

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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SECOND APPEAL No.460 of 2014

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JUDGMENT:

This Second Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') by the 2nd appellant/2nd plaintiff is directed against the decree and judgment dated 11.06.2014 passed in A.S.No.51 of 2012 by the learned Judge, Family Court-cum-Additional District Judge, Karimnagar. The learned Additional District Judge while allowing the said appeal had set aside the decree and judgment dated 13.08.2012 of the learned Senior Civil Judge, Peddapalli passed in O.S.No.49 of 2006 and had dismissed the said suit filed by the appellants/plaintiffs against the respondents/defendants for declaration of title and recovery of possession of the tiled house, more fully described in the schedule annexed to the plaint.

2. I have heard the submissions of the learned counsel for the 2nd appellant/2nd plaintiff ('the plaintiff', for brevity) and the learned counsel for respondents 1 and 2/defendants ('the defendants 1 and 2', for brevity). The 1st plaintiff died. I have perused the material record.

3. The learned counsel for the 2nd appellant/2nd plaintiff would contend that the following substantial questions of law are involved in this second appeal:

1) Whether the lower Appellate Court not committed an error of law as the findings are perverted and against the oral and documentary evidence adduced by the parties.

2) Whether the Lower Appellate Court right in dismissing the suit filed by the Appellants for declaration of title and recovery of possession on the ground that the plaintiffs admitted the jointness of property. Whether the Lower Appellate

Judge right in dismissing the suit in toto without relying on the admitted facts.

3) Whether the court below committed an error of law in relying upon the documents Ex.B1 to B3 as no independent witness is examined to prove the document. Whether such finding is not hit by Sec.61, 67 & 68 of Evidence Act.

(Reproduced verbatim)

4. *Per contra*, the learned counsel for the defendants 1 and 2 had argued that no such substantial questions of law or any other questions are involved in this second appeal and that the second appeal is liable to be dismissed at the admission stage.

5. Now, before examining as to whether or not any substantial questions of law are involved in this second appeal and whether or not the appeal deserves admission for disposal on merits, it is necessary to first examine as to whether the second appeal deserves to be allowed at the stage of admission.

6. The case of the plaintiffs, in brief, is as under:

The 1st plaintiff (since died) is the wife and the second plaintiff is the daughter of late Komuravelli Rajesham. The defendants 1 and 2 are the wife and son of late Komuravelli Sathaiah, who is the brother of the said Rajesham. The plaintiffs are the absolute and joint owners and possessors of H.No.2-36 and 4-80 at Sultanabad being the legal heirs of late K.Rajesham, who had purchased the same with his own money. The plaintiffs are residents of Karimnagar. The plaintiffs had allowed the defendants to stay in the suit property for proper maintenance of the same. The plaintiffs had filed a petition on 08.02.2005 before with the 3rd defendant-Village Secretary for mutation of the suit property in their names; but, the 3rd defendant under the colour of an affidavit dated 24.12.1994 wanted to mutate the property in the names of the defendants 1 and 2. The plaintiffs had approached the defendants 1 and 2 and asked them to vacate the property. But, the defendants 1 and 2 had denied the title and interest of the plaintiffs over the property. The 3rd defendant had issued a notice dated 06.10.2005 rejecting the application of the plaintiffs for mutation. As such the plaintiffs are constrained to file the suit for declaration of their title over the schedule property, recovery of possession and grant of injunction.

7. The defendants 1 and 2 had filed written statement contending *inter alia*, as follows:

The relationship between the plaintiffs and the defendants is admitted. Late K.Rajesham, who is the husband of the first plaintiff, and late K.Sathaiah, who is the husband of the 1st defendant, one K.Shankaraiah and K.Kishan are brothers and are the sons of K.Kanthaiah. The said Kanthaiah had died in or about 1957 leaving behind his sons Rajesham, Sathaiah, Shankaraiah, and Kishan aged about 30, 25, 13 and 10 years, respectively. Kanthaiah had left behind him both the houses to his legal heirs. Sathaiah who is the second son had carried on the business in food grains and had acquired the item no.2 of the plaint schedule property with his own earnings; but, in the Grampanchayat record, the house is nominally recorded in the name of his brother Rajesham. K.Sathaiah had also acquired another house bearing no.2-90/A. K.Rajesham did not carry on any business and did not acquire any property. While so, the said Kishan, the eldest son of Kanthaiah, had filed a suit for partition in O.S.No.1365 of 1991 on the file of the District Munsif, Sultanabad against Sathaiah, Shankaraiah and the plaintiffs 1 and 2 herein, who represented the estate of Rajesham, and against two sisters by names-Mustyala Sathamma and Vensetti Kamalabai. During the pendency of the said suit, Sathaiah had died and defendants 1 and 2 in this suit were impleaded. In the said suit for partition, two houses described in the schedule of the instant suit are included as items 1 and 2 along with two other houses. The plaintiffs 1 and 2 herein, who are the defendants 3 and 4 therein had filed a written statement in the said suit in O.S 1365 of 1991 pleading that the suit houses covered by this suit are joint family properties and that in the said houses they have got 7/30th share. As against the said plea, the plaintiffs had now pleaded that the suit houses are purchased by late K.Rajesham and that they are the owners. This plea is contra to the case earlier set up and pleaded by the plaintiffs. During the pendency of O.S.No.1365 of 1991, there was an oral partition settlement between the plaintiffs and the defendants 1 and 2 in December, 1994. In the said family settlement, the defendants paid Rs.70,000/- to plaintiffs towards their 1/4th share in the house-item no.1 of the plaint schedule and some other properties. The plaintiffs had admitted that item no.2 of plaint schedule is the self acquired property of late K.Sathaiah and had declared that the plaintiffs have no right or interest in both items 1 and 2 of the plaint schedule. In view of the family settlement,

the suit in O.S.No.1365 of 1991 was got dismissed on 20.03.1997, for default. The defendants 1 and 2 alternatively submit that they had acquired title to the suit property on account of their exclusive possession over suit property as owners to the knowledge of the plaintiffs. Late Rajesham was not the owner of the suit properties and the plaintiffs have no manner of right over the plaint schedule properties. The suit was filed suppressing the facts. Therefore, the suit is liable to be dismissed.

8. On the basis of the above pleadings, the following issues were framed:

1) Whether the plaintiffs are entitled for declaration and recovery of possession of the suit property as prayed for?

2) To what relief?

At trial, the plaintiffs examined PWs 1 and 2 and got marked exhibits A1 to A9; and, the defendants had examined DWs 1 and 2 and got marked exhibits B1 to B3. On merits, the trial Court had decreed the suit of the plaintiffs. As already noted, the Court below had allowed the appeal and had dismissed the suit of the plaintiffs by reversing the decree and judgment of the trial Court. Feeling aggrieved, the plaintiffs brought this second appeal.

9. At the outset, the vital fact which is to be taken note of is that the 1st plaintiff in the suit died on 28.01.2012 i.e., even before the original suit was disposed of by the trial Court by its judgment dated 13.08.2012. The said fact of the death of the 1st plaintiff was not brought to the notice of the trial Court. The 2nd plaintiff, who is the daughter of the 1st plaintiff, was on record. As already noted the suit was decreed as the death of the 1st plaintiff was not brought to the notice of the trial Court. Subsequently, the defendants 1 and 2 had preferred the first appeal against both the plaintiffs though by that time admittedly the 1st plaintiff had died. Before the Court below, a memo was filed bringing to the notice of the court below the fact that the 1st plaintiff had died on 28.01.2012. However, ignoring the said fact, the 1st appeal was allowed on 11.06.2014. Subsequently, the present second appeal is filed by both the plaintiffs ignoring the fact that the 1st appellant is no more and had died even long prior to the

judgment of the trial Court in the suit. Therefore, during pendency of the suit before the trial Court, which was decided in favour of the plaintiffs, the 2nd plaintiff was on record representing the estate of the 1st plaintiff, who had died on 28.01.2012. Be that as it may, the 1st appellate Court had passed the decree in the first appeal suit against the 1st plaintiff/the 1st respondent after her death. Therefore, the decree insofar as the 1st plaintiff/1st respondent in the 1st appeal having been passed against the dead person is a nullity and is therefore *non est* in the eye of law and deserves to be set aside.

10. Both the learned counsel had fairly conceded this legal position and requested to remit the matter to the Court below after setting aside the decree and judgment of the Court below.

11. Having regard to the facts, which are undisputed and the legal position that is conceded, this Court finds that there is no need to go into the merits of the second appeal as the decree and judgment of the Court below, which are impugned in this second appeal, are liable to be set aside on a technical ground.

11. In the result, the second appeal is allowed at the stage of admission. The judgment and the decree of the Court below are accordingly set aside and the first appeal suit is remitted to the Court below with a direction to give an opportunity to the defendants 1 and 2/appellants therein to bring on record the legal representatives of the deceased 1st plaintiff, if any, other than the 2nd plaintiff and then decide the first appeal suit afresh on merits and in accordance with procedure established by law. Since this appeal is decided only on a technical aspect without going into the merits of the case, the Court below is directed to decide the appeal as per the directions in this judgment as expeditiously as possible, preferably, within a period of two months from the date of receipt of a copy of this judgment. The costs of the second appeal shall abide by the result of the first appeal. The appellant is entitled to seek the refund of the Court fee paid on the memorandum of second appeal by following the procedure.

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

M. SEETHARAMA MURTI, J

16th September 2015

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THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Dated : 16-09-2015

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