthy to hold that there is joint business and that the property was purchased by joint funds of the family. PW1 in his evidence stated that prior to the purchase of the plaint schedule shop under exhibit A2 sale deed, people of Pentapati family who are owners of the Western side shop No.26 had filed a suit in OS.No.23/99 in the Vacation Civil Court, Vizianagaram and that the said suit was subsequently re-numbered as OS.No.220/99 on the file of Principal Junior Civil Judge, Vizianagaram and that suit was filed against him, his son, his father and others for a perpetual injunction and that in that suit he had pleaded that he was in joint possession of the schedule shop on the Eastern

side and that the said suit was settled before the Lok Adalat as per the Award dated 24.09.1999. Exhibit A3 is the copy of plaint in OS.No.220 of 1999 wherein it is stated that the defendants therein i.e., plaintiff, his son and the deceased 1st defendant are tenants in respect of shop no.25; and, it is not the case pleaded therein that they are doing business jointly in the said shop. Therefore, on an analytical examination of the evidence in juxtaposition with the facts, there is no evidence brought on record to establish that the suit schedule shop is a joint family property. The contention of the plaintiff, therefore, that the 3rd defendant was of 18 years of age and that he has no independent source of income and he has no financial capacity to purchase the plaint schedule property cannot be countenanced in view of the recitals in exhibit A2 and the absence of evidence to the contra. The defendants 2 to 4, having pleaded, had brought on record sufficient evidence to show that with their earnings and with the aid of gold ornaments of the 2nd defendant they had acquired the suit schedule property in the name of the 3rd defendant with the permission of the 1st defendant who was a lessee by then and that, therefore, exhibit B1 agreement has come to be executed. Therefore, there is evidence to accept that the 3rd defendant is the absolute owner of the plaint schedule property by virtue of original of exhibit A2 sale deed. Therefore, in the light of the recitals in exhibit A2 coupled with the recitals in exhibit B1 the execution of which is admitted by PW1 in his evidence, it can safely be held that the plaintiff could not establish that the plaint schedule property is a joint family property and that on the other hand, the 3rd defendant has established his title and right to seek eviction of the plaintiff from the suit schedule property. Having regard to the reasons, this Court finds that the Courts below are justified in holding in favour of the 3rd defendant against the plaintiff on all issues and points involved in the *lis*. More over the fact that no appeal was preferred inspite of a decree granted in respect of the counter claim in favour of the 3rd defendant is fatal to the case of the plaintiffs as the decree granted allowing the counter claim operates as res-judicata.

10. Having thus analytically examined the facts and the evidence, this

Court finds that the questions, which are sought to be raised as substantial questions of law are not pure questions of law let alone substantial questions of law. The law is well settled that a second appeal shall not be admitted if no substantial question of law arises for consideration and when no substantial question of law is involved. In the case on hand, as this Court finds that no substantial questions of law are involved, this second appeal is liable for dismissal at the stage of admission in view of the settled legal position and in view of the narrow compass of Section 100 of the Code. Accordingly this Court finds that no case is made out for admitting the second appeal.

11. Accordingly, the Second Appeal is dismissed at the stage of admission. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

20th August, 2015
Vjl

[\[1\]](#) AIR 1947 PC 189