HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

SECOND APPEAL No.1117 OF 1999

JUDGMENT:

The instant Second Appeal is preferred by the defendants, aggrieved over the judgment and decree dated 25.11.1999 in A.S. No.19 of 1998 on the file of the Senior Civil Judge, Rajam (for short, 'lower appellate court'), whereby and whereunder, the judgment and decree passed in favour of the respondents (plaintiffs) herein dated 28.03.1998 in O.S. No.112 of 1992 on the file of District Munsif, Rajam (for short, 'trial court'), was confirmed decreeing the suit for delivery of plaint schedule property, i.e., wet land consisting of Ac.0-90 cents, situated in Sy.No.17/8 shown as item Nos.1 and 2 in the plaint schedule giving liberty to the plaintiffs to make a separate application for determination of future mesne profits while rejecting the claim for past profits of Rs.2,000/-.

2. For the sake of convenience, the parties hereinafter referred to as they were arrayed before the trial court in the original suit.

3. The plaintiffs' case has been that the suit properties are their ancestral properties and since they were in need of money, plaintiff No.1, who was the father of plaintiff No.2, approached the defendants, 10 years prior to the institution of suit and contracted a loan of Rs.2,300/- from defendant No.1 under an unregistered possessory mortgage concerning item No.1 consisting of Ac.0-50

cents of wet land and likewise, within a short time thereafter, plaintiff No.2 also contracted a loan of Rs.1,635/- under an unregistered possessory mortgage concerning item No.2 consisting of Ac.0-40 cents of wet land with the condition that the defendants to enjoy the usufruct thereof towards interest and principal. According to them, the defendants realized atleast Rs.2,000/- net profits each year. Besides the same, they were also putforth the plea that they were small farmers and the debts are discharged under the Andhra Pradesh Act 7 of 1977 and also by enjoyment of usufructs of the land by them. It is according to them, the notices got issued by them in Exs.A.1 and A.2 dated 20.07.1989 to the defendants were returned with the endorsement that they refused to receive the same. Therefore, they got issued a telegraphic notice dated 01.01.1989 to surrender the plaint schedule lands. Even a letter addressed by plaintiff No.1 under certificate of posting to both the defendants with the same contents of registered notices, stood un-served.

4. They further plead that they approached the Mandal Revenue Officer of Regidi, under the Andhra Pradesh Act 7 of 1977 making a separate application and the Mandal Revenue Officer has sent notices to the defendants, who then came up with the possessory agreements of sales, on which the Mandal Revenue Officer passed order dated 17.11.1989, advising the plaintiffs to approach the Civil Court. They specifically denied the execution of sale agreements in favour of the defendants alleging that if the defendants possessed any

such agreement of sales, they must be the result of fraud and misrepresentation. Hence, they sought delivery of possession with past profits at Rs.2,000/- and for future profits.

5. Defendant No.1 filed his written statement, whereas defendant No.2 adopted the same completely controverting the allegations levelled by the plaintiffs contending that they have been in possession and enjoyment of the plaint schedule lands with absolute rights paying land revenue therefor and obtaining receipts in token of payment of land revenue since the date of execution of sale agreements. It is their specific case that plaintiff No.1 initially, executed sale agreement dated 15.05.1971 and the second agreement of sale on 23.04.1974, having received full consideration thereunder and delivered possession and, thus, the plaintiffs have no right or ownership over the plaint schedule lands. It is also their case that plaintiff No.1 even admitted before the Mandal Revenue Officer, Regidi at the time of enquiry that he has executed sale agreements and, therefore, sought to dismiss the suit.

6. Since plaintiff No.1 died during the pendency of suit, defendant Nos.3 to 5 were brought on record as legal representatives of plaintiff No.1 by the orders dated 12.04.1991 in I.A. No.26 of 1991.

7. Basing on the aforesaid pleadings, the trial court framed the following six issues:

"1. Whether the sale agreement dt.15.6.71 and 23.4.74 are obtained by fraud and misrepresentation?

2. Whether the agreement dt.15.6.71 and 23.4.74 are valid and binding the parties?

3. Whether the plaintiffs are entitled for recovery of possession?

4. Whether the plaintiffs are entitled for Rs.2000/- as past profits?

5. Whether the plaintiffs are entitled for future mesne profits?

6. To what relief the plaintiffs are entitled to?"

Subsequent to hearing arguments, learned trial court framed the following additional issue on 25.03.1998

"Whether the plaintiff No.1 mortgaged the suit land to defendants and gave permissive possession?"

8. In order to substantiate their claim, plaintiff No.2 examined himself as P.W.1 and got marked Exs.A.1 to A.6; and on behalf of the defendants, defendant No.1 himself examined as D.W.1, besides examining an attestor to Ex.B.1 as D.W.2 and one Dodlangi Satyarao as D.W.3 and marked Exs.B.1 to B.3, which are the agreements of sales, copy of proceedings issued by the Revenue Divisional Officer, Palakonda, dated 04.02.1998, respectively.

9. The trial court initially, taken up the additional issue for adjudication, since the finding thereon would clinch the principal issue between the parties. The learned trial court has pointed out that the pleadings of the plaint do not disclose as to on what date plaintiff No.1 mortgaged the plaint schedule land to the defendants and as to how much amount was borrowed from the defendants and failed to examine attestor or scribe of the unregistered mortgage, but, however, observed that it cannot be expected that the plaintiffs will be able to produce the unregistered mortgage deeds since the said documents must be in the custody of the defendants. The learned trial court basing on the contents of Exs.A.1 to A.3 and having found that there has been endorsement by the Postman on Exs.A.1 and A.2 that the addressees refused to take the notices and noting down the circumstance that the defendants did not answer Ex.A.3-telegraphic notice, drawn an inference adverse to the stand taken by the defendants concerning Exs.B.1 and B.2, which, according to the defendants, are sale agreements, said to have executed by the plaintiffs, having received the entire consideration thereunder, for both the items respectively. The learned trial court also appreciated Ex.A.5 memo issued by the Mandal Revenue Officer, Regidi dated 15.11.1989, and observing that had plaintiff No.1 not executed unregistered possessory mortgages, he would not have approached the Mandal Revenue Officer concerned and since the beginning, the plaintiffs' stand has been consistent that the documents executed then by them were unregistered possessory mortgages and more

particularly, when notices under Exs.A.1 and A.2 were refused by the defendants and even Ex.A.3-telegraphic notice stood unanswered, arrived at the conclusion that the plaintiffs have given their lands to the defendants under possessory mortgages and, accordingly, held additional issue in favour of the plaintiffs.

10. On issue Nos.1 and 2, having appreciated the evidence of D.Ws.1 to 3, more particularly, the evidence of D.Ws.1 and 2, and the probabilities derived, based on Exs.B.1 and B.2 and basing on the admission of D.W.2, an attestor to Ex.B.1 that at the time of Ex.B.1, plaintiff No.1 borrowed amounts from defendant No.1 and that he does not know anything about the facts mentioned in the documents except signing Ex.B.1, that too, stating that when defendant No.1 asked him to sign in Ex.B.1, held that the evidence of D.W.2 is of no use to prove the stand of the defendants that Ex.B.1 was agreement of sale executed by plaintiff No.1. Learned trial court also derived yet another probability that the defendants have failed to examine the other attestor, though available, to prove the nature of Exs.B.1 and B.2, despite the specific denial of the plaintiffs that they never executed any agreements of sales, but they executed possessory mortgages, recorded a finding that the defendants failed to prove Exs.B.1 and B.2. Learned trial court also made further observation that defendant No.1, while in witness box did not even speak that plaintiff No.1 executed an agreement of sale for the lands in his favour and in favour of his wife, but asserted that plaintiff No.1

executed unregistered sale deeds asking him to treat the same as registered sale deeds and basing on the said assertion, the trial court observed that the defendants themselves were uncertain whether plaintiff No.1 has executed agreement to sell the lands or unregistered sale deeds. Learned trial court even refused to accede to the claim of the defendants that they can avail the doctrine of part performance envisaged by the provisions of Section 53-A of the Transfer of Property Act, 1882, and, accordingly, held issue Nos.1 and 2 against the defendants.

11. On issue No.3, in view of the findings tendered on issue Nos.1 and 2 and additional issue, the learned trial court held it in the affirmative recording a finding that the plaintiffs are entitled to recovery of possession of plaint schedule property.

12. On issue No.4, the learned trial Court, however, did not agree with the plaintiffs and disallowed the claim for past mesne profits. On future mesne profits, the learned trial court granted liberty to the plaintiff to file separate application for determination. Thus, the suit of the plaintiff was decreed by the learned trial court to that extent with costs.

13. Aggrieved by the said judgment and decree, the defendants carried the matter in A.S. No.19 of 1998 before the lower appellate court. The learned lower appellate court having formulated the points for determination, found favour with the plaintiffs basing

on the probabilities derived from Exs.A.1 to A.3 as the learned trial court has done, and on Exs.B.1 and B.2 having thoroughly examined the contents thereof observing that Exs.B.1 and B.2 are in the nature of agreement of sales commented at the conduct of the defendants for maintaining silence without raising a little finger until the plaintiffs instituted the suit despite the fact that there has been a condition stipulated in Exs.B.1 and B.2 to obtain registered sale deeds within a period of one month from the date of their execution respectively. Further, observing that no title can be derived under agreement of sales, held that conveyance has not yet completed as the defendants did not approach the Court to enforce Exs.B.1 and B.2, despite there being an obligation cast on the defendants to do so. The learned trial court having answered the arguments advanced by the respective sides on legal aspect referring to the decisions relied on by both sides, mainly taking the admission of the attestor examined as D.W.2 that the plaintiff No.1 borrowed the amount from the defendants on the date of Ex.B.1, which admission was viewed by the lower appellate court supporting the case of the plaintiffs that they executed only unregistered possessory mortgages, but not the sale agreements, dismissed the appeal confirming the judgment and decree passed by the learned trial court.

14. Aggrieved by the aforesaid decree and judgment, the respondents-defendants preferred the instant second appeal formulating the substantial questions of law thus:

"1. Whether the judgment and decree of the appellate court is vitiated by non-compliance of Order 41 Rule 31 of CPC without framing appropriate issues for consideration.

2. Whether the judgment and decree of the appellate court is vitiated as the court failed to consider that issues were recasted by the trial court without affording an opportunity to the appellants or to adduce any evidence and in spite of the specific objection before the appellate court, the appellate court failed to consider the same in proper prospective.

3. Whether the judgment and decree of the appellate court can be sustained in not remanding the matter when it was brought to its notice that an additional issue was framed without giving an opportunity to the parties to the proceedings, when the matter was posted for judgment and such a issue was framed by the court without affording an opportunity to the appellants.

4. Whether the suit for recovery of possession is maintainable without seeking the relief of the redemption of alleged mortgage when the whole case is rested upon the fact that the property was mortgaged.

5. Whether the suit for recovery of possession can be decreed when it is the specific case of the respondents that the agreements of sale dated 15-06-1971 and 23-04-1974 were obtained by fraud and misrepresentation and both the courts below did not record any finding on the said aspect.

6. Whether the appellants can protect their possession by invoking section 53A of the Transfer of Property Act

when the plaintiffs failed to discharge their burden to prove that the appellants obtained those documents by fraud and misrepresentation and when no finding to that effect was recorded by the courts below.

7. Whether the respondents discharged their burden to prove that they have mortgaged the property in favour of the appellants in accordance with sections 58 and 59 of Transfer of Property Act and when the said document was not filed and when the attestor and the scribe of the alleged mortgage was not examined and without reference to the effect of admission made by the respondents before the MRO, Regidi under Ex.B.3."

15. Heard Sri K. Purushotham, learned counsel for the appellants. No representation for the respondents despite they entered appearance and despite affording opportunities on many occasions.

16. Learned counsel for the appellants-defendants would submit that except the evidence of plaintiff No.2 as P.W.1, no other witnesses were examined and even his evidence is absolutely silent as to on what date the unregistered possessory agreements were executed and, therefore, the very case putforth by the respondents-plaintiffs cannot be believed and, somehow, the learned trial court as well as the appellate court went wrong in deriving inferences adverse to the case of the appellants-defendants. It is his further submission that the appellants-defendants have taken the stand that plaintiff No.1 executed agreement of sales Exs.B.1 and B.2, even before the application was presented in the proceedings before the Mandal

Revenue Officer and, therefore, both the courts below were not right in recording a finding that Exs.B.1 and B.2 were not proved by the appellants-defendants. It is his further submission that failure to get reply issued by the appellants-defendants does not amount to admission of suit claim and he places reliance on a decision of Hon'ble Division Bench of this Court in **Manepalli Udaya Bhaskara Rao v. Kanuboyina Dharmaraju**[1] and the decision of Hon'ble Single Judge of this Court in **Malanbee (Died) per L.Rs. v. Syed Amjed Hussain (Died) per L.Rs.**[2] for the proposition that the version of a witness gets probabilised in the absence of suggestion in cross-examination as regards his statement in chief-examination which remains un-controverted.

17. A perusal of the judgment rendered by the appellate court shows that the appellate court formulated the points for determination thus:

> "1) Whether the decree and judgment of the lower court is sustainable against the appellants?
>
> 2) To what relief?"

18. It is well settled that right to first appeal is a valuable right of the parties and the Courts, therefore, must frame points for consideration to hear the parties on facts and law and shall not disturb by opening the whole case for re-hearing the finding of the trial court

[1] 2004(4) ALT 600 (D.B.)
[2] 2011(2) ALT 34

without following such procedure (Parimala v. Veena – AIR 2011 SC 1150). Thus, the duty of the lower appellate court is to frame the points for consideration specifically and not vaguely before deciding the matter. When these principles are kept in view, certainly, the points formulated by the appellate court, as extracted in the above, are not in conformity with what is contemplated by the provisions of Order 41 Rule 31 CPC. On this short ground itself, the matter requires to be remitted to the lower appellate court. Further, the trial court framed the additional issue after having heard the arguments from both sides. The additional issue framed is already extracted in the above. Additional issue was framed on 25.03.1998. Judgment was delivered by the trial court on 28.03.1998. The interregnum was only three days. The judgment of the trial court would not reflect whether on framing of additional issue on 25.03.1998, any chance was afforded to the parties to the suit to lead further evidence. Even the draft issues available on record submitted by the courts below would show that the additional issue was not even incorporated. The relevant notes sheets (docket sheet) of the trial court were not supplied along with the record so as to examine whether any chance was afforded to both sides to lead further evidence on the additional issue. Even, there is no mention at all by the trial court whether the parties entered the trial and lead evidence under the impression that such an issue was settled for trial. Though, the appellants-defendants have agitated the said plea in the appeal grounds as could be gathered from the judgment rendered by the appellate court, still, the appellate court has not addressed to the said aspect of the case. In a situation where non-compliance of Order 41 Rule 31 CPC did occur, Hon'ble Single Judge of this Court in **Vadde Anjanappa v. Vadde Hanumantappa and another**[3] observing that the point formulated by the appellate court carries no legal meaning, remitted the matter to the appellate court for fresh disposal by formulating the points for consideration and to dispose of the appeal as per the evidence on record.

19. Accordingly, the instant Second Appeal is allowed and the judgment and decree dated 25.11.1999 in A.S. No.19 of 1998 passed by the lower appellate court is set aside and the matter is remitted to the lower appellate court, i.e., Senior Civil Judge, Rajam, for fresh disposal according to law, as indicated above, within a period of six months. There shall be no order as to costs.

20. As a sequel thereto, miscellaneous applications, if any pending in the instant appeal, stand closed.

A. SHANKAR NARAYANA, J

10-06-2016

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[3] 2003 A I H C 3370